

UPDATE

# Extension of the time period to file a notice of appeal in Guernsey

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In two recent decisions, the Royal Court has considered applications for an extension of the time allowed to file a notice of appeal. In both cases the Court was invited to consider and follow a developing line of jurisprudence in England and Wales but declined to do so.

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## The test

The time limit for filing a notice of appeal in respect of a decision of the Royal Court is one month from the date of the judgment, although the Guernsey Court of Appeal has the power to extend that period. The established test for the exercise of the Court's discretion to grant an extension was set out in *Gaudion v Weardale Limited* (1997) 24 GLJ 83 (the **Gaudion decision**). According to Gaudion, the Court should consider:

- whether the applicant has a sufficiently arguable appeal against the judgment of the lower Court; and
- whether, as a matter of discretion, an extension of time should be granted. This in turn involves a consideration of:
  - the explanation given by the applicant for its failure to lodge a notice of appeal in time and its subsequent delay in so doing;
  - any prejudice to the respondent as a result of the late service of the notice of appeal and the consequent delay in the hearing of the appeal; and
  - any other relevant factors (**the Gaudion test**).

Two recent decisions of the Royal Court considered whether this test remains applicable and, in particular, whether the first limb should continue to apply.

## The decisions

*Zomain Zaleski v GM Trustees Limited* (Royal Court Unreported Judgment No. 9/2016) (the **Zomain decision**).

The applicant sought an extension of time as the advocate who had acted for him in the proceedings in the lower Court, without any assistance or support from his colleagues, had tragically passed away. A notice of appeal had not been filed in time. The applicant had instructed a new firm of advocates, but they had not been able to access the files and as a consequence, they were unable to advise on the merits of the appeal.

Citing the English Civil Procedure Rules and the decision of the English Court of Appeal in *R. (Hysja) v Secretary of State for the Home Department* (2014) EWCA Civ 1633 (the **Hysja decision**), the applicant asked the Court to overlook the first limb of the Gaudion test (ie whether the applicant had a sufficiently arguable appeal). This was in reliance on comments made by Moore-Brick LJ in the Hysja decision that 'in most cases the merits of the substantive appeal would have little to do with whether it was appropriate to grant an extension of time' and 'in most cases the Court should decline to embark on an investigation and firmly discourage argument directed to them'.

This approach was not accepted by the Guernsey Court of Appeal in the Zomain decision. The test it had been asked to apply by both parties was that set out in the Gaudion decision, so it was necessary to consider the merits of the appeal. In addition, it was not bound by the Hysja decision. As no submissions had been made about the merits, the Court had no option but to dismiss the application.

***Tranquility Holdings Limited v Invista Real Estate Investment Management (CI) Limited (Royal Court Unreported Judgment No. 8/2016) (the Invista decision)***

The applicant sought an extension of time due to the apparent ill-health of its principal director who was dealing with the litigation. Although in this case it did make submissions about the merits of the appeal, it argued – again placing reliance on the Hysja decision – that the first limb of the established Guernsey test should not apply and contended that the approach in Guernsey should be more aligned with the position in England and Wales.

Whilst Sir Michael Birt stated in his judgment that he saw some force in the argument that there is much to be said for the more recent approach in England and Wales, which can avoid the need for the Court to be drawn into a dispute on the merits of the substantive appeal and thus result in a shorter hearing and reduced costs, he concluded that it would be wrong for him to depart from the current line of Guernsey authority. Accordingly, the Gaudion test still applied. As the applicant did not satisfy that test, the application for an extension of time was dismissed.

**Comment**

The cases are a reminder that, whilst they might provide helpful guidance, the Guernsey courts are not bound by English judicial precedent. It is important to remember that it is far from certain that developments in English law will be followed in Guernsey.

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