IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 169 OF 2021 (NSJ)

IN THE MATTER OF SECTION 25 OF THE BANKS AND TRUST COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF INTERTRUST CORPORATE SERVICES (CAYMAN) LIMITED

AND IN THE MATTER OF CAYMAN ISLANDS MONETARY AUTHORITY

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Colin McKie QC of CDM Chambers instructed by Guy Manning, James Austin-Smith, and Jeremy Durston of Campbells for the Appellant**
	Ms Gemma Lardner, Rachael Reynolds, Farrah Sbaiti and Max Galt of Ogier for the Authority
Hearing:	**5 August 2021**
Further submissions:	**12 August 2021**
Ruling:	**13 August 2021**
Draft judgment circulated:	**27 September 2021**
Judgment delivered:	**30 September 2021**

JUDGMENT

Introduction

1. Intertrust Corporate Services (Cayman) Limited (the ***Appellant***) is a substantial provider of financial services in the Cayman Islands (it provides corporate, fiduciary, and related services to a large number of companies, partnerships, and trusts). For that purpose, its activities are licensed (the ***Licence***) pursuant to the Banks and Trust Companies Act (2021 Revision) (***BTCA***). The respondent is the Cayman Islands Monetary Authority (***Authority***), the regulator of the Appellant's licensed activities.

2. By notice to the Appellant dated 13 May 2021 (***Decision Notice***) the Authority, pursuant to section 18(1)(vi) of the BTCA, gave notice that it had imposed various requirements (***Requirements***) with respect to the Appellant's Licence. The Requirements required the Appellant to take certain action before the expiry of various deadlines imposed by the Authority as set out in the Decision Notice.

3. Pursuant to section 25(2) of the BTCA, where the Authority makes a decision requiring a licensee to take certain steps pursuant to section 18 of the BTCA, the licensee is given the right to appeal against the decision on motion. Section 25(2) of the BTCA is in the following terms:

> "*An appeal against the decision of the Authority shall be on motion. The appellant within twenty-one days after the day on which the Authority has given its decision shall serve a notice in writing signed by the appellant or the appellant's attorney-at-law on the Authority of the appellant's intention to appeal and of the general ground of the appellant's appeal:*
>
> *Provided that any person aggrieved by a decision of the Authority may, upon notice to the Authority, apply to the Court for leave to extend the time within which the notice of appeal prescribed by this section may be served and the Court upon hearing of such application may extend the time prescribed by this section as it deems fit."*

4. On 17 June 2021, the Appellant issued a notice of originating motion (the ***Notice of Motion***) seeking a declaration that the whole decision of the Authority to issue the Decision Notice and to impose the Requirements was unreasonable and/or unlawful and an order that the Decision Notice be reversed or alternatively varied or modified by the Court or remitted to the Authority with appropriate directions from the Court. The Notice of Motion also sought a stay of the

Requirements. An appendix to the Notice of Motion set out the general ground of the Appellant's appeal.

5. On 24 June 2021, the Appellant issued a summons seeking an order that "*the time limited for the Appellant to serve a notice of its intention to appeal as well as its general ground of appeal … be retrospectively extended until 17 June 2021*" (the ***Leave Application***). This was required because the 21-day period referred to in section 25(2) had expired on 3 June 2021. In support of the Leave Application, the Appellant filed and relied on the First Affidavit of Mr Daniel Rewalt (***Rewalt 1)*** and the First Affidavit of Mr Daniel Jaffe (***Jaffe 1***). Mr Rewalt is one of the two co-managing directors of the Appellant and Mr Jaffe is employed by the Appellant and holds the title of Managing Director of the Americas and the Rest of the World.

6. The Authority opposed the Leave Application. It submitted that (a) the Court had no jurisdiction to grant an extension of time where the application for an extension was made after the expiry of the 21-day period (the ***Jurisdiction Point***) and that (b) even if the Court did have jurisdiction, it should not grant the extension sought in the circumstances of this case (the ***Discretion Point***). The Authority filed and relied on the First Affidavit of Mr Rohan Bromfield (***Bromfield 1***) and the Second Affidavit of Mr Bromfield (***Bromfield 2***).

7. The Leave Application was heard on 5 August 2021. The Appellant was represented at the hearing by Mr Colin McKie QC and Campbells while the Authority was represented by Ms Gemma Lardner of Ogier. During the hearing, an issue arose as to whether certain terms used in the Decision Notice (the reference in the paragraph numbered 1 under action to "*full Risk Assessments*") had a defined or technical meaning by reference to related regulatory guidance or regulations and I directed that the parties file brief further submissions dealing with this issue. These submissions and further materials were received on 12 August and on 13 August I wrote to the parties (in an email forwarded by my Personal Assistant) in the following terms and setting out my decision:

> *"At the hearing last Thursday, I indicated to the parties that I would aim to let them have my decision on the Appellant's application as soon as I could but that, because I have to be away for the remainder of August, the reasons for my decision, with a written judgment, would need to follow thereafter.*

*After having received last night and been able to review today the notes filed by Campbells and Ogier on the meaning of "full Risk Assessments" in paragraph 1 of the Decision Notice, I am now able to set out my decision on the two main issues raised by the application, namely (a) whether the Court has jurisdiction and the power under section 25(2) of the Banks and Trust Companies Act (2021 Revision) (**BTCA**) to grant an extension of time to a licensee wishing to appeal a decision of the Authority to which that section applies where and even if the notice in writing of the intention to appeal is served after the expiry of the twenty one day period (the **Jurisdiction Issue**) and (b) whether, assuming that jurisdiction exists, the extension of time sought by the Appellant in this case should be granted (the **Discretion Issue**).*

I have decided, after carefully considering the submissions and evidence filed by the parties, to grant the Application and that (i) as regards the Jurisdiction Issue, the Court does have jurisdiction and the power to grant an application for leave to extend the time for service of the notice of appeal even where the application for leave is only made and served after the expiry of the twenty one day period and (ii) as regards the Discretion Issue, on balance, the time period within which the Appellant is required, for the purposes of section 25(2) of the BTCA, to serve a notice of its intention to appeal and of the general ground of appeal, be extended to and treated as 17 June 2021. I consider, however, that leave should only be granted on the basis that the Appellant is liable for and should pay the Authority's costs of and arising from the Application on the standard basis, to be taxed if not agreed (I appreciate that I have not heard submissions as to costs but my decision that the Authority's costs be paid is based on my conclusion that such an order is needed to avoid the Authority being prejudiced to an unjustifiable extend by the granting of the extension of time).

I shall provide a judgment setting out my reasons in due course (at some point and as soon as possible during September). In the meantime, I would request Campbells and Ogier to prepare a suitable form of order for my approval and to seek to agree (within the next 14 days) directions for the further conduct of the appeal(s). If agreement cannot be reached, then each firm should file at the end of that period a draft of the directions they propose with a brief statement of their position on any issues in dispute. I would expect the proceedings to be expedited and to proceed promptly. I confirm that I would be available on 8-10 November for a hearing if those dates would be appropriate and convenient to the parties (I would also be available during the week commencing 18 October but assume that this would be too soon)."

8. This judgment now sets out the reasons for that decision.

The background – the Decision Notice and the Fine Notice

9. The Decision Notice was in the following terms:

*"**TAKE NOTICE**:*

The Cayman Islands Monetary Authority of Six Cricket Square, P.O. Box 10052, Grand Cayman KY1-1001, Cayman Islands, has taken the following action.

ACTION:

Pursuant to section 18(1)(vi) of the Banks and Trust Companies Act (2021 Revision) (the "Act"), the Authority hereby imposes the following requirements with respect to the Company's Trust Licence:

1. *The Company shall conduct and document full Risk Assessments on all clients within six (6) months of this Decision Notice;*

2. *The Company shall ensure all missing documentation such as Nature and Purpose of the Business Relationship, and client due diligence/know your customer information for high risk rated clients is collected within nine (9) months of this Decision Notice; and for medium and low risk rated clients within twelve (12) months1 of this Decision Notice;*

3. *The Company shall ensure Source of Wealth and/or Funds is collected and documented for high risk rated clients within nine (9) months of this Decision Notice; and for medium risk and low risk rated clients within twelve (12) months of this Decision Notice;*

4. *To the satisfaction of the Authority, the Company shall hire additional resources in order to remediate and maintain the Authority's requirements.*

REASONS:

Given the breaches of the Anti-Money Laundering Regulations (2020 Revision) (as amended) (the "AMLRs") as identified in the Company's inspection conducted in February 2020, which relate to serious and very serious breaches; the Company's protracted history of non-compliance with the AMLRs and its failure to remediate these breaches, there is sufficient information for the Authority to be of the opinion that, the Company is carrying on business in a manner detrimental to the public interest, the interest of its depositors or of the beneficiaries of any trust, or other creditors.

***FURTHER TAKE NOTICE**, that failure to comply with the listed requirements prior to the stipulated deadlines will result in the Authority taking further enforcement action."*

10. Prior to the Decision Notice being issued, the Authority, in the exercise and performance of its statutory powers, duties and responsibilities, had conducted inspections of the Appellant in 2017, 2019 and 2020. The Authority's overarching regulatory responsibilities, powers and functions arise under the Monetary Authority Act (2020 Revision) (the ***MAA***), section 6(1)(b) of which states that the Authority's principal regulatory functions are:

"*(i) to regulate and supervise financial services business carried on in or from within the Cayman Islands in accordance with this Law and the regulatory laws;*

(ii). to monitor compliance with the anti-money laundering regulations; and

(iii). to perform any other regulatory or supervisory duties that may be imposed on the Authority be any other law".

11. Following each inspection, the Authority produced and provided the Appellant with a report. During the 2017 and 2019 inspections the Authority had identified a number of what it regarded as serious breaches of the Anti-Money Laundering Regulations (2020 Revision) (the ***AMLRs***) and subsequently the Authority and Appellant corresponded in connection with the requisite remedial action. However, the 2020 inspection revealed further breaches of the AMLRs in relation to the client files that were inspected. Subsequently, the Authority had issued a warning notice (on 26 January 2021) (the ***Warning Notice***) and decided to issue the Decision Notice and a fine notice both on 13 May 2021 (the ***Fine Notice***). The Decision Notice and the Fine Notice were issued pursuant to two distinct enforcement processes at the Authority's disposal. The first is the power to impose an administrative fine pursuant to the Administrative Fines Regulations (2019 Revision) (as amended) (the ***AF Regulations***). The second is enforcement pursuant to section 18 of the BTCA, which includes imposing conditions on a licence by way of a decision notice.

12. The Leave Application relates only to the Decision Notice. However, the Appellant has also challenged the Fine Notice and previously applied (on 11 June 2021) *ex parte* for leave to appeal against the decision of the Authority to issue the Fine Notice. I granted that application for the reasons set out in my judgment dated 23 June 2021 (the ***Fine Notice Judgment***).

13. The general background is set out in the Fines Notice Judgment, which has until now not been placed on the public file since *ex parte* judgments are not generally published and it was not considered appropriate to make the Fine Notice Judgment public until the Authority had been given an opportunity to apply to set aside the *ex parte* order for leave to appeal. However, since

the time for making such an application has now passed and the Leave Application has been made and heard, and since the Fine Notice Judgment relates to and contains information of relevance to the Leave Application, I consider that it should now be made public and shall direct that it be uploaded to the public file so that it may be read in conjunction with this judgment.

14. The Fine Notice was issued pursuant to Part VIA of the MAA, which gives the Authority power to impose administrative fines on a person who breaches, *inter alia*, the AMLRs. A licensee subject to a fine notice is given a right to apply for leave to appeal by the AF Regulations. Pursuant to regulation 19(1) of the AF Regulations "*A party that receives a fine notice for a discretionary fine may apply to the Grand Court for leave to appeal against the original decision within thirty days after receiving the notice*." As can be seen, the time period for seeking leave to appeal is longer than the period within which a licensee must, under section 25(2) of the BTCA, "*serve a notice in writing … on the Authority of the appellant's intention to appeal and of the general ground of the appellant's appeal*." Furthermore, the procedure for dealing with an appeal of a fine notice is different from that governing an appeal of a decision notice. The AF Regulations (see regulation 20(1)) provide that an appeal of a fine notice is treated as an application for judicial review. The procedure applicable to an appeal of a decision notice is governed by GCR O.55, which states, in GCR O.55, r.3(1), that such an appeal shall be by way of rehearing.

15. The Authority and the Appellant have indicated to the Court that they believe that this is the first occasion on which this Court has been called on to consider the construction and operation of section 25(2) or section 18 of the BTCA.

The Jurisdiction Point – the Appellant's submissions

16. The Appellant argued that section 25(2) of the BTCA, on its proper construction, permits the Court to extend time for service of the notice even where the application for an extension is made after the expiry of the 21-day period referred to in the sub-section, and that an extension of time should be granted in this case.

17. The Appellant relied on two main arguments. First, it said that section 25(2) of the BTCA only permitted an application for leave to extend the time for serving the notice of appeal to be made

at the same time as the appellant had filed and commenced its appeal. An appellant could not apply for an extension of time to appeal unless it had first commenced the appeal proceedings by filing the requisite originating process. An extension application could not be brought as a separate and independent cause of action. The Appellant submitted that the only circumstances where a pre-action application could be made before an originating process had been filed was in the case of injunctions (which include confidentiality/anonymity orders) pursuant to GCR O.29, r.1. The Appellant argued that if an appellant was required to apply for an extension of time before the deadline for doing so had expired, the second paragraph of section 25(2) would be entirely redundant, because the appellant, by virtue of having had to file its originating process before applying for an extension, would never be out of time. The Appellant submitted that this cannot have been the legislative intention. Parliament was to be presumed not to have included a meaningless provision in a statute. The second paragraph of section 25(2) was only capable of having any application if it applied to extension applications which were made after the appeal deadline had expired, so that every such extension application, as in this case, would be made retrospectively.

18. The Appellant also argued in the alternative that the statutory power to extend time given by section 25(2) of the BTCA, and the language of that sub-section, should be interpreted as permitting extensions to be granted in any case and even where the application for an extension had been made after the expiry of the 21-day period. The Appellant submitted that the sub-section established a very wide power and gave the Court a broad discretion to grant an extension, and that there was no justification in the language or purpose of the provision for interpreting the power as being limited to applications made before the expiry of the 21-day period.

19. The Appellant relied on the judgment of the Privy Council in *Century National Merchant Bank and Trust Co Ltd v Davies* [1998] AC 628 (***Century National***), a case dealing with the exercise by the Government of Jamaica of what today would be referred to as bank resolution powers. The Minister of Finance, in the exercise of his powers under section 25(1) of the Banking Act, appointed a temporary manager of a commercial bank in Jamaica. He was permitted by the section to take such steps in relation to the commercial bank as he considered best calculated to serve the public interest, where the bank was unable to meet its obligations and was engaged in unsafe and unsound practices. The Minister, as he was required to do, gave the bank notice that he had assumed temporary management of the bank. The bank was entitled (pursuant to

paragraph 2(1) of Part D of Schedule 2 to the Banking Act) to appeal to the Court of Appeal of Jamaica within 10 days of the service of the notice by the Minister whereupon the court might make such order as it thought fit. Furthermore, under paragraph 2(2) of Part D of Schedule 2, the Court of Appeal was authorised "*on sufficient cause being shown [to] extend the [10 day period]*." In fact, the bank did not appeal, nor did it ever apply to the Court of Appeal for an extension of time. However, when the temporary manager commenced proceedings in the Supreme Court of Jamaica on behalf of the bank against the person who controlled the bank and others connected with him seeking damages and repayment of certain debts owed to the bank, the board of directors of the bank brought an action against the Minister and the temporary manager claiming declarations that the assumption of temporary management was unlawful and damages for trespass, conversion and wrongful interference in the business of the bank. The Privy Council dismissed the proceedings. Paragraph 2(1) of Part D of Schedule 2 gave the Court of Appeal wide original jurisdiction to hear an appeal by the bank in respect of a notice announcing the Minister's intention to assume temporary management of the bank provided that the bank appealed within 10 days of the service of the notice, which period could be extended by the Court of Appeal under paragraph 2(2) if sufficient cause were shown. Paragraph 2(2) was in the following terms: "*The Court of Appeal may, on sufficient cause being shown, extend the period referred to in sub-paragraph (1).*" Since on such an appeal the bank could contend that the notice was invalid for procedural or substantive reasons and the Court of Appeal would then have to decide those issues, on its true construction paragraph 2(1) provided an exclusive remedy so that the Supreme Court of Jamaica had no jurisdiction to entertain the directors' actions in the present case.

20. The judgment of the Board was given by Lord Steyn. He noted that whether an appeal to the Court of Appeal was an exclusive remedy was an issue of statutory construction. He then said as follows (underlining added):

> *"The starting point must be to focus on the language and context of the statute. Paragraph 2(1) of Part D is cast in language of width and generality. Prima facie any issue regarding the service of the notice is within the scope of the right of appeal. And paragraph 2(1) expressly provides that the Court of Appeal "may make such order as it thinks fit." It is plainly competent for a bank to contend on such an appeal that the notice was invalid for procedural or substantive reasons. And the Court of Appeal would be bound to rule on the merits of such contentions. Thus, the bank could have appealed on the ground that the minister gave no prior notice of his intention and that the minister resolved to assume temporary management in circumstances when that*

was under the statute an inappropriate remedy, leaving it to the Court of Appeal to rule on the merits or demerits of those arguments. Indeed, every complaint, substantial or insubstantial, advanced by the appellants before the Privy Council could have been raised before the Court of Appeal by way of an appeal under paragraph 2(1) of Part D. This is therefore not a case of an ouster of jurisdiction in whole or in part, as was considered in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147. It is a time limited provision vesting, exceptionally, original jurisdiction in the Court of Appeal to hear an appeal by the bank in respect of the notice announcing the minister's intention to assume temporary management of the bank.

Counsel for the appellants was critical of the short period allowed for an appeal, viz. 10 days. But paragraph 2(2) provides that, on sufficient cause being shown, the Court of Appeal may extend that period. And as a matter of jurisdiction the Court of Appeal may grant such an extension after the lapse of 10 days. The time limited provision therefore has its own built-in safeguard against injustice.

It is true that Part D does not expressly provide that the right of appeal will be an exclusive remedy. But a necessary or plain implication to the same effect, derived from the language and context of the statute, is enough …"

21. Lord Steyn concluded that properly interpreted the right of appeal was to be understood as an exclusive remedy for any claim which could be raised on appeal; and since the challenges to the validity of the notice relied on by the directors in their claim against the Minister could have been raised in an appeal, the court had no jurisdiction to hear the claims when raised in other proceedings. When considering whether treating the right of appeal as an exclusive remedy would risk or give rise to injustice, in view of the short period within which an appeal had to be filed, Lord Steyn concluded that since the time to appeal, having regard to the language of paragraph 2(2) of Part D of Schedule 2, could be extended "*after the lapse of 10 days*", the statutory provisions governing the right to appeal had a built-in safeguard against injustice.

22. The Appellant argued that Lord Steyn must be understood as having meant that the extension of time could be granted where the application for an extension (and not just the order granting an extension of time) was made after the expiry of the ten day time limit; and that *Century National* was a case which showed that an unqualified and general right to extend time to appeal (in the context of a decision taken by a regulator of financial institutions where the regulatory decision seriously affected the business and interests of the financial institution and its stakeholders) could and generally should be interpreted as permitting an extension of time to be granted even where the application for an extension was made after the expiry to the statutory time limit. The Appellant accepted that the Privy Council was considering a different statute from a different

jurisdiction relating to a different regulatory regime, that the case did not involve an appeal or an application for an extension of time to appeal and that Lord Steyn had not set out any analysis to explain or support his conclusion that the wording of paragraph 2(2) of Part D of Schedule 2 permitted the Court of Appeal to grant an extension of time to appeal whenever the application for an extension was made. However, the Appellant argued that Lord Steyn's conclusion on the power to grant an extension of time whenever the application was made was part of his reasoning in reaching his conclusion that an appeal was an exclusive remedy and therefore was part of the *ratio* of the case or at least was closely connected with that conclusion and therefore to be given significant weight. Furthermore, the decision was instructive and the approach to construction of the power to extend time could and should be applied to the interpretation of section 25(2) of the BTCA, which, like paragraph 2(2) of Part D of Schedule 2 of the Jamaican Banking Act, was a broad and unqualified power to extend time created by a statutory regime which had many similarities with the statutory regime created by the BTCA.

The Jurisdiction Point – the Authority's submissions

23. The Authority's position was that the Court had no jurisdiction to grant an extension of time where the application was made outside of the statutory time limit.

24. The Authority argued that the language of section 25(2) of the BTCA was clear and unambiguous – it did not provide for the granting of an extension of time where the extension application was made outside of the statutory time limit – and should be given effect. The Authority noted that the need to give effect to the literal meaning of the words used in section 25(2) was given primacy by section 3(2) of the Interpretation Act (1995 Revision) which states that "*Every local law of the Islands shall be carried out and applied according to the plain reading, and not according to any private construction, and any private construction influencing a decision in any case shall be deemed a sufficient cause for appeal or new trial or counter prosecution*".

25. The Authority also submitted that since (a) the BTCA was silent on the ability to apply out of time, (b) other legislation which gave a right to seek an extension of time after the expiry of the relevant time limit expressly included such a right, and (c) an ability to apply out of time would undermine the very purpose of the short timeframe under the BTCA, the proper interpretation of

section 25(2) of the BTCA was that the Court did not have jurisdiction to grant the relief sought by the Appellant.

26. The Authority argued that express wording was required to grant the Court jurisdiction to extend time where the application for an extension was only made after the expiry of the time limit. Had it been intended by the draftsman of the BTCA that an extension of time could be granted in such circumstances, the BTCA would have said so. The Authority noted that other procedural rules which permitted an extension of time to be granted on an application for an extension made after the expiry of the relevant time period did so expressly. They referred to GCR O3, r.5 which states that:

> "(*1*) *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings;*
>
> *(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period*."

27. They also referred to rule 8(1) of the Court of Appeal Rules, which provides:

> "*Subject to section 25, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed…*".

28. The Authority submitted that in cases where there was no express power to grant an extension on an application for an extension made after the expiry of the relevant time period this Court had concluded that there was no jurisdiction to grant such an extension. The Authority relied on the decision of the Chief Justice in *Streeter and K Coast Development v Immigration Board and Governor in Council* [1999] CILR 264 (***Streeter***). In that case, the Chief Justice dealt with an out of time application for an extension of the time to seek leave to appeal from the Grand Court. The applicants had applied for judicial review of the Immigration Board's decision to revoke the first applicant's work permit. The applicants had requested the discovery of documents by the Immigration Board and when it did not respond to this request, the applicants obtained a declaration that the respondents were obliged to disclose the records of their deliberations and

decisions and any materials that they had considered in deciding to revoke the first applicant's work permit. The applicants succeeded in having the decision quashed and the Immigration Board appealed against that decision. However, they failed to lodge a notice of appeal against the ruling on discovery before the expiry of the 14-day period permitted for appeals against interlocutory orders by the Court of Appeal Rules, 1987, r.12. They therefore sought an extension of time in which to seek leave to appeal on the basis that the Court should not have ordered discovery before they had responded to the applicants' requests and should not have ordered the disclosure of records relating to non-parties to the proceedings. The Chief Justice held that the Court lacked jurisdiction to hear the application, since only the Court of Appeal (under r.8(1) of the Court of Appeal Rules, 1987) could extend a time-limit prescribed by those rules after the expiry of the time-limit. After that time, the Grand Court could no longer hear the application for leave to appeal and the Court of Appeal alone had power to extend the time in which to seek leave. The power of extension contained in the GCR O.3, r.5 related only to matters within the Grand Court's province under those rules. The Chief Justice accepted the submission made on behalf of the Immigration Board (by Mr Alberga QC) that if a party wished to appeal against an interlocutory order but did not apply for leave it could return to the Grand Court within 14-days to ask for an extension of time beyond that period to enable it to apply for leave and to file its appeal if leave was given. However, if the 14 days had expired, the Grand Court could no longer hear the application for leave. The respondents must go to the Court of Appeal for leave to appeal and for an extension of the time within which to file a notice of appeal.

29. The Chief Justice held that Section 6(f) of the Court of Appeal Law (1996 Revision) applied. That said that "*No appeal shall lie … (f) without the leave of the Grand Court, or of the Court [of Appeal], from an interlocutory judgment made or given by the Judge of the Grand Court [subject to certain exceptions which did not apply]*." The time limit was established by Rule 12 of the Court of Appeal Rules. Rule 12 provided that "*In the case of an appeal from an interlocutory order, a notice of appeal shall be filed within fourteen days from the date on which the order of the court below was signed, entered or otherwise perfected."* The Court of Appeal itself was given by the rules the general power of enlargement or abridgement of time and to enlarge or extend time even where an application was only made after the 14-day period. Rule 8(1) provided that (the passage underlined was highlighted by the Chief Justice):

> *"[T]he Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court may direct a departure from these Rules in any other way where this is required in the interests of justice*."

30. The Chief Justice noted that no such power of enlargement was given to the Grand Court in the exercise of its discretion whether to grant leave under s.6(f) of the Court of Appeal Law. He concluded as follows (the passage underlined was highlighted by the Authority):

> *"In my view such an express power would be required in the Court of Appeal Law or Rules to enable the exercise of a power by this court to allow not only leave to appeal as contemplated by s.6(f) itself, but also to allow the present application, which is one for an extension of time within which an application for that leave might be sought. [GCR O.3, r.5. could not be relied on since it only applied where a person was authorised or required by the GCR, or by any judgment, order, or direction, to do any act in any proceedings. These] limitations are such as not to address the requirements of the Court of Appeal Law or Rules. This is in marked contrast to the Rules of the Supreme Court of England and Wales, upon which the Grand Court Rules are based. The Rules of the Supreme Court, O.3, r.5(4) expressly provide for the same powers to be exercised in respect of matters before the English Court of Appeal. Otherwise, O.3, r.5 is in identical terms to the Grand Court Rules, O.3, r.5. I conclude that Mr. Alberga is correct in his objection on the jurisdictional ground."*

31. The Authority argued that the decision in *Streeter* supported its argument that in order for the Court to have a power to grant an extension of time in a case where an application for an extension was filed only after the expiry of the relevant time limit, it must be given an express power to do so.

32. The Authority argued that the *Century National* should be given no weight in the present case. It was a decision dealing with wholly different legislation and the statements made by Lord Steyn on which the Appellant relied were only dicta and not supported by analysis.

33. The Authority also submitted that a power to grant an extension on an application for an extension made after the expiry of the 21-day time period established by section 25(2) of the BTCA was inconsistent with the statutory purpose of that provision and the BTCA generally.

34. The Authority argued that a primary purpose of its powers and duties conferred by sections 17 and 18 of the BTCA was to enable it to act quickly and effectively in response to a breach to ensure that both the public and the jurisdiction as a whole were properly protected. For example, its powers included taking pre-emptive steps where a licensee "*is or appears likely to become unable to meet its obligations as they fall due,*" and to require rectification "*immediately*." The time sensitive nature of the enforcement powers conferred by section 18 was highlighted by the seven-day window in which a licensee may ask the Authority to reconsider the significant step of revoking a licence. The Authority argued that it was clearly in the interests of good administration and of upholding the purpose of the BTCA as a whole (and the enforcement powers conferred by sections 17 and 18 in particular) that the right of appeal under section 25(2) be exercised within the strict statutory time limit in section 25(2) of the BTCA, or, if an extension of time was required, that an extension application be made promptly and within the prescribed time frame, so that the Authority could take necessary steps in response to the breaches identified. The clear intention of the legislature to require any appeal to be brought within the stated timeframe was supported by the following:

(a). a decision notice was only issued after a process during which submissions, queries and objections are invited from a licensee. A decision notice did not come out of the blue and would not be a surprise to a licensee who had been found to be in breach. In the present case the Appellant had been on notice of the issues identified by the Authority since at the least the issue of the Warning Notice on 27 January 2021 – several months prior to the appeal deadline.

(b). an open-ended window in which licensees were able to appeal would greatly diminish the efficacy of the Authority in ensuring compliance with the BTCA. The Authority's ability to comply with its enforcement obligations in those circumstances would be undermined by the uncertainty as to whether (and when) an appeal would likely be forthcoming.

(c). GCR O.55, r.4 (2), which applied to appeals to the Court from the Governor-in-Council, the Registrar of Lands, or any tribunal or *person* (GCR O.55 r.1(1)) provided that "*In the absence of any other statutory time limit, the notice must be served, and the appeal entered, within 28 days after the date of the order, determination, award or other decision against which the appeal is brought*." The time limit for the Appellant to lodge its appeal would

therefore have been twenty-eight days but for section 25(2) BTCA which had expressly shortened the appeal window to twenty-one days. The Authority submitted that to read into this provision a jurisdiction to expand the appeal window after the statutory time limit had expired would be contrary to the legislature's decision to prescribe a shortened time frame – clearly imposed by reason of the particular context in which this appeal timeframe appeared.

35. The Authority argued that its position that express wording was required to grant the Court jurisdiction to entertain an appeal out of time was supported by the approach of the courts in England & Wales to applications for leave to appeal administrative tax decisions, where there existed no provision for appeals to be made out of time. These decisions concern section 56 of the Taxes Management Act 1970 (***TMA***). The appeal process under section 56 of the TMA was in two stages. First, within thirty days following the determination by the Commissioners, the appellant or inspector or other officer of the Board dissatisfied with the Commissioner's determination could, on notice in writing, require the Commissioners to state and sign a case for the High Court. Second, the party requiring the opinion of the High Court transmitted the case when stated and signed, within 30 days after receiving the same, to the High Court. In *Valleybright (in Liquidation) v Richardson (Inspector of Taxes)* [1985] S.T.C. 70 the court held that where the company failed to transmit the case stated to the court within the 30-day time limit under section 56(4) of the TMA, the court was deprived of jurisdiction to hear the appeal at all. In *Brassington v Guthrie (Inspector of Taxes)* [1992] S.T.C. 47, the High Court applied *Valleybright* and held that the time limit for appealing decisions of the General Commissioners was mandatory in order to prevent appellants from keeping appeals in abeyance indefinitely. The case stated was not lodged within the requisite 30 days and the court held this meant there was no jurisdiction to hear the appeal. *Vallebright* and *Brassington* were endorsed by the English Court of Appeal in *Gurney (HM Inspector of Taxes) v Petch* [1994] EWCA Civ 27 (27 May 1994), confirming that no power was conferred on the court to extend the time limits laid down by section 56 of the TMA. The taxpayer contended that the inherent jurisdiction of the court could be invoked, or alternatively, the power contained in the RSC O.3, r.5(1) could be relied on. The Court of Appeal held that "*[n]either availed the taxpayer. The first is defeated by a logical difficulty: the Court cannot assume a jurisdiction to waive or vary a statutory requirement upon which the very existence of its jurisdiction depends. The second is defeated by the terms of Order 3 rule 5(1) which is expressly confined to time limits contained in the Rules themselves or in any*

judgment order or direction (meaning any judgment order or direction of the court)". Consistent with the reasoning and conclusions of the English Court of Appeal, the Authority submitted that the Court's inherent jurisdiction cannot be invoked to waive or vary the statutory time limit imposed under section 25(2) of the BTCA after the 21-day period had expired.

36. The Authority also argued that the Appellant was wrong to assert that an extension application could not be made before the appeal was filed. Section 25(2) of the BTCA imposed a procedural requirement that any appeal was to be on motion. But this did not preclude an earlier application (by other originating process) seeking an extension of time. The relief sought by the extension application, independent of the appeal itself, was to grant the appellant permission to file out of time his notice of motion commencing the appeal proceedings. There was nothing in the BTCA or the GCR which prevented the Appellant from making a separate application to the Court prior to the expiry of the 21-day time period in section 25(2) by way of originating summons to extend the time for bringing its appeal. GCR O.5, r.3 provides that "*(1) Proceedings by which an application is to be made to the Court or a Judge thereof under any Law must be begun by originating summons except whereby these Rules or by or under any Law the application in question is expressly required or authorised to be made by some other means".* This was the approach adopted when seeking confidentiality orders prior to filing an originating summons seeking substantive relief, for example in *Beddoe* or *Norwich Pharmacal* relief.

37. Furthermore, the Court had jurisdiction to grant pre-emptive interlocutory orders prior to the commencement of proceedings. The granting of pre-action confidentiality (or anonymity) orders was an example of this jurisdiction, and two cases illustrated the Court's approach. In *In the matter of a settlement dated 16 December 2009*, unreported, Kawaley J, 25 July 2018 (FSD 54 of 2018) (***Julius Baer***) a trustee had issued an *ex parte originating* summons (the ***Confidentiality Summons***) prior to issuing proceedings seeking directions regarding the administration of a Cayman Islands trust. The Confidentiality Summons sought various protections in relation to the proposed substantive originating summons; in essence permission was sought to place only an anonymised version of court documents on the public file and for all applications relating to the substantive directions summons to be heard in private. Kawaley J concluded that the Confidentiality Summons was properly to be treated as an *interlocutory* summons filed in the main proceedings. Under the GCR it was not possible to file an anonymised form of originating process without the prior leave of the Court. To avoid

this rule precluding the Confidentiality Summons being issued, it was argued (based on the approach adopted by Stephens J in a case in Northern Ireland) and accepted by Kawaley J that an application for an anonymisation order was in substance and effect an application for an *ex parte* interlocutory injunction to which GCR O.29, r.1(3) applied. That sub-rule states that "*The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit.*" Confidentiality orders restrained the Court's staff from entering particulars of the parties in a cause book or other register list of filings which was open to public inspection and the public generally from otherwise publishing the identity of the parties.

The Jurisdiction Point – the Appellant's reply to the Authority's submissions

38. The Appellant made the following points in reply with respect to Authority's submissions:

(a). *Streeter* was of no assistance to the Authority. It had been decided on a different point. The Chief Justice had found that an extension of time needed to be sought from the Court of Appeal because the provisions of GCR Order 3 did not apply under the Court of Appeal Rules (the provision under which the extension of time was sought) and because the Court of Appeal Rules did not provide the Grand Court with power to grant an extension of the time limit (a power reserved to the Court of Appeal). The position was completely different in the instant case. The Appellant seeks an extension under the BTCA which, unlike the Court of Appeal Rules, clearly gave the Court the power to "*extend the time prescribed…as it deems fit*".

(b). GCR Order 5, r.3 had no application in the present case because section 25(2) of the BTCA expressly required that "*An appeal against the decision of the Authority shall be on motion."* The originating summons procedure was therefore statutorily precluded. In any event, an application for an extension of time was not based on a freestanding cause of action arising under the BTCA or any other law and therefore could not be made by *originating* process.

(c). *Julius Baer* was also of no assistance to the Authority. Applications for injunctive relief are the only case where a summons can be taken out before the main proceedings have been issued. The procedure approved by Kawaley J in *Julius Baer* was not available in respect of applications under section 25 of the BTCA.

(d). the cases dealing with section 56 of the TMA were distinguishable.

The Jurisdiction Point – discussion and decision

39. In my view, section 25(2) of the BTCA gives the Court the power to grant an appellant an extension of time within which to serve a notice in writing of its intention to appeal (and the general ground of the appeal) even in a case in which the application for the extension is made after the expiry of the 21-day period.

40. Section 25(2) gives the Court the power to grant an extension of time in very wide and unqualified terms. It seems to me to be inconsistent with such a power to imply or interpret it as being subject to a qualification of the kind for which the Authority contends. I would be unwilling to do so absent clear and strong reasons justifying such a construction. I do not consider that any of the arguments on which the Authority relies establish such reasons, nor do I find them persuasive.

41. I do not consider that the Authority is right to say that express wording is (always) required to grant the Court jurisdiction to extend time where the application for an extension was only made after the expiry of the time limit. Whether such jurisdiction exists must depend on the relevant statutory language or rules and on their proper construction. During the hearing, I asked the Authority whether the drafting history of or case law or commentary on GCR O.3, r.5(2) (quoted above) indicated that the express reference to the power and permission given to extend time even where the extension application was made out of time was included because it was considered *necessary* to add an express permission since without it there could be no such extension or *clarificatory* to make the position clearer. The Authority (and the Appellant) was unable to find any relevant commentary or case law and was unable to cite any authority (other than *Streeter*, which as I explain below, does not seem to me to be on point) in support of the proposition that express wording is required.

42. In my view, *Century National* represents a decision containing at least persuasive dicta to the contrary. I accept the Appellant's submissions, as summarised above, in relation to *Century National*. It seems to me that even after taking into account the fact that Lord Steyn's judgment deals with different legislation in a different jurisdiction, and does not contain detailed reasoning, his construction of a wide and unqualified judicial power to extend time for lodging an appeal supports my preliminary view of the proper construction of such a provision. Furthermore, the decision arose in a broadly similar regulatory context. The Minister's statutory power to assume the (temporary) management of a bank in the public interest (where the bank was unable to meet its obligations and was engaged in unsafe and unsound practices) is an important tool in enforcement of regulatory standards and policies designed to prevent the continuation of improper conduct by, or to protect the public from the risk of the failure of, a financial institution; and it would follow that this was a time sensitive enforcement power and that it was important that the Minister was able to act quickly and effectively in response to a relevant trigger to ensure that both the public interest was properly protected. But this context and these factors did not prevent Lord Steyn from concluding that the power to extend time to lodge an appeal should be understood as applying to extension applications made after the expiry of the 10-day period in order to ensure that justice could be done. The Authority's statutory power to impose requirements on licensees where the Authority has identified breaches of relevant regulatory standards including the AMLRs (which will materially impact on the licensee's ability to manage and conduct its business and allow the Authority rapidly to stop breaches of the AMLRs) and the Authority's need for expedition and certainty are broadly analogous to the power and needs of the Minister under the Banking Act (in many respects the power to assume the temporary management of a bank is more draconian than the power to impose requirements to be complied with by the regulated licensee). None of this, of course, is determinative or a substitute for a careful interpretation of the language of section 25(2) of the BTCA having regard to the provisions and legislative purpose of the BTCA (and the legislative purpose of section 25 in particular). But it does indicate that Lord Steyn's view in *Century National* is at least helpful guidance for the purposes of this case. His conclusion that as a matter of jurisdiction the Court of Appeal was able to grant an extension after the lapse of 10 days (which seems to me clearly to reference an application for an extension made after the expiry of the ten day period because it is made in the context of a criticism that the ten day period for lodging the appeal was too short and would give rise to injustice since an appellant might be unable to comply with the deadline) is probably not part of the *ratio* of the case in the sense of being a necessary part of the Court's

reasoning supporting its conclusion that an appeal was the exclusive remedy for challenging the Minister's decision to issue the notice announcing his intention to assume temporary management of the bank. That decision was primarily based on the nature and scope of the matters that could and had to be considered by the Court of Appeal on an appeal. But even if that is right, the conclusion was nonetheless closely connected with that decision because the ability to grant an extension of time on a late application was important in showing that the appeal procedure laid down by the Banking Act, which the Privy Council was being asked to accept as exclusive, was fair and would not give rise to injustice. The conclusion, therefore, in my view, cannot be treated as an insufficiently considered or tangential comment and should be given substantial weight.

43. I also accept the Appellant's submission that *Streeter* is clearly distinguishable and does not support the Authority's argument. It was a case dealing with the allocation of jurisdiction and powers as between the Court and the Court of Appeal and the construction of the Court of Appeal Law (1996 Revision) and the Court of Appeal Rules. This is confirmed by the Chief Justice's discussion of the English Supreme Court Rules which he said "*expressly [provided] for the same powers to be exercised [by the High Court] in respect of matters before the English Court of Appeal*". The point was that there was no grant to the Grand Court of the same powers as had been given to the Court of Appeal and in the absence of clear words it was to be assumed that there had been an allocation of jurisdiction (to grant an extension of time) only to the Court of Appeal. Giving the Court of Appeal the express power to extend time to apply for leave after the expiry of the 14-day period but not giving the Grand Court the same power indicated that only the Court of Appeal had the power to grant such an extension.

44. I also agree with the Appellant that the cases dealing with section 56 of the TMA relied on by the Authority are clearly distinguishable. The court's lack of jurisdiction to extend time to appeal in those cases arose from its lack of jurisdiction to hear any appeal if a case stated was not lodged within the requisite 30 days. If under the case-stated procedure it could only hear an appeal if and when the case stated had been filed within the required period – in essence there was a condition precedent to the court having jurisdiction which had not been satisfied – it must follow that the court could not amend the conditions on which it was granted jurisdiction by extending the thirty-day period. The present case arose by reference to a wholly different legislative framework and appeal process.

The procedure to be followed when applying for an extension of time to bring an appeal

45. There was, as I have explained, a dispute between the parties as to the proper procedure to be followed in bringing and applying for an extension of time to bring an appeal. It is therefore necessary to review the relevant provisions in section 25 of the BTCA and the GCR in order to establish what is required.

46. Section 25(2) of the BTCA starts by establishing the procedure to be followed for the purpose of bringing an appeal. The appeal is to be made on motion. Since the motion is a form of originating process, an originating motion is required. This is mandated by GCR O.55, r.3(1) which states that:

> *"An appeal to which this Order applies shall be by way of rehearing and must be brought by originating motion."*

47. Technically, an originating motion is an oral application heard in open court and could be made on an *ex parte* or *inter partes* basis (see *Blackford, Jaque and Quint*, Chancery Practice and Orders, Longman, 1991 at page 17). GCR O.8 governs all motions save for those originating motions for which special provision is made by the GCR or under any Act (see GCR O.8, r.1). GCR O.55, r.1(1) makes special provision for originating motions bringing appeals which by or under any enactment lie to the Court from any tribunal (which is to be construed as a reference to any tribunal, board or authority constituted by or under any enactment other than any of the ordinary courts of law) or person. By GCR O.55, r.1(3), GCR O.55 has effect "*subject to any provision made in relation to that appeal by any other provision of these Rules or by or under any enactment*."

48. For motions governed by GCR O.8, previous notice of the motion is generally required save where an application by motion may properly be made *ex parte* and unless the Court orders otherwise there must be at least four clear days between the service of notice of a motion and the day named in the notice for hearing the motion (see GCR O.8, r.2).

49. For the purpose of appeals governed by GCR O.55, a notice of the originating motion is also generally required. GCR O.55, r.3(2) states that:

> *"Every notice of the motion by which such an appeal is brought must state the grounds of the appeal and, if the appeal is against part only of any order, determination, award or other decision, must state whether the appeal is against the whole or part of that order, determination, award or other decision and, if against a part only, must specify the part."*

Furthermore, the hearing of the appeal must not be heard sooner than 21 days after service of the notice of motion unless the Court directs otherwise in accordance with GCR O.55, r.5.

50. Section 25(2) of the BTCA requires the appellant to "*serve a notice in writing signed by the appellant or the appellant's attorney-at-law on the Authority of the appellant's intention to appeal and of the general ground of the appellant's appeal.*"

51. The combined effect of the opening words of section 25(2) of the BTCA ("*An appeal against the decision of the Authority shall be on motion*"), GCR O.55, r.3(1) and GCR O.55, r.1(3) is that the appeal must be brought by originating motion and notice of the motion is to be given in the manner set out in section 25(2), namely by "*notice in writing signed by the appellant or the appellant's attorney-at-law on the Authority of the appellant's intention to appeal and of the general ground of the appellant's appeal*." This notice is the equivalent of the notice of motion (and satisfies the requirement that a written notice of the motion be served on the other party in advance of the hearing) and displaces the requirement for the giving of notice that would otherwise apply by reason of GCR O.55, r.3(2).

52. Section 25(2) and GCR O.55 do not deal explicitly with the procedure to be used when an application for leave to extend time is being made. So, the question arises as to how and when such an application is to be made.

53. It seems to me that section 25(2) is to be understood as giving the appellant the right to apply for an extension of time before the appeal has been brought and the notice of motion served. There is nothing in the language of the subsection to suggest that an application for an extension of time can only be made at the same time as the appeal is filed nor does the requirement that the appeal be made by way of originating motion do so. The Appellant argued that because section 25(2) of the BTCA only made provision with respect to the originating process to be used for the purpose of bringing the appeal, without making provision for a separate procedure for applying for an

extension of time in advance of the commencement of the appeal, there was no other procedural route available to an appellant (save for the originating motion) which would allow the extension application to be made and brought before the Court before the appeal had been filed. I do not accept this proposition. The proviso to the sub-section appears to me to create a statutory right to apply for an extension of time which is not tied to the bringing of the appeal. I do not see why such an application cannot be made in advance of and be treated as an interlocutory application within the proposed appeal (the appellant no doubt being required to undertake at the time of making an application for an extension of time that it would give notice in accordance with section 25(2) within a defined period if the application was granted). This would involve following the procedural technique adopted in the pre-action confidentiality/anonymity order cases but instead of placing reliance on the ability to apply for pre-action injunctive relief as giving authority to hear the application in advance of the commencement of the main proceedings, reliance would be placed on the statutory authority to hear applications for an extension of time (in the case of an application for an anonymisation order, the authority to make the order was found, in the cases I have discussed above, by finding that the application was in substance and effect an application for an *ex parte* interlocutory injunction to which GCR O.29, r.1(3) applied). If this is wrong, and the correct view is that an extension application is to be treated as a separate proceeding when made before the appeal has been brought by the service of the notice in writing, I would accept the Authority's alternative submission that GCR O.5, r.3 applies and authorises the making of the extension application by way of an originating summons. However, it seems to me that the former approach is to be preferred since the application for an extension of time is most naturally understood and is to be treated as an application within and as closely related to the appeal and it would be odd and otiose to require two forms of originating process to be used, one for leave to extend time to appeal and one for the appeal itself.

54. In the present case, the Leave Application was made by way of an interlocutory summons in the appeal, which was issued after the Notice of Motion on 24 June 2021 and sought relief by reference to the statutory power to grant an extension of time in section 25(2) of the BTCA. This was a permissible approach, and no objection was made by the Authority to the form of the Leave Application (assuming that the Court had jurisdiction to grant leave on an application made after the 21-day deadline).

The Discretion Point – the authorities

55. Accordingly, I am satisfied that there is jurisdiction enabling the Court to grant an extension of time for bringing an appeal against the Decision Notice even though the Leave Application was only made after the expiry of the 21-day period. The question now arises as to whether I should grant the Appellant's application for an extension of time.

56. The Appellant and the Authority referred to a large number of authorities dealing with the approach to be adopted by the Court when considering whether to grant an extension of time to file an appeal or other process. It is helpful, before considering the parties' submissions, to begin by reviewing chronologically the main cases, in particular the line of English Court of Appeal authority, which both parties referred to and relied on.

57. In *Costellow v. Somerset County Council* [1993] 1 W.L.R. 256 (***Costellow***), the plaintiff had claimed damages for personal injuries by a writ issued just within the limitation period but had failed to serve the statement of claim, schedule of loss and medical reports thereafter. The defendant's application to strike out the action was granted, and the plaintiff then appealed, applying for an extension of time to serve the documents. The first instance judge concluded that the plaintiff had been unable to show good reason for the delay and that the action should be dismissed. However, the Court of Appeal allowed the plaintiff's appeal. It held that in the absence of special circumstances an action would not normally be struck out for failure to comply with the rules or for want of prosecution unless the delay complained of had caused a real risk of prejudice to the defendant. A similar approach would be adopted to applications under RSC Ord.3 r. 5. An extension of time would ordinarily be granted where the overall justice of the case required that the action be allowed to proceed and since the defendants had suffered no prejudice in this case it was not appropriate to strike out the action and the plaintiff would be granted the extension of time sought. The court's approach was set out by Sir Thomas Bingham M.R. who said as follows (at 263) (underlining added):

> *"As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a*

time limit: Ord. 19, r.1; Ord. 24, r:16(1); Ord. 25, r.1(4) and (5); Ord. 28, r.10(1) and Ord. 34, r.2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord. 3, r.5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord. 3, r.5, and would indeed involve a substantial rewriting of the rule.

The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate…

……

Cases involving procedural abuse ... or questionable tactics (such as Revici v. Prentice Hall Incorporated [1969] 1 W.L.R. 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant..... The approach to applications under Ord. 3, r. 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord. 3, r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

58. *Regalbourne Ltd. v East Lindsey District Council* (1993) 6 Admin, LR 102 (***Regalbourne***) was a case involving an appeal from a decision of Mr Justice Potts who dismissed an application by

Regalbourne Limited for an order that the time for lodging appeals to the High Court against decisions of the Lincolnshire Valuation and Community Charge Tribunal given on 5th August 1991 be extended. Regalbourne Limited were developers with properties in Lincolnshire. In order to make appropriate entries in the Community Charge Register in respect of those properties the East Lindsay District Council had to decide when the properties being built became "*substantially complete*" and Regalbourne Limited was not satisfied with the local authority's approach to that decision. Accordingly, it appealed to the Lincolnshire Valuation and Community Charge Tribunal, which heard the matter on 24th July 1991 and gave its decision on 5th August 1991. By virtue of regulation 32 of the Valuation and Community Charge Tribunals Regulations 1989 there was then available to Regalbourne a right of appeal to the High Court on a question of law. But regulation 32(2) provided that an appeal under paragraph (1) could be dismissed if not made within 28 days of the decision or order that was the subject of the appeal. Such an appeal was governed by RSC O.55. RSC O.55, r.4(2) provided that notice must be served, and the appeal entered within 28 days after the date of the decision against which the appeal was brought. In order to be within the 28 days allowed, the notices of motion should therefore have been served and the appeals entered by 2nd September 1991, but they were not. This was the result of what Lord Justice Kennedy called a sorry history. Regalbourne's solicitor had initially instructed counsel to settle the required notice of motion shortly after the Tribunal's decision and written to the Council in terms that made it clear that an appeal remained under consideration (on 23 August). But counsel was on holiday and did not provide the draft notice of motion until after the expiry of the deadline. The papers were then sent to London agents whereafter Regalbourne's solicitor went on holiday. The notice of motion was eventually filed on 28 October, eight weeks out time. Lord Justice Kennedy noted that there was nothing in the evidence which indicated that Regalbourne's solicitor was on 2 September aware of the expiry of time. Potts J had concluded as follows:

> *"Try as I might, however, I can find no satisfactory explanation in the available evidence as to how it came about that Mr Flynn, or those acting on behalf of these applicants, came to be in ignorance of the fact that a notice of appeal was required within 28 days of 5th August 1991. The terms of the regulations are plain; the terms of the Rules of the Supreme Court are plain. Whilst the court accepts that a solicitor is entitled to leave his office on holiday, the fact is that these applicants were out of time before Mr Flynn left his office on [14th September] for that purpose. In the circumstances, I have reached the conclusion that no satisfactory explanation has been adduced as to why the notice of appeal was not served within time. Moreover,*

the explanation given as to why no steps were taken with regard to the issuing of the notice of appeal within the period 1st October to 28th October is unsatisfactory."

59. The Court of Appeal dismissed the appeal. Lord Justice Kennedy's approach was set out as follows (underlining added):

> *"In my judgment, the proper approach to the situation which arises in this case is as follows. Regulation 32(2) I regard as being complementary to Order 55, rule 4 and Order 3, rule 5. The combined effect is that the right to appeal only exists for 28 days after the tribunal has made its determination. Thereafter, that right can only be revived or extended if the court is prepared to extend time pursuant to Order 3, rule 5, and it will be slow to do so …*
>
> *In the absence of agreement, before the court will consider exercising its discretion to extend the time pursuant to Order 3, rule 5, it will normally need to be satisfied that there is an acceptable explanation for the delay. The fact that lawyers were unaware of the relevant time limit or found it difficult to comply with the time limit because of other commitments such as a holiday or other work, is unlikely to amount to an acceptable explanation. If there is no acceptable explanation, the question of prejudice is unlikely to arise and, even if there is an acceptable explanation for the delay, the court may refuse to exercise its discretion to extend time if the delay is substantial or if to do so would cause significant prejudice to the respondent. In any event, as in the interests of good administration the law requires that public law challenges to decisions of tribunals should be made within a limited time scale, the courts will always be reluctant to extend time in such a situation….*
>
> *Obviously, if time is not extended, there is prejudice to the potential appellant because he or she loses his right to appeal, and the prejudice will be greater if the intended appeal had good prospects of success. But in most cases that is unlikely to be of great weight. If the failure to appeal within the time allowed is due to neglect on the part of the potential appellant's lawyers, such a litigant may have some redress against his own lawyers, but that again is not something with which the court is likely to be concerned when it is being asked to extend time.*
>
> *Accordingly, I cannot fault the approach here of the learned judge and I would dismiss this appeal. But, of course, that does not prevent the substantive issue which these intending appellants wish to ventilate before the High Court being reconsidered by another tribunal and, if it be thought appropriate, by the High Court on another occasion in relation to a different fiscal year."*

60. Sir Thomas Bingham MR, in *Regalbourne*, commented on his judgment in *Costellow* and said as follows (underlining added):

> *"Mr Lowe for the appellants relied as a prominent part of his argument on the judgment recently given by this court in [Costellow] and particularly on the passage*

at page 264 in that judgment. In that case the court was giving guidance and the thrust of the decision was to indicate that the outcome of the decision should not depend on how the issue came before the court, that is on whether the party not in default sought to strike out or the party in default sought an extension of time to do the act in question under Order 3, rule 5.

I cannot of course speak for the other members of the court, but I can speak for myself when I say that I did not have in mind, or regard my judgment as applicable to, an application for leave to appeal out of time, let alone an application for extension of time to appeal against the decision of a statutory tribunal in the public law context. I do not accept that the same principles apply in all those situations.

In this case the appellants seek to challenge the decision of a statutory tribunal. They did not comply with a clear and short time limit. In this context the reasonable requirements of public administration have a significance which is absent in ordinary inter partes litigation. By contrast, prejudice may assume a rather smaller significance. But most importantly, there is in this context a different statutory framework and the court must do its best to give effect to the intention of Parliament in the particular context before it. I would be reluctant to lay down a rule that in this context an application to extend time may never be granted in the absence of a satisfactory explanation for the delay. Had the learned judge here decided, in the exercise of his discretion, to grant an extension of time, I question whether his decision could have been successfully challenged as unlawful. But he took the view that, on the facts here and in particular in the absence of a satisfactory explanation of the delay, he should not exercise his discretion to grant an extension. In my opinion, that decision cannot be impugned as contrary to law. The decision of the tribunal was final unless subject to appeal. Unless an appeal was initiated within the time limit there was no right to appeal. The judge found no good reason to extend time. I have some sympathy for the appellants because the decision was given at a very inconvenient time of year and the decision itself may be open to some criticism. But I find it impossible to hold that the learned judge's decision was wrong."

61. *Mortgage Corporation v Sandoes* (26 November 1996, LTA 96/7443/E) (***Mortgage Corporation***) involved an application by the plaintiff in an action for professional negligence for leave to extend time for the service of witness statements and expert reports (shortly before the trial date). The judge dismissed the application, but the Court of Appeal allowed an appeal from his decision and gave general guidance on the approach to be adopted by the court in future cases of non-compliance with the requirements as to time contained in the rules or directions of the court.

62. In relation to the facts of the case, the Court of Appeal considered that the judge's reasoning had been illogical. Lord Justice Millett, who gave the lead judgment, said that (underlining added):

> *"The judge concluded that in the absence of an acceptable reason for the delay, there was nothing on which the discretion could properly be exercised. In my judgment, that is not the law. Cases on the circumstances in which it is appropriate to extend the time for service of the writ, or for the service of a notice of appeal, in which observations to such effect are to be found, are not in point. The context is completely different."*

63. Millett LJ said that the basic principles to be applied on the extension of time application were to be found in the passage from the judgment of the Master of the Rolls in *Costellow* which I have quoted above. He then set out the approach that should be taken in the future and provided a summary of the applicable principles which had been approved by the Master of the Rolls and the Vice Chancellor. He said this:

> *"I now turn from the facts of the present case to a more general matter. This court is acutely aware of recent events and the growing jurisprudence in relation to the failure to observe procedural requirements. There is a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What I say now goes beyond the exchange of witness statements or expert reports; it is intended to be of general import. The Master of the Rolls and the Vice Chancellor, as Head of Civil Justice, have approved the following guidance as to the future approach which litigants can expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:*
>
> *1. Time requirements laid down by the Rules and directions given by the court are not merely targets to be attempted; they are rules to be observed.*
>
> *2. At the same time the overriding principle is that justice must be done.*
> *3. Litigants are entitled to have their cases resolved with reasonable expedition. Non-compliance with time limits can cause prejudice to one or more the parties to the litigation.*
>
> *4. In addition, the vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice.*
>
> *5. Extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.*
>
> *6. Where time limits have not been complied with the parties should co-operate in reaching an agreement as to new time limits which will not involve the date of trial being postponed.*
>
> *7. If they reach such an agreement, they can ordinarily expect the court to give effect to that agreement at the trial and it is not necessary to make a separate application solely for this purpose.*

> *8. The court will not look with favour on a party who seeks only to take tactical advantage from the failure of another party to comply with time limits.*
>
> *9. In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions.*
>
> *10. In considering whether to grant an extension of time to a party who is in default, the court will look at all the circumstances of the case including the considerations identified above."*

64. Lord Justice Millett considered the impact of a failure to provide good reasons for the delay in complying with the applicable deadline and said:

> "*For my part, I would reject the argument that the absence of a good reason is always and in itself sufficient to justify the court in refusing to exercise its discretion. All the circumstances of the case must be considered*."

65. He also quoted with approval the following statement made by Simon Brown LJ (as he then was) in *Willis v Royal Doulton* (unreported decision of the Court of Appeal, 4 November 1996) (***Willis***):

> *"At end of the day it must be for the Court, upon the individual facts of the case and having regard to all the circumstances, to weigh the competing considerations and decide where the justice of the case lies. Crucially it will ask how serious was the breach, how explicable, and how far it has affected the proceedings or disrupted the administration of justice generally*."

66. In *Finnegan v Parkside Health Authority* [1998] 1 W.L.R. 411 (***Finnegan***) a notice of appeal against the dismissal of the plaintiff's claim for want of prosecution was issued out of time. At first instance the judge refused to extend the time under RSC O. 5, r. 3 because the plaintiff had no explanation for having failed to serve the notice in time. The plaintiff appealed and the Court of Appeal allowed the appeal, holding that a mechanistic approach to deciding such applications was inappropriate and that it should not be assumed that dismissal of the action would inevitably follow a failure by the applicant to show good reason for his procedural fault, nor should prejudice be ignored as a factor. Hirst LJ reviewed the authorities and noted that there were two lines of authority on the question of reasons for delay and the consideration of prejudice and merits with regard to applications for extensions of time.

"In my judgment the starting point is R.S.C., Ord. 3, r.5 itself, which explicitly confers the widest measure of discretion in applications for extension of time, and draws no distinction whatsoever between various classes of cases. Costellow v. Somerset County Council [1993] 1 W.L.R. 256 seems to me fully in line with that philosophy, was expressed to be a guideline case, and, I would add, drew no rigid distinctions, since contrary to Miss Neale's argument I do not accept that the last paragraph in Sir Thomas Bingham M.R.'s judgment did any more than point out that in special cases or exceptional circumstances the court must, as is obvious, apply special treatment. For present purposes it is extremely important to note that Sir Thomas Bingham M.R. expressly disapproved of a rigid mechanistic approach and rejected the contention that the application for an extension should be heard first, and that dismissal of the action is an inevitable result if the applicant fails to show good reason for his procedural default.

If there was any doubt as to the strength and breadth of guidance given by Costellow's case in the general application of R.S.C., Ord. 3, r.5, that in my judgment was finally laid to rest by Mortgage Corporation Ltd. v. Sandoes, ... which follows precisely the same line of principle, and again expressly rejects the notion that the absence of a good reason is always and in itself sufficient to justify the court in refusing to exercise its discretion; that case moreover lays down clear guidelines requiring the court to look at all the circumstances, and to recognise the overriding principle that justice must be done."

67. In *Bush v Baines* [2016] 2 CILR 274 (a case involving a successful application for an extension of time to file a summons seeking to set aside an *ex parte* order granting leave to serve a writ and statement of claim by way of substituted service) Mangatal J considered the recent English Court of Appeal case of *Zumax Nigeria Ltd. v. First City Monument Bank plc.* [2016] EWCA Civ. 567 and said as follows:

"*49. The decision in Zumax provides very useful guidance as to the principles governing applications for extension of time (in particular at paras. 24, 25, 27, 28, 36 and 43). Kitchin L.J. restated the three stages of enquiry discussed in earlier cases:*

(1) Identifying and assessing the seriousness and significance of the default;
(2) Identifying the cause of the default; and
(3) Evaluating all of the circumstances of the case.

50. In allowing the appeal, Kitchin, L.J. stated ([2016] EWCA Civ 567, at para. 43):

"As Moore-Bick LJ emphasised in Salford Estates at [18], enforcing compliance with the rules is not an end in itself and it is not part of the function of the courts to impose sanctions for punitive purposes. In light

> *of all of the foregoing I believe that FCMB should have been granted the short extension that it sought."*
>
> ……
>
> 52. *In my judgment, the delays in the instant case could not properly be regarded as serious or significant. Whilst the reasons for the delay are not altogether satisfactory (they really do appear to amount to careless mishaps), Mr. Bush has not been prejudiced in any way, in particular because his counsel had already been served in the correct time, with supporting affidavit evidence and the listing form which indicated the very matters which the summons would seek. Having regard to all of the circumstances, to my mind,* dealing *with the application justly requires that the court grant the extension of time sought by the second defendant."*

68. I would also note that in *Streeter* the Chief Justice considered whether to grant the application for an extension of time in case he was wrong in concluding that the Grand Court was unable to hear the application. He said as follows (at page 270):

> *"[The attorney for the applicant] started off her submissions quite correctly by describing the four considerations for the grant of an extension of time: (a) the length of the delay; (b) the reasons for the delay; (c) the likelihood of success on appeal; and (d) prejudice to the respondents (in the proposed appeal). As for (a), by the time this application was filed, six weeks had elapsed since the ruling on discovery. That, she submitted, was not an inordinately long delay. As for (b), [the applicant's attorney] submitted that the reasons for the delay are not to be a primary consideration. When pressed, however, she did explain that the reason for not having complied with the time-limits imposed by the Law and the Rules was the preoccupation of the respondents' advisers, including herself, with their quest to prepare for the main trial which had been set down within a short time of the discovery hearing.*
>
> *I will not decide on whether or not that is sufficiently good reason for non-compliance with the time-limits, as I accept that even the absence of a good reason for any delay, is not in itself sufficient to justify the court's refusal to exercise its discretion (assuming I have the power) to grant an extension. The court is required, none the less, to look at all the circumstances and to be guided by the overriding principle that justice has to be done: see Finnegan* v. *Parkside Health Auth. The test of doing justice requires a consideration of whether, in refusing the extension, a just claim might be shut out and whether, in granting the extension, prejudice might result to a respondent because of the failure on the part of an appellant to observe the time-limits imposed."*

The Discretion Point – the Appellant's submissions

69. The Appellant submitted that in exercising its discretion under section 25(2), the Court should properly consider all the circumstances of the case as to do otherwise would result in injustice. As regards the test to be applied by the Court when deciding whether to grant the requested extension, the Appellant relied on the line of English Court of Appeal authority discussed above, in particular *Mortgage Corporation*, *Willis,* and *Finnegan* (which discussed the earlier cases and set out the correct approach). The Appellant said that these cases set out the relevant broadly based test for all cases involving an application for an extension of time to appeal, whether the case related to a public law or private law matter. *Regalbourne* and the other authorities which appeared to take a more restrictive approach to the extension of time in RSC O.3 cases were at odds with the approach taken in these later cases.

70. The Appellant argued that the approach set out in these cases was reflected in the Cayman Islands authorities dealing with GCR Order 3, r. 5. The Appellants relied in particular on *Bush v Baines* and also the decision of Quin J in *Gabato v Immigration Appeals* [2011] (1) CILR Note 6. In that case the Court was dealing with an application to extend time to appeal to the Grand Court from a decision of a statutory tribunal, which decision was made on an appeal against an underlying administrative decision. The application was 21 days late. The Court held (underlining added by the Appellant):

> *"When determining whether to grant an extension of time, the court needed to consider in the round whether there was an acceptable reason for the delay that justified departing from the time limits, and whether granting an extension would cause prejudice to the other party (Costellow v. Somerset County Council, [1993] 1 W.L.R. 256, dicta of Bingham, M.R. applied; Regalbourne Ltd. v. East Lindsey District Council (1993), 6 Admin. L.R. 102, dicta of Kennedy, L.J. applied).*
> ...
> *Since the decision had not drawn attention to the applicant's right of appeal, the court would look upon ... his [sic] delay benevolently—though had the decision set out the provisions of [the law] he could have had no valid excuse for his delay in appealing.*
> ...
> *The delay of 21 days was not substantial, and the applicant had provided an adequate explanation for it.*
> ...
> *Furthermore, granting an extension of time would cause no significant prejudice to the Tribunal."*

71. The Appellant relied on the statements made by Bingham MR in *Regalbourne* that had the judge decided to grant an extension in the absence of an explanation in the circumstances of that case,

where the delay was seven and a half months, the decision would have been unappealable. The Appellant also noted that there were important differences between the present case and *Regalbourne* and the other cases which relied on it. In *Regalbourne* the appellants had been unsatisfied with an administrative determination by the local council and had appealed to a statutory tribunal. Before the tribunal (which was independent of the local council) the appellants had the benefit of a full, adversarial hearing with the ability to examine the other side's evidence, present their own evidence, and make submissions before the decision was made. As Kennedy LJ had pointed out: *"[a] different situation…arises after there has been a hearing*". There had been no hearing in the present case. The Appellant's case is that it is challenging a decision taken without having access to adequate reasons for the Authority's decision, or the materials on which the Authority acted, or the internal processes adopted by the Authority. It claims to be challenging a decision made by the Authority without apparent consideration of the Appellant's submissions in correspondence that the breaches relied on by the Authority had not occurred and/or had already been remediated. The Appellant's appeal was not against a decision made by an independent tribunal, but of enforcement action taken by the Authority which it argued was effectively acting as investigator, prosecutor, and judge.

72. As regards the circumstances of this case, Mr Rewalt set out in Rewalt 1 the Appellant's explanation of the reason for the failure to file its appeal in time. He said as follows (at [8]):

> *".. the Decision Notice was issued on 13 May 2021. The time limit for Intertrust to serve the Authority with notice of its intention to appeal the Decision Notice as well as the General Ground passed on 3 June 2021. Intertrust was not aware of the statutory time limit to serve the Authority with notice of its intention to appeal the Decision Notice and the General Ground with respect to the Decision Notice and had, since 13 May 2021, been focussing its attention and resources on preparing and filing its application for leave to appeal the Fine Notice …. within the 30-day time limit. If Intertrust had been aware of the applicable time limit it would have taken steps to file the Decision Notice Appeal before the deadline to do so had passed."*

73. The Appellant argued that the following circumstances and matters were of particular relevance and should be taken into account:

(a). the delay was short. The delay in filing the Notice of Motion had been fourteen days (between 3 and 17 June 2021). The Appellant noted that in *Bush v Baines* Mangatal J had said that the 14-day delay that occurred in that case "*could not properly be regarded as*

serious or significant" while in *Gabato* Quin J had said that "*The delay of 21 days was not substantial*". Furthermore, the Authority had been made aware by Campbells' letter to Ogier dated 11 June and therefore on notice only eight days after the 3 June deadline that the Appellant intended to appeal.

(b). this was not a case where there had been no explanation at all for the delay. Mr. Rewalt had explained that the Appellant was unaware of the deadline and had been focusing its resources on the Fine Notice appeal.

(c). it would be wrong and unjust to deprive the Appellant of the opportunity to appeal against the Authority's decision, which had a substantial and potentially very damaging impact on the Appellant and its business, in circumstances where the Appellant had yet to have a hearing of its challenge to the administrative decision of the Authority before an independent tribunal and its conduct had not involved a deliberate breach of applicable orders or rules or wilful misconduct (this was not a case involving a deliberate or contumacious breach). There had not been a breach of a peremptory order, or an order specifically made in these proceedings but only a single breach without repeated breaches of a succession of orders.

(d). there had been no or only minor prejudice to the Authority (save for the need to deal with the Leave Application which could be compensated for by an order for costs). The late filing of the appeal had not had a material impact on the Authority's position or delayed in any material respect the conduct of the appeal or the time at which the Court would hear the appeal. Even if the delay in bringing the appeal had not occurred the Authority would have done nothing differently. In any case where an appeal is made, the Authority had to accept some uncertainty as to whether its decisions will stand. In this case, the Authority knew on receipt of Campbells' 11 June letter that an appeal would be made and accepted that it could not have objected to an appeal filed on or before 3 June. Such a small time difference in the context of this case was not material.

(e). conversely, if the extension was not granted the Appellant will be very significantly prejudiced. First, the full merits of the Decision Notice will never be subject to the independent judicial scrutiny which is an important part of the regulatory structure

established by the BTCA (and given to licensees as of right without, as in the case of fine notices, the need for leave). The Appellant argued that its proposed appeal was based on strong grounds, and the fact that the Court had already granted leave to appeal the Fine Notice where the circumstances surrounding the issue of the Fine Notice were the same as those surrounding the issue of the Decision Notice should be taken into account and add weight to its claim that there were serious grounds for challenging the Authority's decision making. The Appellant referred to the grounds of appeal as set out in the appendix to the Notice of Motion and summarised the basis of its challenge as follows:

(i). the Authority appeared not to have appreciated that in order to comply with the first of the requirements set out in the Decision Notice (within the six-month deadline) the Appellant would first have to comply with (and must have previously satisfied) the second and third requirements (which had, respectively, nine- and twelve-month deadlines). As noted above, the first requirement required the Appellant to "*conduct and document full Risk Assessments on all clients within six (6) months of this Decision Notice.*" As was explained in Jaffe 1, the Appellant considered, based on its understanding of what was meant by the reference to a "*full Risk Assessments on all clients*", that in order to complete and satisfy the first requirement it would need to have done the work required by and have satisfied the second and third requirements. This was because in order to complete a "*full Risk Assessment*" it was first necessary to collect updated Customer Due Diligence (***CDD***) and Know Your Customer (***KYC***) information and source of wealth and/or funds data for all clients. The Appellant said (in its post-hearing Note dated 12 August 2021 Re. Meaning of Full Risk Assessment) that "*full Risk Assessment*" was not a term that had been defined by the MAA, the BTCA, AMLRs, or related guidance notes. The Appellant understood that it first had to complete its CDD and KYC checks in order to be able to conduct full risk assessments of clients, since information obtained from the CDD and KYC checks was relevant to the assessment of each client's risk level and were required to enable the Appellant to apply its risk based approach methodology. The Appellant submitted that, as a result of the manner in which the first requirement had been formulated and drafted, the time given to the Appellant to complete both the second and third requirements was in fact six months and not nine or twelve months.

(ii). furthermore, and importantly, it was wholly unreasonable and unrealistic to require the Appellant to complete all the tasks required by "*a full Risk Assessment on all clients*" within the six-month period imposed by the Authority. The six-month deadline was unreasonably short for an exercise of the massive scale which the Authority had ordered, which included reviewing and re-risk rating all client files, regardless of whether they in fact needed remediation or not.

(iii). compliance with the requirements was dependent on the Appellant obtaining prompt responses from approximately 25,000 client entities. The Appellant was unable to control when clients responded and its experience of dealing with clients demonstrated that they were often slow to respond. A substantial number of these entities had been struck off, were inactive, or had already been suspended by the Appellant from service, and in those cases it would be extremely difficult for the Appellant to obtain the requisite updated CDD and KYC information at all, let alone within the short timescales required by the Decision Notice.

(iv). as was explained in Jaffe 1, while it was correct that the Appellant had prepared two presentations (including one prepared with the assistance of PricewaterhouseCoopers (***PWC***)) outlining its proposed responses to and remediation plan for dealing with the breaches identified by the Authority, these only contained a *preliminary* analysis of what was involved in doing so. The language used in these presentations repeatedly referred to estimates, indicative timetables and assumptions and had made it clear that the Appellant considered that there was a significant risk of delays and that its time estimates were subject to significant change. In the circumstances it had been unreasonable, where the Authority had declined the Appellant's requests for a meeting and further discussions, for the Authority to treat and interpret the presentations (at the time they were delivered, and at the time that the Decision Notice was issued) as representing the Appellant's final or concluded views as to what it would be able to do and the timeframe within which it would be able to act and complete a remediation plan.

(v). on 20 February 2021 Intertrust Law had written to the Authority setting out the Appellant's representations with respect to, amongst other things, the warning notice issued on 26 January 2021. One of the appendices to the letter was a PowerPoint slide presentation dated 19 February 2021 entitled "*Our Commitment and Proposed Approach to the Remediation*" (the ***February Draft Proposal***). The February Draft Proposal was clearly marked as being a "*Draft for Discussion*" and was provided to the Authority as a working document with the intention that it would open discussions with the Authority as to how the Appellant would seek to implement the requirements. The 20 February 2021 letter enclosing the February Draft Proposal also requested a meeting with the Authority two weeks thereafter in order to, amongst other things, initiate discussion. The Authority did not accept the Appellant's invitation to meet and have the requested discussion although on or around 25 February 2021 representatives of the Appellant did meet with representatives of the Authority for what was described as a "*prudential meeting.*" In that meeting the February Draft Proposal, and the Appellant's request for a meeting to discuss its remediation plan, were raised by the Appellant's representatives, however the Authority simply acknowledged that the February Draft Proposal had been received and said nothing more.

(vi). the Appellant had subsequently prepared an update to the February Draft Proposal, which was sent to the Authority on 12 March 2021 entitled "*Our Plan for Operational Improvement and File Level Remediation*" (the ***12 March Update***). The Appellant considered that one of the purposes of the 12 March Update was a renewed attempt to open a dialogue with the Authority.

(vii). the Appellant argued that it was unreasonable for the Authority to have considered the February Draft Proposal or the 12 March Update as its final position on the remediation, and that it would be unreasonable to hold the Appellant to what was said in those presentations with respect to the remediation.

(viii). the Authority had also failed to follow the correct procedure in issuing the Decision Notice and had failed to give proper reasons for its decisions in breach of administrative law principles. The Decision Notice was based on the 2020 final

report prepared by the Authority, which had also formed the basis on which the Fine Notice had been issued. The reasons given by the Authority for issuing the Warning Notice and Decision Notice were the same inadequate six lines of text that were given for issuing the Fine Notice. The reasons given in the Decision Notice simply stated that the Authority had reached the conclusion that "*the Company is carrying on business in a manner detrimental to the public interest, the interest of its depositors or of the beneficiaries of any trust or other creditors*" which was only a repetition of the statutory test for the exercise of powers under the BTCA. The Appellant submitted that it would require a very detailed and cogent explanation from the Authority to justify how it could properly have concluded that its findings in respect of its inspection of a limited number (a few score) of client entities was truly reflective of the business carried on by the Appellant in respect of a portfolio of approximately 25,000 entities, and that such an explanation and justification could not properly be given. In addition, the Authority's reliance on the Appellant's alleged "*fail[ure] to remediate*" the breaches identified by the Authority could not be justified. By the time that the Decision Notice was issued the Appellant had sent to the Authority a number of monthly updates and had informed the Authority that some of these alleged breaches had already been remediated. The Authority could not have been aware of the up-to-date position and the current status of the Appellant's continuing efforts to remediate the rest.

(ix). the Appellant accepted that the process for issuing the Fine Notice was different from that which applied to the issue of the Decision Notice, but it nonetheless submitted that the concerns I had identified and accepted in the Fine Notice Judgment applied equally to the Authority's approach to and its stated reasons for issuing the Decision Notice. The Appellant referred to the following conclusions I had reached in the Fine Notice Judgment:

> *"It seems to me to be at least arguable that the Fine Statement Notice of Reasons were inadequate in the circumstances, particularly in light of the detailed response provided by Intertrust in the 20 February Letter. The Fine Statement Notice of Reasons were brief and close to perfunctory. There was no attempt to address the issues raised by Intertrust. So, it is at least arguable that there was an inadequate statement of the reasons for the way in which the fine discretions were*

> *exercised which seriously prejudiced and undermined Intertrust's ability to challenge the fines. ….. Furthermore, the Authority's failure to provide proper written responses to the requests made on Intertrust's behalf in the letter of 2 February 2021 from Intertrust Law and in Campbells' letter of 25 May 2021 is arguably a breach of Intertrust's constitutional (and common law) rights."*

(f). the Appellant's appeal required the Court to consider a section of the BTCA on which there was no direct authority and also to review the exercise by the Authority of important and draconian enforcement powers, which have not been the subject of consideration previously. The Appellant submitted that in these circumstances this was a case in which there was a strong public interest in the issues raised and regulatory powers which had been exercised being considered by the Court. The Appellant relied on the judgment of Lord Woolf M.R. in *Smith v. Cosworth Casting Processes Ltd. (Practice Note)* [1997] 1 W.L.R. at 1538 for a statement of the relevant principle:

> *"The court can grant the application even if not…satisfied [of a realistic prospect of success]. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."*

The Discretion Point – the Authority's submissions

74. The Authority argued that if the Court concluded that it had jurisdiction to consider the Leave Application out of time and retrospectively, the Court's discretion should be exercised cautiously, as a defaulting party should not have an unfettered right to lodge an appeal out of time. The Court should have regard to the approach taken in cases decided in relation to GCR O.55, and other similar provisions, as regards the exercise of a discretion on applications for extensions of time in respect of public law matters. There were, the Authority submitted, a large number of cases dealing with public law challenges, and these should be given particular weight in the present case, which involved such a challenge. These authorities and the commentary on them confirmed that there was a requirement for strict compliance with statutory deadlines to appeal in the case of public law matters.

75. The Authority argued that in public law cases an extension of time should only be permitted where the applicant first established that there was an acceptable reason for the delay. In the absence of a good reason, the Court's inquiry comes to an end. In the absence of a good reason, there should be no inquiry into the merits of the appeal, the potential prejudice to either party, or the length of the day. None of those considerations are relevant to the Court's inquiry. The Authority relied in particular on the following:

(a). the notes to RSC O. 55, r.4 (which was materially similar to GCR O.55, r.4) The Supreme Court Practice 1999 at paragraph 55/4/2, at 937 stated as follows:

> "*In Ynys Mon Borough Council v. Secretary of State for Wales [1992] C.O.D 410 (Rose J)] ... the court emphasised that it was the duty of legal advisors either to know or to discover the law and it should not follow that their ignorance of relevant time limits should attract judicial dispensation. Moreover, when there would be prejudice to the respondent and there was no valid and substantial reason for exercising the discretion conferred by O.3, r.5, an application for an extension of time will be refused. …. In the interests of good administration public law challenges to decisions of tribunals have to be made within limited timescales (a consideration which is absent in ordinary inter partes litigation) and the courts will always be reluctant to extend time in such situations.*"

(b). the passage from Lord Justice Kennedy's judgment in *Regalbourne* set out and underlined above.

(c). while an extension of time had been granted in *Gabato*, this had only been done on the basis that there was an acceptable reason for the delay (namely that the applicant was not represented at the relevant time, his first language was not English, and the Court emphasised that his attention had not been drawn to the right to appeal in the decision documents). None of these considerations applied in the present. On the contrary, the Appellant was a large, well-resourced financial services provider, who was represented by competent and experienced attorneys at the time and several weeks before the deadline expired.

(d). in *Morbaine Ltd and Abigail Roberts and First Secretary of State and Stoke on Trent City Council and Lear Management Ltd* [2004] EWHC 1708 (Admin), Blackburne J in the

Administrative Court considered whether to overlook late service of a claim to challenge planning permission granted under section 288 of the Town and Country Planning Act 1990, which ought to have been made within 6 weeks of the decision. The application was refused notwithstanding a mere five-day delay as:

> "*It cannot therefore be said that Morbaine and Ms Roberts were without the resources, or lacked the time within which, to ensure that their challenges were duly served. There is no good reason why that did not happen. It is true that the delay was no more than a week. It is true also that no real prejudice has flowed from that short period of delay. But I am required in the interests of good administration — this being a public law challenge — to consider whether there are any circumstances to overcome the court's reluctance to disregard the late service of the claims. I do not regard the relatively short period of delay and the absence of prejudice as, in themselves, a sufficient reason*."

(e). in *Phillips v Derbyshire County Council* [1997] C.O.D. 130, the Court of Appeal considered an application for an extension of time to appeal a decision of the Special Educational Needs Tribunal, which ought to have been made within twenty-eight days of the date of the Tribunal's decision. Despite a delay of only four days in making the application, the Court refused the application: "*There had to be an acceptable explanation for the delay and if there were no such explanation the question of prejudice did not arise. There must be some material on which the court can exercise its discretion. The facts relied on by the applicant did not amount to an excuse or a worthwhile explanation for the delay, but merely demonstrated a series of derelictions of duty by the applicant's advisers. There was neither explanation nor excuse for the delay following the decision coming into the hands of Mrs Denney, no explanation as to why the solicitor did not immediately ascertain the time limit or immediately secure a fresh set of papers when the first set did not arrive, and no explanation as to why the fresh set of papers took some days to arrive. There was no material on which the Court could exercise its discretion except a tale of neglect*."

76. In the present case, the Authority argued, there was no acceptable, and no evidence had been adduced showing an acceptable, reason for the delay. Mr Rewalt's statement in paragraph [8] of Rewalt 1 was wholly inadequate. Mr Rewalt relied on one reason, namely oversight caused by unawareness of the statutory time limit and a preoccupation with and exclusive focus on the appeal relating to the Fine Notice. But the Appellant should have been and there was no reasonable excuse for it not being aware of the statutory time limit. The Appellant had been

subject to and involved with the Authority's investigations since 2017 and the issuance of the Decision Notice was a result of an inspection which took place twelve months before then. It cannot have been a surprise to the Appellant that the Decision Notice was issued. Furthermore, the Appellant had been directed to the BTCA on multiple occasions and had the benefit of advice from well-resourced and experienced attorneys, and Leading Counsel, such that they, and their advisors, had no reasonable excuse for not being aware of the statutory deadline. The Authority noted that:

(a). the Appellant is licenced in accordance with the BTCA and subject to the provisions contained therein.

(b). the inspection reports from 2017, 2019 and 2020 all stated at paragraph 2.1 that the review was conducted pursuant to, among other things, the BTCA.

(c). on 12 February 2020, the Authority wrote to the Appellant to inform it that it was conducting a focussed thematic inspection pursuant to, among other things the BTCA

(d). on 26 January 2021, over five months before the Decision Notice was issued, the Authority issued the Warning Notice which stated on its face that the Authority proposed to take action pursuant to the BTCA.

(e). the Appellant had confirmed, by the email from Colin Mackay of the Appellant to the Authority dated 27 January 2021, that "*we have engaged Intertrust Law to advise and assist us in preparing a detailed response and will submit that in accordance with the timetable set out in the notice*."

(f). on 2 February 2021, Intertrust Law had written to the Authority and stated, "*We have been instructed to act as legal counsel to Intertrust Corporate Services (Cayman) Limited (Licensee) with respect to the (i) Breach Notice For The Proposed Discretionary Fine (Breach Notice) and (ii) Warning Notice issued by the Cayman Islands Monetary Authority (Authority) dated 22 January 2021 and 26 January 2021 respectively.*"

(g). on 25 May 2021 Campbells first wrote to the Authority and confirmed that it was instructed in respect of the Fine Notice, although no reference was made to the Decision Notice.

(h). on 11 June 2021 Campbells wrote to Ogier and stated, "*please note that Intertrust also intends to seek leave to apply for judicial review of the Authority's Decision Notice dated 13 May 2021*." In fact, the deadline for it to appeal had already passed, on 3 June.

(i). on 13 May 2021, the Decision Notice had stated on its face that the Authority proposed to take action pursuant to the BTCA.

77. The Authority also noted that the Decision Notice and the Fine Notice were issued on the same day, and the Appellant had actively pursued an appeal of the Fine Notice within the thirty-day time frame set by section 19(1) of the AF Regulations. Yet, it had failed to observe the shorter time period under the BTCA. There was no evidence before the Court as to why the Appellant had been aware of the statutory deadline in respect of the Fine Notice but not in respect of the Decision Notice and it was not possible to justify the failure to ascertain the time limit applicable to one of a number of connected regulatory notices and decisions.

78. The Authority argued that even if the failure to demonstrate an acceptable reason for the delay was not of itself fatal to the Leave Application, it was a factor to be taken into account and given substantial weight. Furthermore, there were various other factors which should be taken into account which showed why the Court should not grant the extension of time sought by the Appellant.

79. The Authority argued that the absence of prejudice to it was not a sufficient ground to justify granting the Leave Application and in any event the Appellant was wrong to claim that the Authority would not be prejudiced if the Leave Application was granted:

(a). the Cayman Court of Appeal in *HSH Cayman v ABN Ambro* [2010 (1) CILR 114] had made it clear that a lack of prejudice cannot, of itself, justify the granting of an extension of time. At paragraph 42 of its judgment, the Court had said that: "*It is not enough for a party who has not complied with the rules simply to say to the court that his non-*

compliance has caused no prejudice to the other party—he must provide some reason why the court should exercise its discretion in his favour."

(b). in any event, the breach by the Appellant in the present case was both serious and significant. It had missed the deadline by fourteen days. That was a considerable length of time and later even than the twenty-eight-day deadline that would have applied under GCR O.55. The Court should be cautious in setting a precedent that an extension may be granted on the facts of this case, where no good reason had been provided by a sophisticated, well-resourced, and represented party. Doing so would undermine the intention of a specific short deadline in which to appeal, which provided the public, the regulator and regulated entities with certainty as to when and how conditions may be imposed upon licences.

(c). the Authority argued that it would be inappropriate and damaging to its ability to meet its obligations as regulator for the Court to go against this settled judicial approach to the treatment of appeal deadlines in a public law context. This, it submitted, was particularly so in a case where no issue has been taken by the licenced entity as regards the accuracy of the Authority's findings as breaches of the AMLRs, where a remediation plan incorporating a timetable for effecting remediation action had been proposed by the licensee, and where there had been a subsequent declaration by the licensee that this timetable would not be met. In such circumstances the Authority needed to be free to act in accordance with its enforcement powers, in the best interests of those clients using the services of the licensee which was in a continuing breach of its obligations.

80. The Authority did not accept that there would be significant, if any, prejudice to the Appellant in the event that the Leave Application and appeal were dismissed. The Appellant was able to continue its appeal of the Fines Notice, in which many of the issues in this appeal will be determined. To the extent that the Appellant would suffer financial prejudice as a result of the dismissal of the appeal, the case law established that the Court could take into account the alternative remedies that could be available to the Appellant to make it whole (for example by bringing a claim against its legal advisers).

81. The Authority submitted that the underlying merits of the appeal were at best only of tangential relevance to an application for an extension of time to file the appeal, and the authorities indicated

that they were of no relevance in the context of public law appeals. In any event, it was clear that the Appellant's challenge to the Decision Notice had only poor prospects of success, having regard to the procedural background set out in Bromfield 1. The Authority argued that the Appellant's case that the requirements imposed by the Decision Notice were so onerous as to be unreasonable and were irrational and that the Authority had failed to give adequate reasons for its decision to impose the Decision Notice was clearly unsustainable:

(a). the fundamental purpose of the Decision Notice was to require the Appellant to comply with the AMLRs and its wider statutory obligations. The Appellant contended that it could not afford to comply with its obligations. However, that could not be a sufficient justification to render the Authority's decision to issue the Decision Notice irrational or unreasonable. All regulated entities are expected to comply with the law, and the Appellant was currently benefitting from cost savings as a result of its corner cutting systems and processes and its failures to comply with the law.

(b). the Authority had issued inspection reports in 2017, 2019 and 2020. The Authority had identified the same or similar breaches in respect of each investigation (including but not limited to failure to procure evidence of source of funds, failure to obtain certified documents, and expired or missing due diligence documents).

(c). during each inspection process, a summary of the discrepancies was prepared by the Authority and sent to the Appellant for its comments, which gave the Appellant the opportunity to raise questions and correct any mistakes.

(d). the Appellant had attended a closing meeting in respect of each inspection, at which the discrepancy summary and the Authority's findings (which would subsequently feature in the investigation report) were discussed.

(e). the Appellant had been given the opportunity to dispute any findings and provide management comments on the first draft of each inspection report. Whilst it had provided comments, it had not disputed or questioned the findings. Its comments had been taken into account by the Authority when producing the final report.

(f). the Appellant had confirmed that the breaches would be remediated and that agreed with the findings contained in the 2017, 2019 or 2020 inspection reports.

(g). the Appellant had subsequently provided monthly updates to the Authority in respect of its remediation efforts and detailed its anticipated compliance dates. At no point did it suggest the remediation requirements were unworkable.

(h). the Appellant's own plan for remediation in respect of the 2020 inspection report (which plan had been prepared with the assistance of and advice from PWC) asserted that the remediation steps were achievable and that the Appellant was willingly carrying them out, and indeed imposed shorter time limits for compliance than the Decision Notice itself. To claim at this stage that the Authority's longer timelines, set in light of the Appellant's own remediation reports and shorter timelines, were "irrational and unreasonable" was therefore unsustainable. The Authority rejected the Appellant's claim that it had acted unreasonably in relying, and that it would be unreasonable for it to rely, on the statements and representations made by the Appellant in the February Draft Proposal and the 12 March Update.

82. The Authority also argued (and confirmed its position in its post-hearing Note of the Parties Regarding the Meaning of "Risk Assessment") that the meaning of the first requirement in the Decision Notice (to "*conduct and document full Risk Assessments on all clients within six (6) months of this Decision Notice*") and the reference to "*full Risk Assessments*" were clear and meant that the Appellant must carry out an assessment of the risk posed by each of its clients in accordance with the requirements sets out in the AMLRs and the Guidance Notes on the Prevention and Detection of Money Laundering, Terrorist Financing and proliferation Financing in the Cayman Islands dated 5 June 2020 (the ***AMLR Guidance***). The manner in which risk assessments were to be conducted was prescribed by the AMLRs and the AMLR Guidance. The AMLR Guidance explained at section 3, B, paragraph 4 that financial service providers (***FSPs***) "*should at the outset of the relationship understand their business risks and know who their applicants for business .../clients are, what they do, in which jurisdictions they operate and their expected level of activity with the FSP*." Part III of the AMLRs was entitled "*Assessing and Applying a Risk-Based Approach*" and section 8 was entitled "*Assessment of Risk*" and provided as follows:

"(1). A person carrying out relevant financial business shall take steps appropriate to the nature and size of the business to identify, assess, and understand its money laundering and terrorist financing risks in relation to —

(a) a customer of the person;

(b) the country or geographic area in which the customer under paragraph (a) resides or operates;

(c). the products, services and transactions of the person; and

(d) the delivery channels of the person.

(2) A person carrying out relevant financial business shall —

(a) document the assessments of risk of the person;

(b) consider all the relevant risk factors before determining what is the level of overall risk and the appropriate level and type of mitigation to be applied;

(c) keep the assessments of risk of the person current;

(d) maintain appropriate mechanisms to provide assessment of risk information to competent authorities and self-regulatory bodies;

(e) implement policies, controls and procedures which are approved by senior management, to enable the person to manage and mitigate the risks that have been identified by the country or by the relevant financial business;

(f) identify and assess the money laundering or terrorist financing risks that may arise in relation to the development of new products and new business practices, including new delivery mechanisms and the use of new or developing technologies for both new and pre-existing products;

(g) monitor the implementation of the controls referred to in paragraph (e) and enhance the controls where necessary; and

(h) take enhanced customer due diligence to manage and mitigate the risks where higher risks are identified."

83. The Authority noted that the AMLR Guidance explained the practical application of section 8 (under the heading "*Assessing Risk and Applying a Risk-based Approach*") and that the Appellant had developed its own policy for developing such a risk-based approach. The Authority argued

that in view of the relevant regulations, guidance and the Appellant's own policy, there was no reason or basis for confusion or uncertainty over what needed to be done to comply with the first requirement. The required "*full Risk Assessment*" (there was no significance in the use of capital letters) was the first step in determining the level of due diligence that needed to be undertaken and only an initial assessment had to be made by reference to and based on the basic information which was available to the Appellant at the outset of the process, having regard to section 8 of the AMLRs. Thereafter the Appellant (and any FSP) would go on to determine the level of due diligence to be done. There was therefore no basis for the interpretation now given to the first requirement by the Appellant or for Appellant's submissions that the time period imposed by the Authority to complete the tasks which needed to be done by the first requirement was unreasonable or unrealistic or that the Appellant was being required to complete the second and third requirements before completing or in order to satisfy the first requirement.

84. The Authority noted, in addition, that it appeared that the Appellant had understood what was required by a full risk assessment in this way (that is, the Appellant had adopted an interpretation consistent with the interpretation put forward by the Authority on this application) in its response to the Warning Notice. The Warning Notice was dated 26 January 2021 and was in the same terms as the Decision Notice. It referred to a requirement that the Authority was considering imposing which required the Appellant to "*conduct and document full risk assessments on all clients within six months of the Decision Notice issued by the Authority."* The 12 March Update prepared by the Appellant had responded to each requirement in the Warning Notice and had stated the following in response to this proposed requirement:

> "*We will aim to make optimal use of technology to perform an initial gap analysis of the entire client population within the first three months of the remediation, ensuring that all client engagements are risk assessed and risk rated by June 30, 2021.*
>
> *This will be performed primarily by the RiskEngine system and based upon current data points.*
>
> *The full client population will therefore be risk rated up front and a cross section of the engagements will then be remediated during the pilot phase to support training, validate the processes, and verify the timings.*
>
> *As the remediation progresses, we will re-risk rate clients with the fully populated data set to conclude an accurate risk assessment in line with our policies and procedures."*

The Discretion Point – discussion and decision

85. In my view, in deciding how to exercise the discretion to extend time for the bringing of an appeal, the Court must begin by having regard to the scope and purpose of the statutory power to grant leave to extend and then consider how the statutory power is to be exercised in light of its scope and purpose and the facts of the case before it, taking into account the guidance provided in the relevant authorities.

86. As I have noted, the power to extend time is given in wide terms:

> *"Provided that any person aggrieved by a decision of the Authority may, upon notice to the Authority, apply to the Court for leave to extend the time within which the notice of appeal prescribed by this section may be served and the Court upon hearing of such application may extend the time prescribed by this section as it deems fit."*

87. Section 25 of the BTCA gives a licensee the right to appeal certain decisions of the Authority. The section covers the more significant decisions that the Authority can make in the exercise of its statutory and regulatory powers. They are a decision revoking the licensee's licence; withdrawing the Authority's approval to use the name "*bank*" or "*trust company*" or to solicit deposits from the public; requiring a licensee to take steps specified by the Authority (as in this case) and cancelling the registration of a private trust company. The appeal under section 25, in contrast to an appeal with respect to a Fine Notice, involves as I have noted above a rehearing (leave to appeal a notice for a discretionary fine under regulation 19 of the AF Regulations can only be granted by the Court if the party has grounds for seeking judicial review of the decision or if the decision was made with a lack of proportionality or was not rational). This suggests, although I was not addressed on the precise difference between the two types of appeal and I recognise that the extent to which there is a real difference between an appeal by way of a rehearing and by way of review of the decision under appeal remains a not altogether straightforward issue, that the appeal of a decision notice is intended to be more wide-ranging and to allow the Court to exercise the relevant discretion afresh. In any event, it seems to me that the clear purpose of the right to appeal to the Court is to ensure that there is proper judicial oversight of the exercise by the Authority of those regulatory powers which have the most significant impact on licensees. In my view, the right of appeal is an important part of the protection for licensees established by the legislative and regulatory framework.

88. The right to appeal is subject to a time limit of twenty-one days. This is shorter, as was noted by the Authority, than the thirty days allowed for an appeal of a fine notice and shorter than the twenty-eight days allowed by GCR O.55, r.4 (2) for lodging appeals to which GCR O.55 applies. The Authority was not able to provide any evidence as to the basis on which the legislator had chosen to adopt a reduced time limit for appeals under section 25 of the BTCA but it seems to me to be right to and I accept that I should infer that this was done because it was considered important that any appeal of the significant decisions covered by section 25 be made and progressed rapidly so that the Authority was made aware of any challenge to its decision, and any challenge to such a decision was resolved and disposed of by the Court, promptly. This would minimise the time period during which there would be uncertainty as to whether an important decision of the Authority was open to challenge and during which regulatory action which the Authority had decided needed to be taken was delayed by an appeal. This indicates that ensuring that any appeal is brought and resolved promptly in order to minimise any delay or disruption to the Authority's exercise of these important powers is an important legislative objective which should be borne in mind when interpreting and exercising the power to grant extensions of time under section 25(2) of the BTCA.

89. But the wide statutory power to extend time (as the Court "*deems fit*") is also in my view an important part of the legislative framework, designed to protect the position of licensees and to ensure that there is a real right of appeal which is not lost because of a failure to observe the time limit in circumstances where such a loss would result in injustice. To adopt Lord Steyn's phrase in *Century National*, "*The time limited provision therefore has its own built-in safeguard against injustice*."

90. As Sir Thomas Bingham MR said in *Regalbourne*, the Court must have regard to the "*statutory framework and the Court must do its best to give effect to the intention of Parliament in the particular context before it*." In the case of the BTCA, the context includes the statutory objectives and purposes that I have just identified.

91. I accept that in a case involving a public law matter arising out of a challenge to a decision by a public body the Court should, subject to the terms of the relevant statute, give significant weight to what Sir Thomas Bingham labelled "*the reasonable requirements of public administration*."

In the context of the BTCA, this means giving substantial weight to the need in the public interest to ensure that the Authority's important powers can be enforced effectively and in the manner which the Authority considers to be appropriate. There need to be substantial countervailing or balancing factors that overcome the *prima facie* need to require an appeal to be brought within the statutory time limit. As Blackburne J said in *Morbaine* (a case involving a challenge to planning permission) the Court is "*required in the interests of good administration — this being a public law challenge — to consider whether there are any circumstances to overcome the court's reluctance to disregard the late service of the claims"* (in that case the learned judge said that he did not regard the relatively short period of delay and the absence of prejudice as, in themselves, a sufficient reason).

92. However, in my view, even in a case involving a public law challenge, the Court is not required to and should not adopt a mechanistic approach involving, as the Authority contended, rigid preconditions that had to be satisfied before the Court is able to grant the extension of time sought. Such an approach would in my view be inconsistent with the statutory mandate and power, which as I have explained above, gives the Court a wide and broadly based discretion to extend time having regard in particular to the need to balance on the one hand the requirements of good administration and the need to protect the exercise by the Authority of its important regulatory powers and on the other the need to avoid injustice to the licensee. The Court needs to give considerable weight to the first set of factors and will need to be satisfied that there are what I have labelled substantial countervailing or balancing factors before overriding the need for the time limits to be observed. The approach adopted in the authorities dealing with extensions of time for compliance with procedural requirements in *inter partes* litigation needs to be adapted and modified in the case of public law appeals by giving additional weight to the public law context and the factors which have peculiar significance by reason of that context and the legislative regime within which the appeal is being brought. But it is, in my view, only an adaptation of the underlying approach to the exercise of a broad discretion to extend time rather than the substitution of an entirely different approach. It certainly appears that Quin J in *Gabato* considered (recognising that his decision is only summarised and recorded in a brief note in the CILRs) that even in a public law case the Court should have regard to all the circumstances, including whether there was an acceptable reason for the delay in bringing the appeal and the prejudice to the other party. And so did the Chief Justice in *Streeter*, another public law case,

when he came to consider whether he would have granted the extension sought had he had jurisdiction to do so (see the passage at page 270 from the Chief Justice's judgment cited above).

93. Accordingly, I reject the Authority's submission that in the absence of a good reason for the delay, the Court's inquiry comes to an end so that there should be no inquiry into the other relevant circumstances including the impact on the position of the parties of the refusal to grant or the granting of the extension application. The absence of a good reason is not determinative. But in a case involving a retrospective extension of time the burden on the Appellant is greater since the Court is required to examine and take into account the circumstances surrounding the failure to meet the deadline, and I accept that the reasons for the failure to comply with the deadline (and the nature of the appellant's conduct) are significant factors to be taken into account by the Court, particularly where there has been a material delay.

94. In the present case, the Appellant's explanation of why it failed to comply with the statutory time limit was, as I noted during the hearing, perfunctory and unhelpful. Mr Rewalt's brief explanation was to the effect that the Appellant had been unaware of the time limit applicable to an appeal of the Decision Notice and had been preoccupied with the process of preparing its appeal of the Fine Notice. It may be that Mr Rewalt was intending to say that the Appellant had been unaware of the time limit applicable to the appeal of the Decision Notice *because* it had been paying attention exclusively to the Fine Notice although this is not entirely clear from the cryptic account that he provides. Mr McKie QC accepted during the hearing that Mr Rewalt's account had been limited and that there was no further evidence which enabled him to elaborate on or further explain what had happened. I note that the Appellant had failed to explain or give details in its evidence when it had instructed its attorneys to advise on the availability of appeals against the Fine Notice and Decision Notice, whether they had first been asked to consider appeals in respect only of the Fine Notice or with respect to both and when an appeal of the Decision Notice was first discussed and what advice it had received. Since the Fine Notice and Decision Notice were both issued and delivered on the same date, it is not clear and the Appellant did not explain, why (as the Authority pointed out) it had considered and been aware of the time limit for appealing one notice but not the other. It is noteworthy that there is a clear statement in the Fine Notice but not the Decision Notice drawing to the Appellant's attention the period within which an appeal must be made. As the Authority pointed out, it had followed the statutory procedure and used the different forms of notice contained in the relevant legislation, although it is unclear why there is a difference of

approach in the two forms or how the different approach (and the failure to draw a licensee's attention to the appeal period in the Decision Notice) is justified.

95. Mr Rewalt did not refer to Campbells' letter to Ogier dated 11 June 2021, but it is revealing. It stated as follows (underlining added):

> *"... please note that [the Appellant] also intends to seek leave to apply for judicial review of the Authority's Decision Notice dated 13 May 2021. Given that the Decision Notice will also be subject to proceedings before the Grand Court, [the Appellant] respectfully requests that the Authority makes no public statements in relation to the Decision Notice until those proceedings have also been determined."*

96. It appears that as of 11 June 2021, just over a week after the expiry of the deadline for bringing an appeal of the Decision Notice, Campbells considered that the procedure for appealing the Decision Notice was the same as that for appealing the Fine Notice. Had that been the case, an application for leave to appeal would have had to have been filed by that date. The Appellant would still, albeit only just, have been in time. Of course, the Appellant did file its *ex parte* application for leave to appeal against the Fine Notice on that day. So, the evidence shows that the Appellant's legal advisers had been in error and confused as to the proper procedure for appealing the Decision Notice. It may be that this is the reason as to why the Appellant was coy about the difficulties it had faced and the reasons for not filing the Decision Notice appeal on time, but this is speculation on my part. I certainly consider that the Appellant's lack of candour and its failure to provide further details as to what had gone wrong was regrettable and caused me serious concerns as to whether it was right nonetheless to grant the Leave Application.

97. Nonetheless and on balance, I consider that in all the circumstances it is appropriate and just to grant the extension of time sought by the Appellant, provided that the Appellant pays the costs of the Authority of and in relation to the Leave Application. This is because the Authority should not be out of pocket in having to deal with the Leave Application in the circumstances of this case. While I consider that the Leave Application should be granted, for the reasons set out below, based on the limited explanations provided by the Appellant, I consider that the Appellant's lack of candour and failure to provide further evidence and explanations as to its reasons for failing to appeal within the statutory time period mean that it would not be just to give leave to extend time without ensuring that the Authority's costs of dealing with the Leave Application are paid

by the Appellant. I will invite the parties to make submissions as to whether the Appellant should be required to pay costs on the standard or an indemnity basis.

98. As I have noted, it seems possible that the delay was at least contributed to by the Appellant's legal advisers' error. In any event, the Appellant has relied on its ignorance of the time limit and its preoccupation with the process of preparing its appeal of the Fine Notice. The ignorance of the time limit in the current circumstances, when the Appellant is, apparently, a well-resourced financial institution which has the benefit of competent and experienced legal advisers is to be given little or no weight. The Appellant should have known about the time limit. Furthermore, to the extent that the failure to file the appeal in time was caused by errors by the Appellant's legal advisers, those errors do not justify the failure. I accept that the authorities relied on by the Authority make it clear that delays resulting from errors of or failures by a party's legal advisers are to be given considerably reduced weight. But the preoccupation with the Fine Notice appeal does explain what appears to be an error and genuine mistake. There is no indication and it seems from the evidence highly unlikely that the Appellant intended to mount only a partial appeal of the Authority's enforcement action (by taking action only to appeal the Fine Notice and not the Decision Notice). It never gave any indication to the Authority to that effect. The (admittedly limited) evidence suggests and I infer that this is likely to have been a case of confusion and overload – the Appellant was under considerable pressure as a result of the Authority's action and was struggling to organise its response and manage the need to gather evidence and marshall its defences, and it took its eye off the ball by focussing principally on the Fine Notice. The Appellant ought to have better prepared – as the Authority says, the Appellant had plenty of advance warning of what was coming and was fully aware of the regulatory regime within which it was operating, and which governed the Authority's actions. However, I do take into account, in judging the Appellant's conduct and the reasons for the failure to comply with the time limit, that it is likely that the circumstances surrounding the Authority's enforcement action and the delivery of the two notices resulted in a genuine mistake and that, as the Appellant submitted, its failure to comply with the deadline was not deliberate or designed to delay the appeal or prejudice the Authority and its enforcement action. The genuine mistake and the absence of evidence of deliberate delay or attempts to interfere with or undermine the Authority's exercise of its enforcement powers is a relevant factor to be taken into account. I also take into account, when considering the Appellant's conduct, the fact that the Appellant acted promptly once it realised that the deadline for filing the Decision Notice appeal had been on 3 June. The Appellant appears

to have proceeded rapidly to have the appeal filed. Furthermore, it also seems to me to be relevant, when judging its conduct in the context of the appeal of the Decision Notice, to note that the Appellant acted in time and properly with respect to the related Fine Notice appeal. Having said all this, I would note that had I considered that there had been any attempt to use the appeal process improperly to delay or interfere with or the Authority's enforcement action, I would have refused to grant an extension (and I would not recommend licensees in future to take comfort from this case and think that confusion or inadequate preparation will always be viewed sympathetically since each case depends on its own facts). Furthermore, had there been a longer delay in bringing the appeal or had the Authority not been on notice within a few days of the expiry of the appeal period that an appeal was to be brought, I would have been inclined to give greater significance and weight to the Appellant's failure to provide more evidence and a fuller explanation and justification of the reasons for its failure to appeal in time. I agree with the Authority that licensees cannot be given an open-ended window in which to appeal and in a case where there is a material or substantial delay after the expiry of the twenty-one day period, a licensee will need to provide full evidence of and reasons that demonstrate that their conduct justifies an extension (for example, that they are free of blame for the failure to appeal in time and acted with reasonable alacrity once they became aware of their failure).

99. In my view, in this case the extension of time sought is justified (and just in all the circumstances), and there are substantial countervailing or balancing factors that overcome the *prima facie* need to give effect to and require an appeal to be brought within which the statutory time limit because (i) the extension of time sought by the Appellant will not undermine or prejudice to a material extent the important regulatory objectives (and good public administration) which section 25(2) of the BTCA is designed to promote; (ii) the Court should protect the Appellant's opportunity to have the Court review the exercise of statutory and regulatory powers by the Authority despite its failure to appeal in time since the appeal raises serious issues which should be brought before the Court and in view of the significant impact on the Appellant's business and interests that the enforcement action taken by the Authority will have; and (iii) having regard to and taking into account the Appellant's conduct and the circumstances surrounding its failure to file a notice of appeal in time.

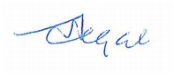
100. I have already discussed the third issue. As regards the first issue, in my view allowing the extension of time sought by the Appellant will not undermine or prejudice to a material extent

those objectives (or good public administration). The Authority was made aware on 11 June 2021, eight days after the expiry of the appeal deadline, that the Appellant intended to (and therefore would, not might) challenge the Decision Notice (and this was in the Campbells letter which gave notice of and served a copy of the Appellant's application for leave to appeal the Fine Notice). The Notice of Motion followed promptly thereafter, on 17 June. There is no evidence that even if the Notice of Motion had been filed before the 3 June deadline, the Authority would have behaved differently or that the relatively short delay in filing the Notice of Motion prejudiced the Authority's rights or position. Even if the Notice of Motion had been filed before 3 June, the timetable for the appeal would not have been altered and the time at which the appeal would have come on for a hearing would not have changed. I also do not consider that the Authority's ability to enforce its decisions, should they be upheld, is materially affected or prejudiced. While there is a stay of the payment obligation resulting from the Fine Notice, there is no stay affecting the Decision Notice. The Appellant must be prepared to comply with the Decision Notice in the event and in case its appeal fails. To the extent that the Authority has the power and is justified in taking further action pending the hearing and outcome of the appeal, it remains able to do so. I accept that in a public law context such as the present case, involving the regulation of financial institutions and the prevention of money laundering, particular weight must be given to the need for the Authority's decision on the requirements to be imposed on a licensed person to be given effect promptly to ensure that the Authority is able effectively to regulate the financial services sector and enforce money laundering rules (which are both important legislative and public policy objectives). But the granting of the extension sought in the present case does not in my view risk undermining or prejudicing the Authority's decision or the exercise of its powers.

101. As regards the second issue, it seems to me that, having regard to the grounds for the Appellant's appeal as outlined to date, there is a serious issue to be tried. The Appellant's case cannot, in my view, be dismissed as frivolous or fanciful. The Appellant has raised a number of serious issues regarding the manner in which the Authority has acted, the justifications for and reasonableness of the requirements and the time limits imposed by the Decision Notice that merit review by way of rehearing and appeal. There is an issue as to whether the Authority was justified and acting reasonably and proportionately in imposing the deadlines for compliance it had selected and there appears to be a factual dispute as to the extent to which the Authority did rely on and was acting reasonably in relying on the Appellant's projected work plan and timetables in its written responses to the Warning Notice and inspection reports (in particular the February Draft Proposal

and the 12 March Update) when setting the relevant deadlines. There is also an issue and both a factual dispute and construction question as to whether requirement 1 in the Decision Notice is sufficiently clear and precise to allow the Appellant to know what action it is required to take and whether it is able to take the action required of it. There is also an issue as to whether the Authority gave sufficient reasons for its decisions and followed the proper procedure. I must say that I see the force of the Authority's responses to the Appellant's claims, in particular the Authority's assertion that the Appellant has belatedly changed its tune and position, that it had previously indicated and clearly represented that it accepted the Authority's conclusions and had carefully mapped out an action plan for remedying (remediating) the acknowledged defaults, that the Appellant had been given plenty of time to challenge the Authority's decisions (in circumstances where the decisions relating to the requirements imposed by the Decision Notice might be said, as it seems to me, easier to understand and assess than the thinking and factors behind the determination of the quantum of the fines) and had failed to do so or put forward alternative proposals and that in the circumstances the Authority had acted properly and reasonably in setting the timetables in the Decision Notice (indeed it had given the Appellant more time than it had requested). I can also see the force of the Authority's argument that its decisions and the requirements it imposed were reasonable and properly required by the serious breaches of the AMLRs which it considered to have been committed. However, at this stage, as I have said, it seems to me that the Appellant has raised serious issues which justify and merit a hearing and I am certainly unable to conclude that the appeal is without merit and likely to fail. This case, as it seems to me, illustrates how an appeal under the BTCA may be different from some other public law appeals, which on occasions may involve a more limited review or a more standardised process so that it may not be unjust in those cases to apply a more rigid approach to applications for an extension of time to appeal. It does, however, seem to me to be wrong, in the context of section 25(2) of the BTCA, to adopt an inflexible approach which would penalise a good faith licensee (who is not seeking to circumvent or avoid his/her obligations by delaying and manipulating the appeal process) for missing the appeal deadline by a relatively short period where the licensee has raised serious issues regarding the Authority's exercise of its statutory

powers which in the Court's view merit a hearing and a review of the Authority's decision by the Court.



Mr Justice Segal
Judge of the Grand Court, Cayman Islands
30 September 2021