(1) Investec Trust (Guernsey) Limited; (2) Bayeux Trustees Limited And Glenalla Properties Limited and Others
Royal Court
6th December, 2013

JUDGMENT 38/2013

Breach of Trust

Civil File 1462/2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

(Lieutenant Bailiff Sir John Chadwick)

BETWEEN

(1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED

Plaintiffs

-and-

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED

Defendants

(5) RAWLINSON & HUNTER TRUSTEES S.A.

Defendant/ Third Party Claimant

-and-

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED

Defendants to Third Party Claim

Advocate Wessels of Mourant Ozannes appeared for the Plaintiffs
Advocate Greenfield of Carey Olsen appeared for the first to fourth named Defendants (and the Defendants to Third Party Claim)
Advocate Swan of Babbé appeared for the fifth named Defendant (and Third Party Claimant)

Hearing dates: 11-15, 19-22, 27-29 June 2012

JUDGMENT

Lieutenant Bailiff Sir John Chadwick:

1. The plaintiffs, Investec Trust (Guernsey) Limited ("ITGL") and Bayeux Trustees Limited (together, "Investec" or "the former trustees"), were formerly the trustees of a Jersey Trust, known as the Tchenguiz Discretionary Trust ("the TDT"). The TDT was established under a declaration of trust dated 26 March 2007.

2. On 24 August 2007 the former trustees, as trustees of the TDT, entered into deeds of novation under which they assumed liability for (i) monies then owing by the Tchenguiz Family Trust ("the TFT") to Kaupthing Bank hf ("Kaupthing"), a company organised under the laws of Iceland, under a loan agreement dated 20 August 2007 and (ii) monies then said to be owing by the TFT to the first and second named defendants, Glenalla Properties Limited ("Glenalla") and Thorson Investments Limited ("Thorson").

3. On 21 December 2007, the former trustees, as trustees of the TDT, were party to arrangements under which, it is said, they became liable for monies paid by the third named defendant, Eliza Limited ("Eliza"), alternatively by the fourth named defendant, Oscatello Investments Limited ("Oscatello"), towards the discharge of the liability of the TDT to Kaupthing under the 20 August 2007 loan agreement.

4. Glenalla, Thorson, Eliza and Oscatello (together "the BVI companies" or "the liquidation companies") were incorporated under the laws of the British Virgin Islands. At all material times the shares in those companies were held, directly or indirectly, as assets of the TFT or the TDT. On 10 December 2008, Kaupthing appointed receivers over the shares in Glenalla, Thorson and Oscatello; on 18 August 2009 Glenalla and Thorson were placed in liquidation by its members; and on 16 February 2010 Oscatello was placed in liquidation by its members. On 22 February 2010 an order for the winding up of Eliza was made in the British Virgin Islands.

5. On 22 April 2010 the joint liquidators of Glenalla, Thorson, Oscatello and Eliza wrote to the former trustees demanding repayment of the sums then said to be due from them as trustees of the TDT.

6. On 2 July 2010 the plaintiffs were replaced as trustees of the TDT by the fifth named defendant, Rawlinson & Hunter Trustees S.A. ("R&H" or "the present trustee").

These proceedings

7. In these proceedings the former trustees seek the Court's determination of the questions whether they did become liable - and, if so, on what terms - (i) for monies said to be due to Glenalla, (ii) for monies said to be due to Thorson and (iii) for monies said to be due to Eliza or Oscatello. Further, the former trustees seek, against the BVI companies, declarations (i) that, pursuant to Article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended), they have no personal liability in respect of the monies said to be due and that the claims of the BVI companies extend only to the trust property of the TDT or, in the alternative, (ii) that, in the events which happened, they are only liable as trustees (and not personally), so that the BVI companies can enforce any obligations against them only to the extent that they continue to hold assets of the TDT available to satisfy those demands. The former trustees seek, against the present trustee, a declaration that they have a right of indemnity against the trust assets of the TDT (whether or not such assets may now be vested in the former trustees) such that they may (i) retain those of the assets now vested in them until the final determination of their liability for the monies claimed, (ii) realise the assets of the TDT in order to meet any liability they may be found to have to meet the claims of the BVI companies and (iii) "exonerate themselves from any [such] liability . . . directly from the trust assets of the TDT".

8. By counterclaim in the action brought against them by the former trustees, the BVI companies seek a declaration that the monies claimed are due under "valid, binding and repayable loan agreements"; and judgments against the former trustees (i) in the sum of £62,742,571.00 "due under the Glenalla loan", (ii) in the sum of £80,541,936.00 "due under the Thorson loan" and (iii) in the sum of £39,386,354.80 "due under the Oscatello loan, alternatively the Eliza loan". In the alternative the BVI companies seek against the former trustees an account of all sums due to them.

9. By its counterclaim in the action brought by the former trustees the present trustee seeks, against the former trustees, declarations that the BVI companies have no claims to monies due; and that, in any event, the former trustees are not entitled to "any indemnity out of or any right of exoneration from or any lien over" the TDT assets in

respect of any demands for payment made by the BVI companies. Further, the present trustee seeks an order requiring the former trustees to take all such steps as may be necessary to vest title to the assets of the TDT in the present trustee; and an account against the former trustees on the basis of wilful default.

10. The present trustee served its defence and counterclaim in the proceedings brought against it by the former trustees on 17 August 2011. On the same day the present trustee served a third party claim against the BVI companies seeking declarations in the same (or substantially the same) terms as those sought in its counterclaim against the former trustees.

The Tchenguiz Family Trust

11. In the late 1980s Mr Victor Tchenguiz made financial provision for members of his family under two settlements. The first, which is of little (if any) relevance in the present context, was a Guernsey settlement ("the Tchenguiz Settlement") made by him in March 1986. The second was the Tchenguiz Family Trust (the TFT).

12. The TFT was established under the laws of the British Virgin Islands by a declaration of trust made on 25 October 1988 by Rhone Trustees Limited. In November 1997 Rhone Trustees Limited was replaced as sole trustee by ITGL (then known as Guinness Flight Trustees S.a.r.l.).

13. The property from time to time subject to the trusts of the TFT was, in effect and until 2007, held upon discretionary trusts for the benefit of Robert Tchenguiz and his brother Vincent Tchenguiz (the two sons of Victor Tchenguiz); although Victor Tchenguiz was, himself, included in the class of beneficiaries under the declaration as made in 1988 and his wife, Violet Tchenguiz, was added to that class in August 1993.

14. That position changed in 2007. In a letter of wishes, dated 20 March 2007 and addressed to the trustees of both the TFT and the Tchenguiz Settlement, Victor Tchenguiz explained that:

> "As our family has evolved and developed different interests I believe that the time has come to indicate how I consider your powers could be exercised so as to achieve clarity and fairness between the interests of the different beneficiaries".

After indicating the provision which, he suggested, could be made for himself, his wife and their daughter, Lisa, Victor Tchenguiz went on to address his sons' interests:

> "My sons have different business interests and each should be free with his Trustees to pursue his own interests independently. I would therefore like you to consider the establishment of two new sub trusts of [the TFT] one for the benefit of Robert and his family ('the RT Fund') and one for the benefit of Vincent and his family ('the VT Fund'). This decision follows much debate with you as Trustees and within our family and reflects the final position and family strategy for the future. I would like you to agree a list of assets to go into each fund with Robert and Vincent and then to work with them and your advisors to create a division which should not be undone in future. Any assets which cannot for any reason be categorised as belonging in one of the two funds should remain in [the TFT] and be over time sold, with the proceeds to be divided between the RT and VT funds."

15. ITGL began to give effect to those wishes by the execution, on 26 March 2007, of (i) a deed of appointment, by which £5,000 was appointed out of the TFT upon trusts to be declared in a declaration of trust (as set out in the second schedule to that deed), and (ii) the proposed declaration of trust. Further, on 28 March 2007, ITGL, as trustee of the TFT, indicated its intention to make appointments to Vincent Tchenguiz absolutely of "a series of capital distributions of up to £270m . . ." from the capital of the trust fund.

The Tchenguiz Discretionary Trust

16. The declaration of trust executed on 26 March 2007 became known as The Tchenguiz Discretionary Trust (the TDT). The governing law was the law of Jersey. ITGL was, at first, the sole trustee of the TDT. On 21 August 2007, Bayeux Trustees Limited was appointed a trustee of the TDT to act jointly with ITGL. The property from time to time subject to the trusts of the TDT was held upon discretionary trusts for the benefit of a class comprising Robert Tchenguiz and his children and remoter issue; but with power in the trustees, with consent, to add to the membership of that class. During the Trust Period (defined as the period beginning with the date of the trust deed and ending on whichever should first occur of the expiry of 80 years from 25 October 1988 or the date of death of the last survivor of Victor Tchenguiz, Robert Tchenguiz, Vincent Tchenguiz and the descendants living at 25 October 1988 of King George V) the trustees had power to pay, transfer, apply or deal with the whole of the capital of the trust fund to or in any manner for the benefit of all or any one or more of the beneficiaries (clause 5.2(1)). Clause 9.1 provided that no trustee should be liable for any loss to the trust fund or its income unless the loss should arise by reason of that trustee's own fraud, wilful misconduct or gross negligence.

The loan agreement dated 20 August 2007

17. It is important to keep in mind that, as at 26 March 2007, the TDT was not funded; save as to the initial £5,000 appointed out of the TFT. In substance, the trust assets destined for the TDT continued to be held in the TFT, subject to the proposed appointments to Vincent Tchenguiz. That remained the position until 24 August 2007. In the meantime, on 20 August 2007, ITGL as trustee of the TFT entered into the loan agreement with Kaupthing to which reference has already been made ("the August 2007 Kaupthing loan facility agreement").

18. The August 2007 Kaupthing loan facility agreement was expressed to be made between ITGL as trustee of the TFT (described as "the Parent"), Heatherville Limited, Thorson and Violet Capital Group Limited ("Borrowers", an expression which included ITGL and any entity, being a subsidiary of ITGL in which ITGL owned more than 75% of the ordinary voting shares, which became a Borrower at the request of ITGL) and Kaupthing ("the Lender"). The agreement set out the terms ("the Facility") upon which the Lender would make funds available to Borrowers by way of loans for the purpose of meeting margin calls and other related costs and expenses. The Lender's Commitment under the Facility was £100 million. The terms included, at clause 11.1, that each Borrower irrevocably and unconditionally jointly and severally guaranteed to the Lender punctual payment by each other Borrower of all that Borrower's obligations in relation to the facility or sums drawn under the facility. The agreement provided, also, for a personal guarantee to be given by Robert Tchenguiz in respect of the obligations of the Borrowers to the Lender. The agreement provided that it was to be governed by and construed in accordance with the laws of England.

The funding of the TDT on 24 August 2007

19. The TDT was funded on 24 August 2007 by the transfer of assets from the TFT pursuant to an appointment made by ITGL as sole trustee of that trust ("the Transferor Trustee"). The assets to be transferred ("the Appointed Fund") were set out in the schedule to the deed of appointment. Those assets comprised shares, loans and cash. The shares included the entire issued share capital in thirty British Virgin Islands companies (listed by name); both Glenalla and Thorson were amongst those companies. The loans included "all the Transferor Trustee's rights title and interests" in thirty four loans (all said to be unsecured, interest free and repayable) owed to the TFT by thirty four companies (again, listed by name).

The deeds of novation dated 24 August 2007

20. The loans did not, of course, include monies owed by the TFT to companies within the group. The liabilities of the TFT in respect of those monies were transferred to (or assumed by) the TDT under deeds of novation. In particular, deeds of novation (each dated 24 August 2007) were made between ITGL, as trustee of the TFT (described as "the Trustee"), ITGL and Bayeux, as trustees of the TDT (described as "the Transferee Trustees"), and (respectively) Glenalla and Thorson (described as "the Company"). Each of those deeds was in the same terms (*mutatis mutandi*). Each contained the following recitals:

> "(A) A loan facility is in place between (1) the Company and (2) the Trustee ('the Loan Facility') under which as at 31 July 2007 the sum of approximately [£53,250,416.44 (in the case of Glenalla) or £57,907,940.31 (in the case of Thorson)] . . . was owed by the Trustee to the Company. The Loan Facility is unsecured, interest-free and repayable on demand ('the Terms').
>
> (B) The Trustee is the beneficial owner of the entire issued share capital in the Company ('the Shares'). Pursuant to a Deed of Appointment . . . dated the same date hereof the Trustee appointed the Shares to the Transferee Trustees.
>
> (C) The Trustee wishes to be released and discharged from the further performance of the Loan Facility. The Company has agreed to release and discharge the Trustee from the performance of the Loan Facility upon the terms that the Transferee Trustees shall jointly and severally undertake to perform the Loan Facility and to be bound by the Terms."

And each contained operative clauses in these terms:

> "**1. The Transferee Trustees' undertaking**
>
> The Transferee Trustees jointly and severally undertake to perform all the obligations of the Trustee under the Loan Facility and to be bound by the Terms in every way.
>
> **2. Release of the Trustee**
>
> The Company releases and discharges the Trustee from performance of its obligations under the Loan Facility and accepts the liability of the Transferee Trustees under the Loan Facility in lieu of the liability of the Trustee and agrees to be bound by the Terms."

21. Also on 24 August 2007 the liabilities of the TFT in respect of monies drawn down under the August 2007 Kaupthing loan facility agreement were transferred to (or assumed by) the TDT under a deed of novation made between ITGL, as trustee of the TFT ("the Transferor"), ITGL and Bayeux, as trustees of the TDT ("the Transferee"),

and Kaupthing ("the Lender"). The deed recited: (A) that, on 20 August 2007, the Transferor, the Lender and others had entered into a loan agreement for the purposes of meeting margin calls and related costs and expenses ("the Loan Agreement"); (B) that "on or about the date hereof" the Transferor wished to transfer the Transferred Assets to the Transferee ("the Transfer of Assets"); and (C) that the Transferor wishes to transfer by novation to the Transferee and the Transferee wished to accept the transfer by novation of all the rights, liabilities, duties and obligations of the Transferor under the Loan Agreement. In that context "the Transferred Assets" meant "(a) the beneficial ownership of the shares in Brigetta [Brigetta Investments Limited], Silverville [Silverville Limited], Thorson and Violet [Violet Capital Group Limited] and (b) the shares in Seacourt [Seacourt Limited], Daniella [Daniella Properties Limited] and Limebrook [Limebrook Limited]". Each of the companies mentioned were incorporated in the British Virgin Islands and (other than Violet Capital Group Limited) each had been included in the list of companies set out in the schedule to the deed of appointment of 24 August 2007. The operative clause in the deed of novation included the following:

> **"2. NOVATION**
>
> In consideration of the mutual covenants and undertakings herein contained and for other good and valuable consideration received, with effect from the Novation Date:
>
> (a) the Transferor wishes to transfer to the Transferee by novation and the Transferee wishes to accept the transfer by novation of all the rights, liabilities, duties and obligations of the Transferor under and by virtue of the Loan Agreement (including all accrued rights and liabilities under the Loan Agreement already in existence as at the Novation Date);
>
> (b) the Transferee undertakes with the Lender to accept, observe, perform and discharge all of the Transferor's rights, duties, liabilities and obligations arising under the terms of the Loan Agreement including but not limited to its obligations to repay all amounts outstanding under the Facility in its capacity as borrower . . . ;
>
> (c) the Lender agrees that the Transferee may exercise and enjoy all rights of the Transferor under the Loan Agreement;
>
> (d) The Lender hereby releases and discharges the Transferor from all claims and demands and from each of its liabilities and obligations to it under the Loan Agreement including all accrued liabilities and obligations of the Transferor already in existence as at the Novation Date and accepts the like liabilities an obligations to the Lender of the Transferee in place of the Transferor;

(e) Save in respect of all accrued rights and liabilities under the Loan Agreement already in existence as at the Novation Date which are novated to the Transferee pursuant to clause 2(a) above, the Transferor hereby releases and discharges the Lender from all claims and demands by the Transferor and from the Lender's liabilities and obligations to the Transferor under the Loan Agreement."

In that context, the "Novation Date" means the date, following the date of the deed, on which the Lender had received, or waived its entitlement to receive, all of the conditions precedent set out in the schedule to the deed. Clause 6 (Amendment of the Loan Agreement) reinforced those provisions by providing that it was agreed that, as from the Novation Date, the Loan Agreement should be amended such that (a) all references to the term "TFT" or to "The Tchenguiz Family Trust" should be deleted and replaced with the term "TDT" or "The Tchenguiz Discretionary Trust" and (b) all references to Parent shall be to "Investec Trust (Guernsey) Limited and Bayeux Trustees Limited as trustees of the The Tchenguiz Discretionary Trust".

The increase of the Lender's Commitment under the August 2007 Kaupthing loan facility agreement.

22. The Lender's Commitment under the August 2007 Kaupthing loan facility agreement was increased from £100 million to £120 million under the terms of a letter agreement dated 6 November 2007 addressed by Kaupthing to the trustees of the TDT and countersigned by them. The Commitment was further increased to £122.5 million, by a similar letter agreement dated 22 November 2007.

The framework agreement dated 19 December 2007

23. On 19 December 2007 the following parties executed a document described as a "Framework Agreement": (1) ITGL and Bayeux Trustees Limited, as trustees of the TDT, (2) Kaupthing, (3) Isis Investments Limited ("Isis"), (4) New Ortland II Equities Limited ("New Ortland"), (5) Eliza, (6) Oscatello and (7) Silverville. The purpose of that agreement was explained in the recitals:

> "(A) The Parties wish to set out the terms on which they will invest in a new corporate structure to hold certain interests in, or referenced to, publicly traded and private companies which interests are currently owned by members of the TDT Group (the 'Companies') (the 'Transaction').
>
> (B) Subject to the terms and conditions of this Agreement, the Parties have agreed that to facilitate the Transaction, TDT will make an equity

investment in each of Eliza and Oscatello and each of Isis and New Ortland will enter into a profit participation loan with Eliza.

(C) As at the date hereof, TDT and Silverville are the ultimate beneficial majority owners of the Companies and have agreed to transfer (or, in the case of TDT, procure that Silverville transfers) their shareholdings in the Companies (the 'Shares') to Oscatello, subsequent to which TDT and Silverville will transfer to Eliza their shares in Oscatello in consideration for shares to be issued in Eliza in each case subject to the terms and conditions of this Agreement.

(D) At the date hereof Kaupthing is the ultimate beneficial owner of Isis.

(E) The Parties have further agreed that Isis will receive as trustee for Oscatello certain benefits received by its Group through its shareholding in, and certain loans made in respect of, Violet."

The "Companies" to which reference is made in recital (A) are those set out in column 1 of schedule 1 to the agreement. Those companies include Glenalla and Thorson.

24. At clause 2.1 of the framework agreement it was agreed that TDT (or a member of its Group), Isis and New Ortland would invest in Eliza. TDT's obligation was to invest "the TDT Equity Amount". That was defined as "£264,458,450 together with any additional amounts contributed to or invested in (directly or indirectly) Eliza, Oscatello or any of the Companies by TDT (directly or indirectly) from time to time". Isis and New Ortland were each to invest £75 million by way of profit participation loan ("PPL").

25. Clause 3.1(A) of the framework agreement provided that Silverville and TDT should, immediately following the release of the charges over "the Shares" granted to Kaupthing under the August 2007 Kaupthing loan facility agreement, transfer their respective holdings of the Shares to Oscatello. In that context "the Shares" had the meaning given to that expression in recital (C): that is to say, it meant the shares in the Companies held by TDT and Silverville. The consideration for those transfers was to be the issue by Oscatello of shares ("the Oscatello Shares") to, respectively, Silverville and TDT: clause 3.2(A). Clause 3.1(B) of the agreement required that Silverville and TDT should transfer their respective holdings of Oscatello shares to Eliza. The consideration for those transfers was to be the issue by Eliza of shares to, respectively, Silverville and TDT. Clause 3.1(C) required that Silverville and TDT procure that the Companies and Oscatello promptly register the transfer of the Shares and the Oscatello Shares. Clause 3.1(D) required that Silverville and TDT procure that Oscatello promptly grant a charge (the "Oscatello Share Charge") over the Shares in favour of

Kaupthing as security for all Oscatello's obligations under an overdraft loan agreement (the "Iceland Loan") made or to be made between Kaupthing, as Lender, and Oscatello, as Borrower.

26. Clause 6.1 of the framework agreement provided that, in consideration of a payment of £44.05 million (the "Violet EquityCo Price") to be made by Oscatello to Isis, Isis agreed (and Kaupthing undertook to procure) that all economic benefits received by Isis (i) in respect of the shares in Violet EquityCo Limited held by Isis and (ii) a £27.15 million loan made to Tazamia Limited should be applied in the manner there set out.

27. By clause 8.1(A) of the framework agreement TDT warranted to each of Kaupthing and New Ortland that the Asset and Liability Statements which had been provided to Kaupthing contained a true and correct list of all the assets and liabilities of the Companies as at 30 November 2007 ("the Benchmark Date"). In that context, the Asset and Liability Statements meant "the statements setting out the assets and liabilities of each Company as at the Benchmark Date, contained in Summary 4 of the spreadsheet headed 'RE AssetsDebt 30.11.2007 – Close of Business". The "Net Equity" shown in Summary 4 of the spreadsheet – being the difference between the aggregate market value of the assets (£1,802,713,142) and the total liabilities (£1,538,254,692) - is shown as £264,458,450.

28. The liabilities shown in Summary 4 of the spreadsheet included "Net Liabilities" attributed to Glenalla (£145,654,419) and Thorson (£225,370,397). But, in computing those net liabilities, no account was taken of "shareholder loans": that is to say, the monies (if any) owed to Glenalla and to Thorson by TDT itself were not set against monies owing by Glenalla or Thorson (as the case may be). Accordingly the "Net Equity" figure shown in Summary 4 was understated by, at the least, an amount equal to the aggregate of the Glenalla loan and the Thorson loan. That figure (together with any additional amounts contributed to or invested in Eliza, Oscatello or any of the Companies by TDT from time to time) was taken to be the "TDT Equity Amount" for the purposes of the Framework Agreement. It followed that the TDT Equity Amount (being the amount which TDT was to invest in Eliza) was also understated by, at the least, an amount equal to the aggregate of the Glenalla loan and the Thorson loan.

29. The effect of the framework agreement was to alter the existing structure by interposing Eliza and Oscatello between TDT and Silverville and the Companies in which the

underlying assets were held. New money (amounting to £150 million in aggregate) was introduced by way of profit participating loans made to Eliza by Kaupthing (through Isis) and by two individual investors, Lydor Gudmundsson and his brother Agust Gudmundsson, through New Ortland.

The overdraft loan agreement dated 19 December 2007

30. Further funds were made available to Oscatello under the overdraft loan agreement (the Iceland Loan) to which reference had been made in clause 3.1(D) of the framework agreement. The overdraft loan agreement, dated 19 December 2007 and made between Oscatello as Borrower and Kaupthing ("the Bank") as lender, recorded (at article 2.1) that the Bank had agreed to make available to the Borrower "financing in an amount of up to GBP 371,000,000 ('the Maximum Amount') in the form of an overdraft on the Borrower's business account". The purpose of the loan was stated to be "to refinance current debt as listed in Schedule 1, to meet potential margin calls in the Borrower's subsidiaries trading accounts and the payment of interest . . .": article 2.2. The current debt listed in Schedule 1 included an amount of £39,366,791 said to be due from ITGL on loan account 5962 as at 19 December 2007. The Borrower could make drawings under the facility at any time prior to 1 December 2010 ("the due date") provided that the aggregate amount outstanding did not exceed the lower of the Maximum Amount and 87% of the market value of the underlying assets of the Borrower and its subsidiaries: article 2.1. Repayment in full was to be made on the due date. By amendments to article 2.1 made on 10 January 2008, 17 March 2008, 25 March 2008 and 30 May 2008 the Maximum Amount was increased (by successive steps) to £600,000,000.

31. The loan facility was secured by a pledge to the Bank of shares in the Companies described in column 1 of schedule 1 to the framework agreement. The market value of the securities pledged was to be not less than 115% of the outstanding amount under the loan: clause 4.2 of the overdraft loan agreement. Those companies were listed, again, at article 4.1 of the overdraft loan agreement. As I have said, those companies included Glenalla and Thorson.

The transfer of funds following the framework agreement and the overdraft loan agreement.

32. On 20 December 2007 New Ortland, Isis, Eliza and Oscatello, by their respective directors and/or attorneys, instructed Kaupthing, by way of irrevocable payment instruction, to make the following payments:

Sender	Receiver	Amount GBP
New Ortland	Eliza	75,000,000
Isis	Eliza	75,000,000
Eliza	Oscatello	150,000,000
Oscatello	Isis	44,050,000
Oscatello	Kaupthing (Limebrook loan no 5436)	4,763,599
Oscatello	Kaupthing (Thorson loan no 6006)	65,433,901
Oscatello	Kaupthing (Investec Trust loan no 5962)	39,368,971
Oscatello	Kaupthing (Daniello Properties loan no 5438)	18,565,462
Oscatello	Kaupthing (Violet loan no 6108)	20,471,616
Oscatello	Collateral for Razino TR6	106,041,451
Oscatello	Collateral payment for Thorson	95,598,921
Oscatello	Collateral payment for Violet Capital Group	86,403,079
Oscatello	Kaupthing – structuring fee	3,710,000

33. In summary, New Ortland and Isis each transferred £75,000,000 to Eliza under the terms of profit participation loans in accordance with clause 2.1 of the framework agreement. On receipt of those sums, Eliza transferred them to Oscatello by way of interest free loans. On 21 December 2007 Oscatello used that £150,000,000, together with a further £143,984,107.10 to make payments amounting in aggregate to £293,984,107.10. Of that sum, £44,050,000 (the Violet EquityCo Price) was paid to Isis in accordance with clause 6.1 of the framework agreement and £3,710,000 was paid to Kaupthing as a structuring fee in respect of that agreement. The balance (£246,224,107.10) was applied in making interest free loans to TDT and a number of the Companies (Razino Limited, Thorson, Violet Capital Limited, Daniella Properties Limited and Limebrook Limited). The amount of the loan by Oscatello to TDT was £39,386,354.80: that loan was applied in repayment of monies owed by TDT to Kaupthing under the August 2007 Kaupthing loan facility agreement. The movement of funds was described by Lydia Peck (as she then was), an Assistant Trust Manager employed by Investec, in a memorandum dated 7 January 2008. In particular, so far as material, she recorded that:

> "(2) Oscatello used the £150m, plus part of the overdraft from Kaupthing of £371m on their 358-36-000509 account, to make the following payments, all for **value 21 December 2007**:
> Oscatello
> CR £293,984,107.10 Kaupthing Bank HF bank a/c 358-36-00509
> DR . . . . . .

DR £39,386,354.80 Int free Loan to TDT
DR . . . . . .
£293,984,107.10 TOTAL DR's

TDT
CR £39,386,354.80 Int free Loan from Oscatello
DR £39,386,354.80 Repay Loan no 5962 with Kaupthing Bank hf, breakdown as follows:

(as per statement from Kaupthing received, attached)

£15,167,696.78 loan from Kaupthing 22/08/07 novated to TDT on 24/08/2007
£467,496.46 loan interest on this loan up to 21/12/07
£14,950,000 loan from Kaupthing on 06/11/07
£166,448.12 loan interest on this loan up to 21/12/07
£4,050,000 loan from Kaupthing on 06/11/17
£45,091.30 loan interest on this loan up to 21/12/07
£2,000,000 loan from Kaupthing on 08/11/07
£21,276.16 loan interest on this loan up to 21/12/07
£2,500,000 loan from Kaupthing on 22/11/07
£18,345.98 loan interest on this loan up to 21/12/07
£39,386,354.80 TOTAL"

The July 2008 book entries

34. It is common ground that, as at the date of the framework agreement, the general ledgers of Glenalla and Thorson continued to show ITGL (as trustee of the TFT) as the debtor in respect of the Glenalla loan and the Thorson loan (as the case might be). It was not until early July 2008, some eleven months after the novations on 24 August 2007, that the general ledgers of Glenalla and Thorson were updated to reflect the assumption by the former trustees of the debts formerly owed by ITGL.

35. As I have said, the effect of the framework agreement dated 19 December 2007 was to transfer ownership of the companies listed in Schedule 1 to that agreement from the TDT or Silverville to Oscatello in return for the issue to the TDT or Silverville of shares in Oscatello; and to transfer the shares in Oscatello held by the TDT and Silverville to Eliza in return for the issue of shares in Eliza. The corporate structure headed by Eliza and Oscatello became known as "the Oscatello structure". It included Glenalla and Thorson. Following the adjustment to the general ledgers of Glenalla and Thorson to which I have just referred, the accounting records of the companies within the Oscatello structure listed in Schedule 1 showed credit or debit balances (i) as between the TDT and those companies and (ii) as between Silverville and those companies.

36. It is common ground, also, that in or about July 2008 further entries in the accounting records of the companies within the Oscatello structure were made which purported to show that those balances had been transferred from TDT or Silverville (as the case might be) to Oscatello or Eliza. In particular, further accounting entries were made in the ledgers of Oscatello, Glenalla and Thorson ("the July 2008 book entries") which purported to adjust the position in relation to the Glenalla loan and the Thorson loan by recording those loans as owing by Oscatello rather than owing by the former trustees:

(1) The credit balance in the records of Glenalla, formerly shown as owed by the TDT, was thereafter shown as a credit balance (of the same amount) owed by Oscatello.

(2) The credit balance in the records of Thorson, formerly shown as owed by the TDT, was thereafter shown as a credit balance (of the same amount) owed by Oscatello.

(3) The credit balance in the records of Oscatello, formerly shown as owed by the TDT, was thereafter shown as a credit balance (of the same amount) owed by Eliza.

Further:

(4) The debit balances in the records of the other companies transferred by TDT into the Oscatello structure and the debit balances in the records of the four companies transferred by Silverville into the Oscatello structure formerly shown as owed by those companies to TDT or to Silverville (as the case might be) were thereafter shown as debit balances (of the same amount) owed to Oscatello.

The entries made in July 2008 purported to record transfers made on 19 December 2007 (the date of the framework agreement) between the TDT or Silverville, on the one hand, and Eliza, Oscatello and the other companies in the Oscatello structure, on the other hand.

37. The further entries made in July 2008 were made by Louw Rabie, an accountant in the employ of ITGL. Those entries were subsequently reflected in draft balance sheets, prepared by Mr Rabie, which purported to show the financial position of Glenalla, Thorson, Oscatello and the other companies in the Oscatello structure as at 31 August 2008. In particular, the draft balance sheets prepared in respect of Glenalla, Thorson and Oscatello did not show the TDT as a debtor of any of those companies. Those draft balance sheets were considered (but were not formally approved) by the respective boards of directors of Glenalla, Thorson and Oscatello on 3 October 2008. On the basis of the financial position shown in those draft balance sheets, decisions were taken by the directors of Oscatello, Glenalla and Thorson (and other companies within the Oscatello structure) to convert debt into equity.

The October 2008 book entries

38. The effect of the entries made in July 2008 was to show (i) a balance of some £242 million owed by Eliza to Silverville and (ii) a balance of some £90 million owed by the TDT to Eliza. In or about October 2008 Mr Rabie made further entries in the accounting records of Eliza and Silverville which purported to show (i) that approximately £188 million of the £242 million owed by Eliza to Silverville had been transferred by Silverville to the TDT and (ii) that that £188 million had been netted off against the £90 million formerly shown as owed by the TDT to Eliza, leaving a balance of some £98 million in favour of the TDT.

The March 2009 assignment

39. The effect of the entries made in October 2008 was to leave a balance of some £54 million (£242 million less £188 million purportedly transferred to the TDT) shown as owed by Eliza to Silverville. On 2 March 2009, in written resolutions signed on behalf of the directors of Silverville (GFT Directors Limited and Finistere Directors Limited, companies controlled by ITGL), it was noted that, following the framework agreement, "a loan position remained in place whereby the Company [Silverville] was owed by Eliza the sum of £53,523,371.80 ('the loan') and that this loan position had arisen as a consequence of various loans which had previously existed between TDT and the Company"; and it was resolved to approve the assignment of the loan to TDT "by way of a capital distribution receipt to the Shareholder [the TDT]". At a meeting of the former trustees, held on the same day, they agreed to accept the proposed assignment of the loan on that basis. A deed of assignment by which Silverville assigned that loan to the former trustees, as trustees of the TDT, was executed on the same day (2 March 2009) by ITGL, Bayeux and Silverville.

The demands for repayment

40. As I have said, Glenalla and Thorson were placed in liquidation by resolution of their members on 18 August 2009. Stephen Akers, a partner in Grant Thornton UK LLP, and Mark McDonald, a partner in Grant Thornton (BVI) Limited, were appointed joint liquidators. On 22 April 2010 Mr Akers wrote to the former trustees to demand payment of the outstanding loans said to be due from TDT to those companies. The letters were in these terms *(mutatis mutandi*):

> "**Glenalla Limited [Thorson Investments Limited] – In Liquidation (the Company)**

We refer you to the deed of novation between you, Investec Trust (Guernsey) Limited ('**ITGL**') and the Company dated 24 August 2007 (the '**Deed**').

Under Clause 1 of the Deed you undertook to perform all the obligations of ITGL under the loan facility between between the Company and ITGL (the '**Loan Facility**'). As you are aware the terms of the Loan Facility are that it is unsecured, interest free and repayable on demand. As at the date of this letter, pursuant to the Loan Facility, you are now indebted to the Company in the sum of £62,742,571.00 [£80,541,936.00].

We hereby make formal demand for the debts due and owing by you to the Company under the Loan Facility, payable immediately, in the sum of £62,742,571.00 [£80,541,936.00].

We would be grateful if you would contact us straight away to arrange payment."

41. Oscatello was placed in liquidation by its members on 16 February 2010. An order for the winding up of Eliza was made in the British Virgin Islands on 22 February 2010. Mr Akers and Mr McDonald were appointed joint liquidators of those companies also. On 22 April 2010 Mr Akers wrote to former trustees to demand payment of the outstanding loans said to be due from those companies. The letters were in these terms (*mutatis mutandi*):

> "**Oscatello Investments Limited [Eliza Limited] – In Liquidation (the Company)**
>
> We refer you to the loan facility between you and the Company dated on or about 21 December 2007 (the '**Loan Facility**').
>
> Pursuant to the Loan Facility the Company made a loan to you in the sum of £39,386,354.80. As you are aware the terms of the Loan Facility are that it is unsecured, interest free and repayable on demand. As at the date of this letter, pursuant to the Loan Facility, you are now indebted to the Company in the sum of £39,386,354.80
>
> We hereby make formal demand for the debts due and owing by you to the Company under the Loan Facility, payable immediately, in the sum of £39,386,354.80.
>
> We would be grateful if you would contact us straight away to arrange payment."

Article 32 of the Trusts (Jersey) Law 1984

42. Article 32 of the Trusts (Jersey) Law 1984 (following amendment by the Trusts (Amendment) (Jersey) Law 1989 and the Trusts (Amendment No 4) (Jersey) Law 2006) is in these terms:

> "**32 Trustee's liability to third parties**
>
> (1) Where a trustee is party to any transaction or matter affecting the trust –

(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).

(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust."

The issues for determination

43. The claims to payment of the monies demanded in the letters of 22 April 2010 were first made on behalf of the BVI Companies by way of counterclaim in a pleading (described as Amended Defences of the First to Fourth Defendants) dated 30 September 2011. That pleading was served in response to the Amended Application, dated 6 August 2011, by which the former trustees, as Plaintiffs, had sought the Court's determination of the question "whether the Arrangements constituted or gave rise to and if so at all material times after 24 August 2007 remained binding loan agreements between Glenalla, Thorson, Eliza and Oscatello and the Plaintiffs".

44. In that context "the Arrangements" were defined to mean ". . . in the period up to 21 December 2007, the Glenalla Arrangement and the Thorson Arrangement, and in the period from 21 December 2007, the Glenalla Arrangement, the Thorson Arrangement and the Oscatello Arrangement". The "Glenalla Arrangement" and the "Thorson Arrangement" meant the arrangement referred to at paragraph 11 of the Amended Application ". . . in so far as it operated between ITGL as trustee of the TFT and [Glenalla/Thorson, as the case might be] up until 24 August 2007 and between ITGL and Bayeux as trustees of the TDT and [Glenalla/Thorson] from 24 August 2007 onwards". The "Oscatello Arrangement" meant the arrangement referred to at paragraph 11 of the Amended Application "in so far as it operated between ITGL and Bayeux as trustees of the TDT and Oscatello and/or Eliza". Paragraph 11 of the Amended Application was in these terms (so far as material):

> "11. Where, in the interests of the TFT, funds were transferred from one entity under the ultimate control of ITGL as trustee of the TFT to another such entity, it was at all material times the general practice of ITGL to account for the transfer of funds as a series of informal loan arrangements. ITGL makes no admission as to whether the said arrangements in law constituted or gave rise to binding loan agreements. . . ."

At paragraphs 30 and 31 of the Amended Application it is pleaded that the loan of £39,386,354.80 made by Oscatello to ITGL and Bayeux as trustees of the TDT "for the purpose of enabling them to repay to Kaupthing the sums owing by them pursuant to the 20 August 2007 Loan Agreement" was approved "on the same basis as the Arrangements set out at paragraph 11 above".

45. The BVI Companies assert, at paragraph 30.1 of their Amended Defences, that:

> "30.1. Whatever may or may not have been the terms of the Loan Facilities prior to the execution of the Deeds of Novation (no such terms different to the Deeds of Novation being admitted), the Deeds of Novation gave rise to and/or constituted new contracts between ITGL and Bayeux as trustees of the TDT and Glenalla and Thorson respectively, that in consideration of Glenalla and Thorson releasing ITGL as trustee of the TFT from its obligations to those companies, the Loan Facilities would henceforth be unsecured, interest free and repayable on demand, and that ITGL and Bayeux as trustees of the TDT would comply with those terms."

At paragraph 31.2 of the Amended Defences the BVI Companies repeat their assertion that, from the date of the deeds of novation, ITGL and Bayeux had bound themselves as trustees of the TDT to repay on demand the Loan Facilities made by Glenalla and Thorson respectively. At paragraph 47.3 (re-numbered 42.3 in the document described as "Further Amended Defences and Counterclaim of the First to Fourth Defendants dated 1 June 2012) the BVI Companies assert that the "informal loan arrangements" referred to in paragraph 11 of the Amended Application do constitute valid and binding loan agreements repayable by the former trustees. At paragraph 71 (renumbered paragraph 66 in the Further Amended Defences document) paragraph 31 of the Amended Application (which pleads that the Oscatello loan was made by way of "informal loan arrangement") is denied.

46. The former trustees responded to the BVI Companies' Amended Defences by a pleading dated 5 October 2011 and described as "Amended Reply and Defences to Counterclaim of the First to Fourth Defendants". Paragraph 27.1 of that pleading contains an admission that "the Glenalla Deed of Novation and the Thorson Deed of Novation gave rise to new contractual arrangements between the Former Trustees as trustees of the TDT and Glenalla and Thorson respectively." The paragraph continues: "Paragraph 30.1 [of the Amended Defences] is otherwise admitted" (*sic*). In paragraph 28.2 of the Amended Reply, paragraph 31.2 of the Amended Defences is admitted "subject to the averral that the liability of the Former Trustees pursuant to the Arrangements is subject to the implied terms set out at paragraph 15 of the Amended

Application". In paragraph 35 of the Amended Reply, the former trustees state that it is their position that "the Arrangements constitute legally binding liabilities, albeit subject to the implied terms set out at paragraph 15 of the Amended Application."

47. Given the admissions made by the former trustees in their Amended Reply (which are confirmed in a "Further Amended Reply and Defences to Counterclaim of the First to Fourth Defendants"), by the time that the trial commenced it had become common ground between the former trustees and the BVI Companies that the answer to the question posed for determination by the Court – "whether the Arrangements constituted or gave rise to and if so at all material times after 24 August 2007 remained binding loan agreements between Glenalla, Thorson . . . and Oscatello and the Plaintiffs" – is "Yes". It had also become common ground that the loan made to the TDT on or about 21 December 2007 was made by Oscatello - and not by Eliza – so that the question whether there remained a binding loan agreement between Eliza and the former trustees did not arise for determination.

48. There is, however, no common ground between the former trustees and the BVI Companies, on the one hand, and the present trustee, on the other hand, on the question whether the "Arrangements" – or, the "Accounting Entries" by which the Arrangements were recorded in the books of account of each relevant company (as alleged in paragraph 13 of the Amended Application) - gave rise to binding loan agreements between Glenalla, Thorson and Oscatello and the former trustees. The position taken by the present trustee (R&H) in relation to the Glenalla loan and the Thorson loan appears from paragraphs 10, 15 and 16 of its Defence and Counterclaim (dated 17 August 2011):

> "10. . . . R&H will aver at trial that the Accounting Entries were not legally binding loan agreements. In particular:
>
> (a) . . . , the Accounting Entries were not intended to create legally binding liabilities to repay on demand sums of money recorded by such Accounting Entries.
>
> (b) There were no formal loan agreements entered into.
>
> (c) The Accounting Entries themselves did not create any legally binding loan agreements, nor did they evidence any actual loan agreements between the companies.
>
> (d) It is not admitted that the book keepers who made the Accounting Entries had authority from any of the companies involved in the Accounting Entries to create legally binding loan agreements between a company and its parent or subsidiary as the case may be.

(e) It is not admitted that the book keepers had authority to make ITGL (as trustee of the TFT) legally liable to repay loans merely by the process of making accounting entries.

(f) Nor were each and every one of the Accounting Entries supported by a board resolution of the relevant company or ITGL (as trustee of the TFT), as the case may be, authorising the company or the TFT entering into the alleged loan and making the subsequent forward loan.

. . .

15. . . . R&H will aver that because the Accounting Entries neither created nor evidenced any legally binding loan agreement . . . , there were no loan obligations of ITGL as trustee of the TFT for the Former Trustees to undertake to perform by the Glenalla Deed of Novation and the Thorson Deed of Novation. In particular:

(a) ITGL was not liable to Glenalla or Thorson for the reasons set out in paragraph 10 above. Any statements to the contrary in the Glenalla Deed of Novation or the Thorson Deed of Novation were made as a result of the mistake or misunderstanding of the parties to those deeds and does not create an obligation where none existed;

(b) Accordingly there were no such liabilities for the Former Trustees to undertake to perform and no such liabilities from which to release ITGL as trustee of the TFT.

16. Further, on their true construction, the Glenalla Deed of Novation and the Thorson Deed of Novation:

(a) did not make or purport to make the Accounting Entries into legally binding loan agreements if they were not already legally binding; and

(b) did not create legally binding loan agreements if none had previously existed."

49. The present trustee does not admit paragraphs 30 and 31 of the Amended Application (at which it is pleaded on behalf of the former trustees that the loan of £39,386,354.80 made by Oscatello to ITGL and Bayeux as trustees of the TDT "for the purpose of enabling them to repay to Kaupthing the sums owing by them pursuant to the 20 August 2007 Loan Agreement" was approved "on the same basis as the Arrangements set out at paragraph 11 above"): see paragraph 28 of its Defence. But, at paragraph 61 of the Defence, it is asserted that:

> "61. . . . by reason of the matters aforesaid, it is denied that the Accounting Entries gave rise to binding loan agreements and/or that they remained binding loan agreements at all material times after 24 August 2007."

50. As appears from that plea, the present trustee asserts that, if there ever were binding loan agreements in relation to the Glenalla loan, the Thorson loan or the Oscatello loan,

no liability under those agreements remains. Paragraph 58 of the Defence is in these terms:

> "58. If the Accounting Entries were legally binding loans, then by reason of all the matters aforesaid:
>
> (a) The Former Trustees as trustees of the TDT are not liable to Glenalla, Thorson, Oscatello or Eliza and those companies have no claim against the Former Trustees in respect of the Accounting Entries;
>
> (b) In particular, the Former Trustees are not liable:
> (i) to Glenalla in the sum of £62,742,571, or any other sum;
> (ii) to Thorson in the sum of £80,541,936, or any other sum; and
> (iii) to Oscatello or Eliza in the sum of £39,386,354.80 or any other sum; and
>
> (c) Instead, the Former Trustees have a claim against Eliza in the sum of approximately £151 million . . ."

In that context, "the matters aforesaid" is a reference to the matters pleaded at paragraphs 30 to 57 of the Defence: that is to say, the assertions made as to the effect of the July 2008 book entries, the October 2008 book entries and the March 2009 assignment.

51. The present trustee seeks against the former trustees, by way of counterclaim, declarations (i) that the Accounting Entries are not legally binding loan agreements, and that the BVI Companies have no claim against the former trustees in respect of the Accounting Entries and, in the alternative, (ii) that the July 2008 book entries, the October 2008 book entries and the March 2009 assignment are valid and effective, that the BVI Companies have no claim against the former trustees in respect of the Accounting Entries and that the former trustees have a claim against Eliza in the sum of approximately £151 million and that such claim is an asset of the TDT.

52. The present trustee seeks the same relief against the BVI Companies by way of Third Party Claim; in which it relies upon the same matters as those pleaded in its Defence. The BVI Companies' response to that claim, in so far as it is based on the July 2008 book entries, is pleaded at paragraphs 17 to 24 of their Amended Defences and Counterclaim to the Third Party Claim of the Fifth Defendant. It is said, first, that the July 2008 book entries were of no legal effect (paragraph 17); and, second, that (if, contrary to that contention, those entries reflected actual transactions) those transactions are voidable and liable to be set aside in the British Virgin Islands under provisions in the Insolvency Act 1983 (paragraphs 19 to 24). By their counterclaim the BVI Companies seek a declaration that (*inter alia*) the July 2008 book entries are of no force

and effect; and, in the alternative (in the event that the Court should hold that those book entries do have the effect for which the present trustee contends), an order that the present trustee's claim in that respect be stayed pending an application by Thorson and Oscatello to the Eastern Caribbean Supreme Court, sitting in the British Virgin Islands, for an order that the July 2008 book entries in respect of those companies be set aside.

53. It can be seen, therefore, that – as between the former trustees and the BVI Companies on the one hand and the present trustee on the other hand - it is necessary to determine the question raised by the Amended Application ("whether the Arrangements constituted or gave rise to and if so at all material times after 24 August 2007 remained binding loan agreements between Glenalla, Thorson, Eliza and Oscatello and the Plaintiffs"). That question raises three distinct issues:

(1) Whether, immediately after 24 August 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Glenalla loan and the Thorson loan.

(2) Whether, immediately after the transfers of funds on 21 December 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Oscatello loan.

(3) Whether the former trustees (or TDT) remained subject to such binding obligations (if any) notwithstanding the July 2008 book entries, the October 2008 book entries and the March 2009 assignment.

It is necessary, also, to determine whether the present trustee is entitled to the declaration that it seeks against the former trustees (by way of counterclaim) and against the BVI Companies (by way of third party claim):

(4) Whether the former trustees have a claim against Eliza in the sum of approximately £151 million which is an asset of the TDT.

54. The second head of relief sought by the Amended Application is a declaration that the terms of the Glenalla loan, the Thorson loan and the Oscatello loan were as set out in paragraph 15 of that pleading. The paragraph is in these terms:

> "15. If the Arrangements in law constituted or gave rise to binding loan agreements, by a course of dealing between ITGL as trustee of the TFT and each of the companies of which they were the ultimate beneficial owner, it was a term of the said Arrangements that:
>
> 15.1 The loans were interest free;

15.2 The loans would be repaid to ITGL, in whole or in part, only if funds were available within the borrowing company with which to make such repayment;

15.3 The loans would be repaid by ITGL, in whole or in part, only if funds were available to ITGL out of certain specific assets of the TFT from which such payment could be made;

15.4 The loans would be repaid by ITGL, in whole or in part, only if ITGL resolved to make such a repayment out of the assets of the TFT in the interests of the beneficiaries of the TFT; and

15.5 ITGL was not personally liable as borrower under any loan made pursuant to the Loan Arrangements."

55. At an early stage of the trial Advocate Wessels, who appeared for the former trustees, informed the Court (transcript, 12 June 2012, page 16, line 9) that his clients no longer contended that it was a term of the Arrangements that the loans would be repaid by ITGL, in whole or in part, only if ITGL resolved to make such a repayment out of the assets of the TFT in the interests of the beneficiaries of the TFT. After the evidence was completed, he informed the Court (transcript, 28 June 2012, page 28, lines 6-20) that his clients were no longer relying on the implied terms pleaded at sub-paragraphs 15.2 and 15.3 of the Amended Application. In any event, it is clear that sub-paragraph 15.2 can have no application to the Glenalla loan or the Thorson loan: those were not loans which (on any view of the facts) "would be repaid to ITGL". Accordingly, paragraph 15 must now be read as if sub-paragraphs 15.2, 15.3 and 15.4 have been deleted by amendment.

56. Paragraph 15 of the Amended Application must be read with paragraphs 26 and 31 of that pleading:

> "26. Paragraphs 15 to 17 above continued to apply to the Glenalla Arrangement and the Thorson Arrangement after 24 August 2007 *mutatis mutandis* as they had applied before that date."
>
> "31. . . . the terms of the Oscatello Arrangement are as pleaded at paragraphs 15 to 17 and 23 above."

Accordingly, notwithstanding that, in terms, the former trustees appear to seek a declaration that the terms of the loans "were as set out in paragraph 15 above", it is reasonably clear that the declaration now sought is that the terms of the Glenalla loan, the Thorson loan and the Oscatello loan are: (i) that the loans were interest free; and (ii) that the former trustees (as trustees of the TDT) - rather than ITGL (as trustee of the TFT) - were not personally liable as borrower in respect of such loans.

57. The BVI Companies accept that the loans were interest free. That, they say, is clear – at least in relation to the Glenalla loan and the Thorson loan - from Recital (A) to the deeds of novation dated 24 August 2007: "The Loan Facility is unsecured, interest free and repayable on demand ('the Terms')". They point out that, in the deeds of novation, the former trustees, at clause 1, and the company (Glenalla or Thorson, as the case may be), at clause 2, agree "to be bound by the Terms". In that context "the Terms" has a defined meaning. It is said that the Glenalla loan and the Thorson loan – assumed under the deeds of novation – were repayable on demand (paragraphs 31.1 and 31.2 of their Amended Defences). At paragraph 50.3.3 of the Amended Defences (subsequently renumbered as paragraph 45.3.3) it is asserted that, by necessary inference, the terms of the Oscatello Loan included, *inter alia*, that the Oscatello Loan was unsecured and repayable on demand.

58. The present trustee does not adopt or admit the terms pleaded in paragraph 15 of the Amended Application (transcript, 27 June 2012, page 51, lines 1 - 6); nor does it adopt or admit the assertions made in paragraphs 26 or 31 of that pleading (paragraphs 9, 18 and 28 of its Defence). As I have said, its position, in relation to the obligations in relation to the Glenalla loan and the Thorson loan said to have been assumed by the former trustees under the deeds of novation, is set out at paragraph 15 of its Defence: in short, the present trustee denies that there were any loan obligations of ITGL as trustee of the TFT for the former trustees to undertake to perform by the Glenalla Deed of Novation and the Thorson Deed of Novation and asserts that any statements to the contrary in the Glenalla Deed of Novation or the Thorson Deed of Novation were made as a result of the mistake or misunderstanding of the parties to those deeds. It advances no case as to the terms of the Oscatello loan; save that (i), if accounting entries made, following the Framework Agreement in December 2007, showed monies owing by the TDT to Oscatello, those entries created no legal obligations and (ii), if (contrary to that contention) the TDT did become under an obligation in respect of the Oscatello loan, that obligation was transferred to Eliza by the July 2008 book entries.

59. Given that it is common ground that the loans (if established) were made on terms that they were interest free, it follows that, in relation to the second head of relief sought by the former trustees (a declaration that the terms of the Glenalla loan, the Thorson loan and the Oscatello loan were as set out in paragraph 15 of the Amended Application), the only question that remains in issue is whether it was a term of the legal obligations

(if any) assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson loan and/or the Oscatello loan that they were not personally liable (paragraph 15.5).

60. The third head of relief sought by the Amended Application is a declaration that the former trustees have no personal liability to the BVI Companies under the Arrangements; and that the claims of the BVI Companies under the Arrangements "extend only to the trust property of the TDT pursuant to Article 32(1)(a) of the Trusts (Jersey) Law 1984 as amended". In so far as the first limb of the declaration sought is not founded on the contractual terms upon which the former trustees assumed or undertook liability (the issue just identified) but, like the second limb, is founded upon article 32(1)(a) of the Trusts (Jersey) Law, the former trustees' case is set out at paragraphs 23 and 31 of the Amended Application:

> "23. If the Arrangements in law constituted or gave rise to binding loan agreements then, in accepting the liability of ITGL and Bayeux in their capacity as trustees of the TDT in respect of the Glenalla Arrangement and the Thorson Arrangement, Glenalla and Thorson respectively knew that ITGL and Bayeux were acting as trustees because they were controlled by subsidiaries of ITGL and were at all times aware of the basis upon which the Arrangements operated and were accounted for. Accordingly, ITGL and Bayeux rely on Article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended). . . ."

Article 32 of the Trusts (Jersey) Law 1984 (as amended) has been set out earlier in this judgment: paragraph (1)(a) of that article provides that where a trustee is party to any transaction or matter affecting the trust and the other party knows that the trustee is acting as trustee, "any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property". As I have said, it is alleged at paragraph 31 of the Amended Application that the terms of the Oscatello Arrangement are as pleaded in (*inter alia*) paragraph 23.

61. The BVI Companies do not admit paragraph 23 of the Amended Application. Their response is found at paragraphs 55, 56 and 58 of the Further Amended Defences dated 1 June 2012. In particular, it is pleaded, at paragraph 55:

> "55. The [BVI Companies] do not admit that ITGL and Bayeux are entitled to rely on Article 32 of the Trusts (Jersey) Law 1984 in casu."

62. The BVI Companies did not formally admit, in their Further Amended Defences, (i) that Glenalla and Thorson knew, when, respectively, they entered into the deeds of novation on 24 August 2007 or (ii) that Oscatello knew, when funds were transferred

for purpose of repaying the indebtedness of the TDT to Kaupthing on 21 December 2007, following the framework agreement, that the former trustees were acting as trustees of the TDT in those transactions for the purposes of article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended). But it was accepted on their behalf, in the course of the oral hearing (transcript, 12 June 2012, page 62, lines 21-23) that Glenalla, Thorson and Oscatello did have knowledge that the former trustees were, throughout, acting in that capacity. To suggest otherwise – in the face of the documents which they executed – would be to ignore the obvious. So it is difficult to see how it can be contended on behalf of the BVI Companies that, if the present trustees are entitled to rely on article 32 of the Trusts (Jersey) Law 1984 in the present proceedings, the case does not fall within paragraph (1)(a) of that article: and, if so, why the BVI Companies' claims should not "extend only to the trust property". But, plainly, the BVI Companies do resist the declaration sought by the former trustees under the third head of relief ; and do not limit the claims which they have brought against the former trustees (brought by way of counterclaim) to the extent of the trust property. In those circumstances, notwithstanding that it has now been accepted that Glenalla, Thorson and Oscatello did have knowledge that the former trustees were, throughout, acting in their capacity as trustees of the TDT, the issue raised by paragraph 55 of the Further Amended Defences – whether the former trustees are entitled to rely on article 32 of the Trusts (Jersey) Law 1984 – remains for determination.

63. The present trustee admits that Glenalla and Thorson knew that the former trustees were acting as trustees of the TDT when entering into the deeds of novation (as alleged in the first sentence of paragraph 23 of the Amended Application); it pleads that it will, if necessary, rely on article 32 of the Trusts (Jersey) Law; but, otherwise, it denies the averments made by the former trustees in that paragraph (paragraph 17 of its Defence and Counterclaim).

64. In those circumstances it is necessary to determine the following issues:

(5) (A) Whether the former trustees are entitled to rely (as against the BVI Companies) on article 32 of the Trusts (Jersey) Law 1984 (as amended) in these proceedings; and, if (or to the extent that) the former trustees are not so entitled, (B) whether it was a term of the legal obligations (if any) assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson loan and/or the Oscatello loan that they were not personally liable.

65. The former trustees went on to aver (at paragraph 23 of the Amended Application) that:

> "23. . . . If the Arrangements in law constituted or gave rise to binding loan agreements, any claim by Glenalla and Thorson falls to be made against the trust property of the TDT only and not against ITGL and Bayeux personally"

The BVI Companies' response is that:

> "56. On its true construction –
>
> 56.1 Article 32 extends to the property or assets of a trust at the time when a trustee enters into the relevant transaction(s);
>
> 56.2 any judgment against a trustee can accordingly be enforced against whomever may hold at the time of such judgment assets of the trust formerly held by the trustee who entered into the relevant transaction(s);
>
> 56.3 a trustee is under a duty to take reasonable care to preserve sufficient assets to meet any liability he may have as such trustee to any third party and if he fails to do so cannot rely upon Article 32.
>
> 57. . . .
>
> 58 The [BVI Companies] deny that any claim by Glenalla and Thorson falls to be made against the trust property of the TDT only and not additionally against ITGL and Bayeux personally. The [BVI Companies] deny that any claim against ITGL and Bayeux as trustee of the TDT under the deeds of novation can only be enforced to the extent that the [former trustees] hold assets of the TDT available to satisfy those obligations . . ."

The present trustee denies (at paragraph 17 of its Defence and Counterclaim) "that any claim made by Glenalla or Thorson falls to be made directly against the trust property of the TDT, whether by virtue of Article 32 or at all".

66. In those circumstances it appeared on the face of the pleadings that the issues for determination in relation to the third head of relief sought by the former trustees (a declaration that the former trustees have no personal liability to the BVI Companies under the Arrangements and that the claims of the BVI Companies under the Arrangements "extend only to the trust property of the TDT pursuant to Article 32(1)(a) of the Trusts (Jersey) Law 1984 as amended") – other than that already identified as issue (5)(A) – included the question whether, on the true construction of article 32(1)(a) of the Trusts (Jersey) Law 1984 (as amended) and on the basis that the former trustees (as trustees of the TDT) assumed or undertook legally binding obligations in respect of the repayment of the Glenalla loan, the Thorson loan and the Oscatello loan, the claims to repayment of those loans were properly made against the former trustees; or should be made (and made only) *in rem* against the assets subject to the trusts of the TDT. But,

by the end of the trial, this was not in issue. At paragraph 40.2 of their Outline Closing Written Submissions the former trustees accept that:

> "40.2 The claim by a creditor is against the trustee as trustee. This would seem to involve the necessary claim by the creditor against the trustee, and not any form of direct recourse against (or proprietary claim to) the trust property). . . ."

It is unnecessary, therefore, to address the question whether, if the former trustees can rely on article 32(1)(a) of the Trustee (Jersey) Law, the claims made by the BVI Companies can be made only *in rem* against the assets subject to the trusts of the TDT (and not against the former trustees). None of the parties now contends that that is the effect of article 32(1)(a) of the Law.

67. If, in response to claims to repayment properly made against them, the former trustees can rely on article 32(1)(a) of the Trusts (Jersey) Law – or on a term of the legal obligations which they assumed or undertook which had the effect of limiting their liability to the extent of the trust assets – then questions may arise whether (if the claims to repayment are upheld) the amounts for which judgments should be entered should be the full amount of the claims (but subject to the proviso that the extent to which those judgments may be enforced is limited to the trust property in the hands of the former trustees at the date of judgment) or should be for the value of the trust property as at the date of the transaction or the value of the trust property at the time of the demands for repayment or for some other (and, if so what) value. It was accepted, I think, that the determination of those questions could be deferred until it was known whether the BVI Companies succeeded on their claims to repayment and (if so) whether the obligations of the former trustees were such that they were not personally liable.

68. The fourth head of relief sought by the Amended Application is a declaration (further or in the alternative to the declaration sought under the third head) that upon the true construction of the Arrangements, the former trustees are only liable as trustees, and not personally, so that Glenalla, Thorson and Oscatello can enforce any obligations due by the former trustees under the Arrangements only to the extent that the former trustees hold assets of the TDT available to satisfy those obligations.

69. In that the foundation for the declaration sought under the fourth head of relief is said to be "the true construction of the Arrangements" – and not (as in the case of the declaration sought under third head of relief) the provisions of article 32(1)(a) of the

Trust (Jersey) Law – there are, as it seems to me, no further issues (in addition to that already identified as issue (5)(B)) which need to be determined in relation to this head.

70. The fifth head of relief sought by the Amended Application is a declaration, as against the present trustee, that the former trustees have a right of indemnity against the trust assets of the TDT (whether or not such assets may presently be vested in the former trustees) "such that they may: (a) retain those of the assets presently vested in them until the final determination of the issue of their liability pursuant to the Arrangements; (b) realise the assets of the TDT in order to meet any liability they may be found to owe to Glenalla, Thorson . . . and/or Oscatello pursuant to the Arrangements; (c) exonerate themselves from any liability they may be found to owe to Glenalla, Thorson . . . and/or Oscatello pursuant to the Arrangements directly from the trust assets of the TDT."

71. The grounds upon which the former trustees seek a declaration in those terms are set out in paragraphs 38 and 38A to 38E of the Amended Application. After setting out (at paragraph 38) the net amounts owing by the former trustees to Glenalla, Bayeux and Oscatello as shown in the accounting records and noting (at paragraph 38A) that the former trustees consider that the net asset value of the assets of the TDT is less than the aggregate of those amounts, the pleading continues:

> "38B. ITGL and Bayeux have at all relevant times since 2 July 2010 [the date upon which they were removed as trustees of the TDT and the present trustee was appointed in their place], pursuant to clause 10.4 of the TDT trust instrument, considered in good faith that any sums due pursuant to the Arrangements are, to the extent that the Arrangements may be enforceable by Glenalla, Thorson . . , and/or Oscatello, properly chargeable against the trust fund of the TDT or the income thereof and that the trust fund of the TDT may become subject to the Arrangements by virtue of ITGL and Bayeux having acted as trustees of the TDT. Accordingly, ITGL and Bayeux have at all relevant times since 2 July 2010 withheld those of the assets of the TDT which were vested in it immediately before their removal as trustees of the TDT as security for, *inter alia*, their liability (if any) pursuant to the Arrangements.
>
> 38C. Further or alternatively, by virtue of Article 34(2) of the Trusts (Jersey) Law 1984 (revised ed.), ITGL and Bayeux are under no obligation to surrender the trust property of the TDT to R&H until they are provided with reasonable security for, *inter alia*, their liability (if any) pursuant to the Arrangements.
>
> 38D. Further, ITGL and Bayeux are entitled to retain those assets of the TDT presently vested in them until the final determination of the issue of their liability pursuant to the Arrangements.
>
> 38E. If ITGL and Bayeux are liable to pay Glenalla, Thorson . . . and/or Oscatello the sums set out . . . above or any part thereof pursuant to the Arrangements, ITGL and Bayeux have a right:

38E.1 to realise the assets of the TDT in order to meet the said liabilities; and

38E.2 to exoneration in respect of such liability from the trust assets of the TDT."

72. The BVI Companies (in so far as material, in that no declaration is sought against them under the fifth head of relief) admit paragraphs 38 and 38A to 38E of the Amended Application.

73. The present trustee does not admit the amounts said to be shown in the accounting records and set out at paragraph 38 of the Amended Application (paragraph 61 of its Defence). It admits that (as at the date of the Defence) the net asset value of the assets subject to the trusts of the TDT is less than the aggregate of those amounts (£182,670,861). It admits that the former trustees have, since 2 July 2010, withheld all the assets of the TDT vested in them immediately prior to their removal as trustee (save for a claim against Kaupthing which, it is said, has been assigned to the present trustee on terms); but denies that the former trustees are entitled to do so. It denies that the former trustees have any right of indemnity or exoneration in respect of the claims based on the Accounting Entries: first, on the grounds previously pleaded – that is to say, (i) because the Accounting Entries did not give rise to legally binding loans and (ii) because, if they did, they ceased to be liabilities of the TDT by reason of the July 2008 book entries, the October 2008 book entries and the March 2009 assignment (paragraphs 64 and 65 of the Defence) – and, second, on the ground that, by reason of the matters pleaded in paragraphs 67 to 76 of the Defence (under the heading "The Former Trustees' unreasonable conduct"), the former trustees "are not entitled to any indemnity or right of exoneration from the TDT assets for any balances resulting from the Accounting Entries" and are not "entitled to retain the TDT assets or to exercise any lien over them, or to realise them to meet any liabilities resulting from the Accounting Entries" (paragraphs 66 and 77 of the Defence).

74. The matters said to constitute unreasonable conduct by the former trustees – so as to disentitle them to any right of indemnity or exoneration to which they might otherwise be entitled – are grouped under three heads: (i) creation and acceptance of accounting entries, (ii) failure to extinguish any liability on or shortly after the creation of the Oscatello structure and (iii) failure to render valid the July 2008 entries, the October 2008 entries or the March 2009 transaction.

75. Under the first of those heads it is said, first, that ITGL, as trustee of the TFT, acted unreasonably and/or improperly in making the Accounting Entries which purported to show multiple obligations where no such obligations actually existed, were unnecessary and were not made as a result of any legal, tax or accounting advice (paragraph 70 of the Defence); second, that the former trustees acted unreasonably and/or improperly in accepting that multiple loan obligations were created "by virtue of the upstreaming and downstreaming involved in the Accounting Entries" and in accepting a novation of such notional obligations in August 2007 in circumstances where (it is said) the Accounting Entries "should simply have been replaced by a direct loan obligation by the company which received the funds to the company which actually transferred them before the transfer of assets from the TFT to the TDT" (paragraph 71 of the Defence); and, third, that the former trustees acted unreasonably and/or improperly in failing to novate such loan obligations "so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT".

76. Under the second of those heads (failure to extinguish any liability on or shortly after the creation of the Oscatello structure) the present trustee relies on the matters set out in sub-paragraphs (a) to (j) of paragraph 74 of its Defence. It is said that: (a) the purpose of creating the Oscatello structure was to ring-fence the TDT's core investments as security for further lending by Kaupthing; (b) the former trustees and Kaupthing knew that Kaupthing's further lending to the Oscatello structure was intended to be non-recourse to the rest of the TDT assets; (c) the former trustees were concerned to ensure that Kaupthing should not be able to enforce its loan against any assets outside the Oscatello structure; (d) ITGL personnel realised that there was a risk to the TDT assets outside the Oscatello structure if the purported liabilities recorded by the Accounting Entries were not extinguished or transferred to the Oscatello structure; (e) it was the usual practice in the TFT and the TDT for the Accounting Entries to follow the shareholding where a shareholding was transferred; (f) accordingly, a trustee acting properly and exercising reasonable care, skill and diligence would have taken steps to preserve the rest of the TDT assets by extinguishing any purported liability under the Accounting Entries or by transferring such liabilities to the Oscatello structure; (g) the former trustees took no steps in this regard on the creation of the Oscatello structure or shortly thereafter (in particular, they failed to amend the accounting or ledger entries, failed to pass any resolutions novating the purported liabilities, and/or failed to execute

any written agreements novating the purported liabilities); (h) if the former trustees had sought Kaupthing's consent to the restructuring of the Accounting Entries (if such consent were necessary), such consent would have been forthcoming; (i) having warranted, in the framework agreement, that the list of assets and liabilities given to Kaupthing (which did not show any purported loans to the BVI Companies (*sic*)) was accurate, the former trustees failed to take any steps to comply with that warranty (by extinguishing the Accounting Entries and replacing them with documents showing a loan by the company which transferred the funds to the company to which the funds were transferred); and (j) the July 2008 book entries, the October 2008 book entries and or the March 2009 transaction "ought to have been carried out promptly on or shortly after the creation of the Oscatello structure".

77. Under the third of those heads it is said that the former trustees acted unreasonably and/or improperly "in failing to do more to render the July 2008 entries, the October 2008 entries and the March 2009 transaction valid" (if, contrary to the present trustee's contention, they were invalid). In support of that contention the present trustee relies on the facts and matters set out in sub-paragraphs (a) to (c) of paragraph 76 of its Defence. It is said that: (a) between July 2008 and March 2009, the former trustees took deliberate steps to relieve themselves of the purported liabilities arising from the Accounting Entries; (b) as the purported liabilities involved very large sums of money, it was the duty of the former trustees to exercise reasonable care, skill and diligence to make their transaction effective and to observe the necessary formalities, such as preparing and causing to be properly executed deeds of extinction, extinguishing the purported upstreaming and downstreaming loans, and preparing and causing to be properly executed deeds of loan confirming or creating the loan obligation directly between the transferor company and the transferee company; and (c) the formalities were not onerous or otherwise difficult to achieve.

78. Accordingly, the present trustee denies paragraphs 38C, 38D and 38E of the Amended Application. By way of counterclaim it seeks a declaration that the former trustees are not entitled to any indemnity out of or any right to exoneration from or any lien over the TDT assets in respect of the Accounting Entries or in respect of any demands or claims for payment made by the BVI Companies.

79. It can be seen that the matters said to constitute unreasonable or improper conduct by the former trustees – and so to disentitle them to any right of indemnity or exoneration

to which they might otherwise be entitled – include, but go beyond, conduct directly related to the entry into the transactions by which the liabilities in respect of which the former trustees seek indemnity or exoneration arose. For example, it could not be said that the former trustees' decision to enter into the deeds of novation was, itself, unreasonable or improper because ITGL, as trustee of the TFT, had previously acted unreasonably and/or improperly in making the Accounting Entries which purported to show multiple obligations where no such obligations actually existed; or because the former trustees subsequently, after the transfer of assets to them, acted unreasonably and/or improperly in failing to novate such loan obligations "so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT". Nor could it be said that that the former trustees' decision to accept a loan from Oscatello in order to discharge their existing debt to Kaupthing was itself unreasonable or improper because, subsequently they acted unreasonably or improperly "in failing to do more to render the July 2008 entries, the October 2008 entries and the March 2009 transaction valid".

80. The premise which underlies the present trustee's contention that, by reason of the former trustees' unreasonable or improper conduct (as alleged), they are not entitled to any indemnity out of, right to exoneration from or lien over the TDT assets in respect of demands or claims made by the BVI Companies is not stated – or, at the least, not stated in express terms - in its Defence and Counterclaim. But it may be inferred that the present trustee relies on the proposition that a trustee who has acted unreasonably or improperly (whether or not that conduct related directly to the entry into the transactions by which the liabilities in respect of which the former trustees seek indemnity or exoneration arose) is unable to rely on the right conferred by article 26(2) of the Trusts (Jersey) Law 1984 (to which reference is made at paragraph 69 of the present trustee's Defence and which confers an express right on a trustee to reimburse himself or pay out of the trust fund expenses and liabilities reasonably incurred in connection with the trust); and that there is no other right to indemnity.

81. That, it seems, is the basis upon which the former trustees understood the contention to be advanced. Paragraph 123.2 of their Reply and Defences to Counterclaim of the Fifth Defendant is in these terms:

> "123.2 The Former Trustees will say that the effect of the Article 26(2) of the 1984 Law, read in conjunction with Article 32 of the 1984 Law, is that, under Jersey Law, there is no equivalent to the English equitable rule that a trustee is not entitled to an indemnity for expenses incurred in the administration of a trust for so long as it remains liable to account for other breaches of trust. Accordingly, the effect of Article 26(2) of the 1984 Law is to provide a right of indemnity to the Former Trustees for all expenses and liabilities reasonably incurred in connection with the TDT, regardless of any liability to account to the trust estate in relation to other breaches of trust. . . ."

82. The allegations of unreasonable or improper conduct made in paragraphs 70 to 76 of the present trustee's Defence are traversed by the former trustees in paragraphs 124 to 146 of their Reply.

83. In those circumstances, the issues for determination in relation to the fifth head of relief sought in the Amended Application (a declaration that the former trustees have a right of indemnity against the trust assets of the TDT), are these:

(6) (A) Whether, on the basis of any of the matters alleged to constitute unreasonable or improper conduct (if established) and, if so, which of those matters ("the relevant matters"), it would be open to the Court, as a matter of law, to hold that the liabilities (if any) incurred by the former trustees in relation to the Glenalla loan, the Thorson loan and the Oscatello loan were not liabilities "reasonably incurred in connection with the TDT" for the purposes of article 26(2) of the Trusts (Jersey) Law 1984; and, if so, (B) whether any of the relevant matters (and, if so, which) did constitute unreasonable conduct on the part of the former trustees so as to deprive them of the right to rely on article 26(2) of the 1984 Law.

84. In paragraph 83 of its Counterclaim the present trustee avers that, by reason of the matters set out in paragraphs 70 to 76 of the Defence the former trustees acted in breach of trust "which amounted to wilful default and/or gross negligence". It is said that, in conducting the affairs of the TDT in the manner set out in those paragraphs, the former trustees (a) failed to exercise their powers with the diligence to be expected of a prudent business man, with remunerated expertise in trust administration and to the best of their ability and skill; and/or (b) failed to preserve the value of the TDT trust property or enhance its value; and (c) failed to exercise their powers only in the interests of the beneficiaries. At paragraphs 84 and 85 it is said that, by reason of their breaches of trust, the former trustees are liable to account on the basis of wilful default: alternatively, are liable to pay compensation for all loss suffered by the TDT trust

estate. Declarations are sought to that effect under heads (5) and (7) of the relief claimed.

85. In relation to the relief sought under those heads, the issue for determination is:

(7) Whether, in the respects alleged in paragraphs 70 to 76 of the present trustee's defence, the former trustees acted in breach of trust, amounting to wilful default or gross negligence.

86. Before addressing the issues which I need to determine, it is convenient to describe (i) the "Tchenguiz team" through which ITGL (and, latterly, Bayeux) sought to discharge the responsibilities attaching to the trusteeship of the TFT (until August 2007) and (thereafter) the TDT and (ii) the role of R20 Limited.

The Tchenguiz team

87. The composition of the Tchenguiz team, and the internal responsibilities of the individual members of that team, are helpfully described in the witness statement of Lydia Katrina Bleasdale (formerly, prior to her marriage in November 2008, Lydia Peck) dated 30 March 2012. Her evidence, so far as material in this context, may be summarised as follows:

(1) Mrs Bleasdale joined ITGL as an employee in February 2006 as an Assistant Manager. She had a relevant professional qualification: in that she was then the holder of a certificate and a diploma issued by the Society of Trust and Estate Practitioners (STEP). She had worked in trust management for some nine years.

(2) On appointment she was allocated to what was then a small team working on Tchenguiz matters. She worked on what she described as "the Robert side" of the TFT; which, as she explained, was responsible for what had come to be recognised as the investment interests of Robert Tchenguiz. As Assistant Manager she reported to Claire Tersigni (her manager) and Ciara Gurney (the Client Services Director). Robert Clifford became Managing Director of ITGL in August 2006. From the end of 2006, Claire Tersigni was engaged on other matters within ITGL: she was replaced as manager of the Robert side by Tracey Walker

(3) By the second half of 2007, following the transfer of assets from the TFT to the TDT, the Tchenguiz team had grown to about twenty. Tracey Walker was away on maternity leave; so also, from mid-November 2007 until May 2008, was Ciara

Gurney. The effect was that Mrs Bleasdale "effectively became acting manager on the TDT side" during the second half of 2007.

(4) Mrs Bleasdale described her key responsibilities from 2006 to 2008 as liaising with clients and day-to-day administration for the Tchenguiz companies administered by ITGL. In the process, she said, she progressively acquired primary responsibility for the day-to-day dealings with R20 Limited. From February to August 2008 she took on more of a "back-office" role and dealt with administrative management.

(5) In addition to the Tchenguiz administration team, there were also accounting and bookkeeping teams. Louw Rabie joined as an accountant in January 2008. His role covered both accountancy and bookkeeping issues. He sat with the Tchenguiz bookkeeping team and liaised with the administration team. He was an important link between the two. He became involved in the preparation of accounts within the Tchenguiz team. He left ITGL in November 2008.

The role of R20 Limited

88. R20 Limited ("R20") was incorporated in 2002 by Robert Tchenguiz. In his witness statement dated 30 March 2012 he described it as "a private investment firm specialising in a range of alternative investment strategies including private equity, public equity and structured finance and real estate." At all material times Robert Tchenguiz was a director and the chairman of the board of directors. Timothy John Smalley became a director of R20 on 1 March 2004.

89. In her witness statement dated 30 March 2012 Mrs Bleasdale explained that R20 had been the investment advisers to ITGL (in its capacity as trustee of the TFT) in relation to the assets notionally allocated to the Robert side; and that that arrangement had been in place for some time. The arrangement continued when assets were transferred to the TDT. On 5 October 2007 it was set out in a written agreement ("the Consultancy Agreement") made between the former trustees and R20.

90. Recital (B) to the Consultancy Agreement records that, pursuant to paragraph 7 of the first schedule to the declaration of trust dated 26 March 2007, under which the TDT was established, and since 24 August 2007, the trustees had employed R20 as investment adviser in respect of the whole of the TDT trust fund ("the Trust") to perform the services more particularly described in clause 1.1.4 of the agreement. Clause 1.1.4 defined "Services" to mean "the duties and functions normally undertaken

by professional consultants or advisers of investment opportunities including (but not restricted to) the duties set out in Schedule hereto". The duties set out in the Schedule to the Consultancy Agreement included the following: (i) the identification of new business opportunities within the United Kingdom, where the expected return is primarily one of capital growth; (ii) the monitoring of assets liabilities or other interests of the Trust and the reporting of the same to the trustees; (iii) appointment and liaising with professional in respect of advising on the suitability of investments both prior to any recommendation being made to the trustees, and any follow up advice required; (iv) the negotiation and facilitation of arranging finance/refinance, as necessary; (v) maintenance of loan account and cash account records, where appropriate; (vi) production of accounts of entities both onshore and offshore owned by the trustees; and (vii) the provision of directors to the boards of those UK companies comprised within the trust structure.

91. Mrs Bleasdale explained that, although "the Consultancy Agreement was certainly something which made us feel more comfortable", it did not reflect any change in the relationship between the former trustees and R20. She said that R20 was at the centre of practically every significant action taken in the TDT structure, including (i) making investment recommendations, (ii) negotiating and drafting douments and (iii) monitoring the various CFD (contract for differences) accounts. In relation to the third of those activities, she said this:

> ". . . R20 had online access to view all the CFD accounts in the names of companies in the TDT structure. We would only withdraw money from those accounts if R20 recommended we should do so, as they would already have discussed what would be drawn down with the broker on behalf of the trustee(s). We relied on R20 to assess the cash position and advise us when and where cash could be moved."

92. She went on to say that ITGL had three main points of contact at R20 – Tim Smalley, Aaron Brown and Mark Grunnell - all of whom reported to Robert Tchenguiz. She described her relationship with R20 as "good in general"; but "very far from being perfect". She said this (witness statement, paragraphs 31 and 32):

> "31. . . . Most of all, R20 were not forthcoming in providing information. Although the monthly meetings [which had been set up on her initiative in February 2007, as described in paragraph 29 of the witness statement] were not established out of any particular concern, I nevertheless took the view that I should go to R20 to try to obtain the information myself, because it was very much the case with R20 that you would not receive anything if you did not persistently ask for it. As time passed, R20 would get a bit better at giving us

information, but I still felt they were holding information back, even after the Consultancy Agreement was in place.

32. R20 also did not always seem to appreciate the need to keep the Former Trustees fully informed about their activities. I got the feeling that sometimes things could happen which we did not know about and would not know about unless R20 needed us to do something which they could not. . . ."

93. I can turn now to address the issues which I need to determine.

Issue (1): Whether, immediately after 24 August 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Glenalla loan and the Thorson loan.

94. As I have said, the BVI Companies submit that, whatever may have been the position as between Glenalla and Thorson on the one hand and the TFT on the other hand before 24 August 2007, the obligations of the former trustees (as trustees of the TDT) to Glenalla and Thorson arose under – and are to be determined by reference to - the deeds of novation. It is said that the deeds of novation constituted new contracts between Glenalla and Thorson (as the case might be) and the former trustees which were intended to have legal effect. Under the terms of those contracts, in consideration of Glenalla (or Thorson, as the case might be) releasing ITGL (as trustee of the TFT) from performance of its obligations in respect of the "the Loan Facility" (which was a defined term), the former trustees (as trustees of the TDT) undertook "to perform all the obligations of [ITGL] under the Loan Facility and to be bound by the Terms [also a defined term] in every way".

95. The former trustees agree with that analysis. The issue between the former trustees and the BVI Companies, in this context, is not whether the former trustees (as trustees of the TDT) assumed a legally binding obligation to perform the obligations under the Loan Facility. The issue between them, in this context, is what those obligations were: in particular, whether those obligations were limited by the "implied terms" set out in paragraph 15 of the Amended Application. That question is addressed in this judgment under issue (5).

96. As I have said, in its pleaded case the present trustee contended that the former trustees assumed no legally binding obligations under the deeds of novation. The premise upon which that contention was advanced in the pleadings (in paragraphs 10, 15 and 16 of its Defence) was that, on a proper understanding of the facts, ITGL (as trustee of the TFT) was under no obligations in respect of loans said to have been made to it by Glenalla or

Thorson prior to 24 August 2007; and that, accordingly, there were no such obligations from which ITGL could be released or which the former trustees (as trustees of the TDT) could assume.

97. By the time these proceedings came on for trial the present trustee had reconsidered its position in relation to the Glenalla loan. It accepted on 25 May 2012 – in response to a notice to admit facts - that, immediately after 24 August 2007, there was a valid and binding loan in the amount claimed owing by the former trustees to Glenalla. Its position in relation to the Thorson loan was that it was for the BVI Companies to establish that the amount claimed (£80,541,936) was owing immediately after 24 August 2007. It was said, correctly, that, although the claim for payment is made against the former trustees (and not the present trustee), nevertheless – given that the former trustees seek to satisfy the claim out of the trust property - either the BVI Companies or the former trustees do need to establish the claim to the satisfaction of the Court; and the present trustee has a proper role in resisting it. Neither the present trustee, nor the trust property, is bound by an admission made by the former trustees after they had ceased to be trustees.

98. The starting point, as it seems to me, is to identify the obligations which the former trustees assumed under the Thorson Deed of Novation by construing that deed. As I have said, by clause 1 of the deed, the former trustees undertook to perform all the obligations of ITGL (as trustee of the TFT) "under the Loan Facility". It has not been suggested that at any relevant time there was a loan facility in existence between Thorson and ITGL in the sense in which that expression is commonly understood: that is to say, that there was an arrangement or agreement under which ITGL (as trustee of the TFT) was entitled to call upon Thorson for loans (up to a stated maximum, or otherwise) from time to time as it required. Recital (A) to the Deed of Novation – which states that "A loan facility is in place between (1) the Company and (2) the Trustee [ITGL]" – cannot have been understood by the parties in that sense. Rather, the "loan facility" to which reference is there made must be understood in the sense of a running loan account between Thorson and ITGL; and that is the meaning which must be given to the defined term "Loan Facility" in that context. The obligation assumed by the former trustees under the Thorson Deed of Novation was to repay, in accordance with "the Terms", the balance (if any) owing to Thorson by ITGL (as trustee of the TFT) as at 24 August 2007 on the running loan account. The Terms – as defined in Recital (A) - required that repayment was to be on demand.

99. It follows from that analysis that, if it were necessary to do so, I would hold that, upon a true construction of the Thorson Deed of Novation, it did not, itself, impose any obligation on the former trustees to repay further loans made by Thorson after 24 August 2007. The obligation to repay loans made by Thorson to the former trustees (as trustees of the TDT) after 24 August 2007 arose under whatever terms were agreed (expressly or by implication) between Thorson and the former trustees when those loans (if any) were made. That follows, as it seems to me, from the meaning that must be given to the defined term "Loan Facility". The Thorson Deed of Novation did not have the effect that the former trustees (as trustees of the TDT) became entitled, in place of ITGL (as trustee of the TFT), to call upon Thorson for loans from time to time as required under the terms of an existing facility agreement. But it is not necessary to decide that issue. Thorson does not claim, in these proceedings, to recover loans made to the former trustees after 24 August 2007 (transcript, 28 June 2012, page 23, line 22 to page 24, line 2).

100. That invites the question: what was the balance (if any) owing to Thorson by ITGL (as trustee of the TFT) as at 24 August 2007 on the running loan account. That question is, of course, a question of fact.

101. In support of their case that the balance owing to Thorson by ITGL as at 24 August 2007 on the running loan account was £80,541,936 the BVI Companies rely on the witness statement of William Davies dated 2 April 2012. Mr Davies, who is a Fellow of the Institute of Chartered Accountants in England and Wales and a partner of Grant Thornton UK working in the forensic and investigations services team, conducted an accounting review of the records, books of account and other documents of the BVI Companies in order to assist the joint liquidators in these proceedings. He was tendered for cross-examination at the trial; but his evidence was not challenged by Advocate Swan on behalf of the present trustee (transcript, 15 June 2012, page 68, line 11 to page 69, line 3).

102. At paragraph 44 of his witness statement Mr Davies stated that, at 24 August 2007, the general ledger of Thorson showed a net loan balance of £80,578,539.26 due from ITGL to Thorson. He set out the components (accounting entries) which, as he said, made up that balance:

Ref	*Date*	*Loan to*	*£*	*£*
T(i)	21 Nov 2005	TFT re Elsina	1,263,900	

T(ii)	30 Nov 2005	TFT re Elsina	(12,082)	
T(iii)	30 Nov 2005	TFT re Elsina	(1,716)	
		Sub total		1,250,102
T(iv)	5 Dec 2006	TFT [repayment]	13,000,000	
T(v)	14 Feb 2007	TFT [repayment]	20,000,000	
T(vi)	9 Mar 2007	TFT [repayment]	460,500	
T(vii)	23 Mar 2007	TFT [repayment]	20,000,000	
T(viii)	3 May 2007	TFT [repayment] from Kaupthing Bank Lux	10,000,000	
T(ix)	24 Feb 2004 to 3 May 2007	Various other entries (net)	1,000,000	
T(x)	20 June 2007	TFT [repayment] – funds trf from Kaupthing	25,000,000	
		Sub total		89,460,500
		TOTAL (debits)		90,710,602
		Less credit balances		(10,099,194)
		Less foreign exchange difference		(32,869,02)
		NET LOAN BALANCE		80,578,539

It can be seen that Mr Davies puts the net loan balance as between ITGL (TFT) and Thorson at a figure (£80,578,539) which is a little higher (£36,603) than that claimed by the BVI Companies (£80,541,936). But it has not been suggested that anything turns on that.

103. At paragraph 46 of his witness statement Mr Davies set out, in the form of a table, the documentary evidence which he had found to support the accounting entries. He attached copies of those documents as exhibits to his statement. At paragraph 47, he explained that that evidence was substantially corroborative of the accounting entries. At paragraph 53 he said this:

> "The balance sheet of Thorson as at 31 May 2007 (which appears only to have been produced in draft and does not appear to have been approved by the directors) records shareholder loans of £55,611,408.18 due from ITGL to Thorson. Due to further advances between May 2007 and August 2007, the balances increased to £80.6 million at the time of the Thorson novation."

104. It is clear from those paragraphs of Mr Davies' witness statement to which I have referred that he has reached his conclusion from an examination of the general ledger of Thorson. He explained the reason for that approach at paragraph 11 of his witness statement:

> "Whilst the full general ledgers of . . . Thorson . . . are available to and have been disclosed to the Joint Liquidators, the complete general ledgers of ITGL (TFT) and the Former Trustees (TDT) have not been disclosed to the Joint

> Liquidators. . . . The Joint Liquidators have only been provided with extracts of the general ledgers of ITGL (TFT) relating to the intercompany loan accounts. . . ."

Nevertheless, when he stated at paragraph 18 of his witness statement that the accounting entries for the period to 24 August 2007 recording the cash payments from Thorson to ITGL (TFT) "represent and record net cash payments of £80,578,539.26 made by Thorson to ITGL and are supported by resolutions and other documents", he may, I think, be taken to have satisfied himself that there was nothing in the extracts of the general ledgers of ITGL which were available to him which was inconsistent with that statement.

105. In its written opening submissions the present trustee challenged the BVI Companies' claim that, as at 24 August 2007, the balance owing to Thorson by ITGL (as trustee of the TFT) on the running loan account was in excess of £80 million on three principal grounds. First, it is said (at paragraph 3.14) that there appear to be a number of instances where (i) ITGL were not the recipient of sums transferred by Thorson or (ii) ITGL were not the transferor of sums received by Thorson. At paragraphs 3.14 and 3.15 examples are given of such cases: at paragraph 3.16 examples are given of cases where it is said that that ITGL appears to have been a conduit for the onward transfer of funds. Second, it is said (at paragraph 3.18) that the claim made is for approximately £80 million, yet the Thorson Deed of Novation purported to novate a sum of approximately £57.9 million from ITGL to the former trustees. And, third, it is said (at paragraph 3.19) that Thorson's records show an entry made on or about 3 December 2007 with a value date of 30 May 2007 allocating a sum of £65,460,500 from the TFT-Thorson loan account to a different loan account referenced "Tchenguiz Family Trust re Vincos – (Kaupthing)". The present trustee suggests (*ibid*) that "Vincos Limited appears to be a company relating to investments notionally allocated in the TFT to Vincent Tchenguiz and his family, rather than to Robert Tchenguiz and his family, and it appears that these entries were purporting to separate out investment[s] notionally allocated to Vincent and his family from those notionally allocated to Robert and his family in the TFT".

106. In the course of his oral closing submissions, Mr Swan contented himself with submitting that it was for the BVI Companies to satisfy the Court that there was a net loan position of a particular sum and that, therefore, there was a repayable loan. He submitted (transcript, 27 June 2012, page 152, line 18 to page 153, line 9) that the evidence surrounding the Thorson loan was "highly unsatisfactory"; and that the BVI

Companies' reliance on the evidence of Mr Davies was misplaced. As he put it:

> "Mr Davies . . . actually he had no evidence to give. He wasn't relied on as an expert and he has no direct knowledge. . . . he can't take the BVI companies any further than the documents take them".

He submitted that the documents are both confused and confusing. It was clear, he said, that on occasions money moved from the trustee to Thorson; and that on occasions money moved from Thorson to the trustee; and that these movements were variously described. He pointed out that movement described in the general ledger of Thorson as repayments of loans are now said to be, in fact, the making of loans. There were no loan agreements; and, in many cases, there were no company resolutions or trustee resolutions.

107. As I have said, the first ground of challenge to the BVI Companies' claim that, as at 24 August 2007, the balance owing to Thorson by ITGL (as trustee of the TFT) on the running loan account was in excess of £80 million is that there appear to be a number of instances where (i) ITGL were not the recipient of sums transferred by Thorson or (ii) ITGL were not the transferor of sums received by Thorson. Examples of cases said to fall within the first of those heads (so that ITGL cannot be said to be indebted to Thorson in respect of the amounts transferred) are listed at paragraph 3.14 of the present trustee's written opening submissions. A comparison of that list with the entries T(i) to T(viii) and T(x) listed in paragraph 44 of Mr Davies' witness statement provides no support for a submission that Mr Davies took those sums into account (and so erred) when he calculated the balance on the running loan account between Thorson and ITGL. Examples of cases said to fall within the second of those heads are listed at paragraph 3.15 of the written opening submissions. Again, a comparison of that list with the entries T(i) to T(viii) and T(x) listed in paragraph 44 of Mr Davies' witness statement provides no support for a submission that Mr Davies erred in taking (or not taking) those items into account.

108. Entry T(ix) listed in paragraph 44 of Mr Davies' witness statement is "24 February 2004 - 3 May2007 Various other entries (net) £1,000,000". Mr Davies provides some particulars of this entry at paragraph 52 of his witness statement:

> "The majority of the accounting entries (approximately 99%) are supported by bank statements (see the table at paragraph 46) showing cash payments from Thorson's Kaupthing Luxembourg bank account (the source of the funds being an overdraft facility that Thorson had with Kaupthing Bank Luxembourg) to ITGL's Investec bank account in Guernsey. There are approximately 70 entries which net to exactly £1 million. I have verified the majority of the

> payments with reference to company resolutions and bank statements (see the table at paragraph 46). All 70 entries are recorded in the Thorson general ledger and are represented by cash payments or receipts that net out to £1 million (except for approximately 7 minor receipts, which reduces the debt due)."

The documents listed in the table at paragraph 46 of Mr Davies' witness statement bear dates from 4 December 2006 to 8 October 2010. There is nothing to suggest that any of those documents refer to the transactions listed in paragraphs 3.14 and 3.15 of the present trustee's written closing submissions (all of which are said to have taken place before November 2006). Further, the 70 transactions which have been included in item T(ix) are all recorded in the Thorson general ledger and, save for the 7 minor receipts to which Mr Davies refers, are represented by cash payments or receipts. Again, there is nothing to suggest that Mr Davies took those transactions into account (and so erred); or that he erred in leaving the transactions listed at paragraphs 3.14 and 3.15 of the written closing submissions out of account.

109. It is, perhaps, unclear whether the cases listed in paragraph 3.16 of the present trustee's written closing submissions as examples of transfers where ITGL "appears to have been a conduit for the onward transfer of funds" are intended to provide support for the first ground of challenge. It seems to be accepted that they are cases where funds were paid to, or by, ITGL: for, if they were not, it is difficult to see how ITGL can be said to have been "a conduit for the onward transfer of funds" in such cases. Two of the three cases mentioned are listed in paragraph 44 of Mr Davies' witness statement: they appear as items T(iv) – "5 December 2006 TFT [repayment] £13,000,000" – and T(v) – "14 February 2007 TFT [repayment] £20,000,000". They are the subject of documentary entries noted in the table at paragraph 46 and appear in the documents exhibited (in the case of item T(iv)) as 5, 20, 22 to 27 and 128; and (in the case of item T(v)) as 5, 20, 28 to 33, and 128. At paragraph 45 of his witness statement, Mr Davies had explained that, although the narrative of the Thorson general ledger describes certain credit entries as a loan "repayment", it was apparent from the entries themselves that those were, in fact, loan advances made by Thorson to ITGL. At paragraph 49 he said this:

> "As already explained, in a number of instances the payments made from Thorson to ITGL are described as 'repayment of loans from shareholders in Thorson's general ledger, as well as in minutes/resolutions, bank statements and accompanying documents. This is contradicted by Thorson's general ledger (see Thorson's Ledger Summary, Exhibit 128). When the payment of £13,000,000 was made on 5 December 2006 from Thorson to ITGL this amount exceeded the balance owed to ITGL of £4,233,938 recorded in the ledger. When the subsequent payments were made from Thorson to ITGL

> there was a credit balance recorded on the ITGL (TFT) loan account (i.e. no money was owed to ITGL, money was instead owed by ITGL to Thorson). . . ."

If and so far as reliance is placed on the cases listed in paragraph 3.16 of the written submissions in support of the first ground of challenge, I am not persuaded that they provide such support.

110. The second ground of challenge (raised at paragraph 3.18 of the written opening submissions) is that, although the claim made by the BVI Companies is for approximately £80 million, the Thorson Deed of Novation purported to novate a sum of approximately £57.9 million from ITGL to the former trustees. Put on that basis the challenge is misconceived. The Thorson Deed of Novation did not purport to novate a sum of £57.9 million. Recital (A) of the deed contained the statement that "under [the loan facility] as at 31 July 2007 the sum of approximately £57,907,904.31 . . . was owed by [ITGL] to the Company". But the liability of ITGL which the former trustees assumed under clause 1 of the deed, as I have explained, was not an obligation to repay the amount owed by ITGL to Thorson on 31 July 2007 (whatever that might have been): rather, it was an obligation to repay the balance (if any) owing to Thorson by ITGL (as trustee of the TFT) as at 24 August 2007 on the running loan account. There was no reason why the balance as at 24 August 2007 on the running loan account should, necessarily, be the same as the amount said to be owing on 31 July 2007. To state the obvious, there could have been movement on the account between 31 July and 24 August. As Mr Clifford put it, at paragraph 50 of his witness statement dated 30 March 2012:

> "I believe the figures for the Novations were calculated on the basis of the ledger entries available to the Tchenguiz Team at the time. These would have been up to date to the best of the Former Trustees' knowledge but may not have been accurate in respect of some movements on the loan balances which had not yet been posted as book entries."

111. Nevertheless, it is said that the BVI Companies needed to explain why a balance of some £57.9 million as at 31 July 2007 had increased to a balance of some £80.5 million by 24 August 2007. It is said that the BVI Companies have not done so, either in their pleadings: or through the evidence of Mr Davies.

112. I am not persuaded that there is any substance in the pleading point. As Advocate Swan pointed out (transcript, 27 June 2012, page 155, lines 3–16), the BVI Companies do not rely, as part of their case, on the amount said to be owing in recital (A) to the Thorson

Deed of Novation. But, in any event, the BVI Companies had sought from the former trustees an explanation for the figure (£57.9 million) which appears in the recital; and for the difference, some £22.7 million, between that figure and the amount (£80,611,408) that the former trustees had, by the trial, admitted to be the balance of the Thorson loan. The response from the former trustees was that there had been "an inadvertent exclusion from the schedule of a transfer of funds which had recently taken place and had already been recorded in the books of account of Thorson". What was being said there, as I understand it, is that the figure in Recital (A) of the Thorson Deed of Novation had been taken from the books of account of ITGL, which had not been brought up to date; and that the true figure was that recorded in the books of account of Thorson.

113. Mr Davies, as he said at paragraph 62 of his witness statement, was not able to provide an explanation for the figure which appears in the deed of novation. But, as it seems to me, he did not need to do so. His conclusions were based on the position as it appeared from the books of account of Thorson, not as it had appeared in August 2007 from the books of account of ITGL. In my view, the figure which appears in the deed of novation – which, as the former trustees state, was the result of inadvertence – provides no support for a challenge to a claim based on his evidence.

114. The third ground of challenge (raised at paragraph 3.19 of the written closing submissions) is that Thorson's records are said to show an entry made on or about 3 December 2007 with a value date of 30 May 2007 allocating a sum of £65,460,500 from the TFT-Thorson loan account to a different loan account referenced "Tchenguiz Family Trust re Vincos – (Kaupthing)". But there is nothing to suggest that that allocation reflected any transfer of funds between ITGL, as trustee of the TFT, and Thorson; or that it altered the overall balance, as at 24 August 2007, on the running loan account between ITGL and Thorson. Advocate Swan had the opportunity to put the point to Mr Davies in cross-examination; but he chose not to do so.

115. As I have said, the BVI Companies rely on the evidence of Mr Davies to make good their case that the balance owing to Thorson by ITGL as at 24 August 2007 on the running loan account was £80,541,936. In evaluating that evidence I have had in mind, and accept, the need to scrutinise carefully any claim based simply on the accounting entries to which the present trustee refers at paragraph 3.21 of its written opening submissions. But I reject the submission, made by Advocate Swan in the course of his

oral closing submissions, that Mr Davies "had no evidence to give". It is clear from his witness statement that he was able to satisfy himself that the documentary evidence, which he set out at paragraph 46 of his witness statement, did reflect actual movements of funds between Thorson and ITGL. His evidence was not challenged. I am satisfied that I can accept it.

116. As I have said, by the time these proceedings came to trial the former trustees had admitted both the Glenalla loan and the Thorson loan; and the present trustee had admitted the balance owing to Glenalla on 24 August 2007. I have held that, on the basis of the evidence given by Mr Davies, the BVI Companies have established their case that the balance owing to Thorson as at 24 August 2007 was not less than £80,541,936. In those circumstances I conclude, on issue (1), that immediately after 24 August 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Glenalla loan and the Thorson loan in the amounts claimed.

Issue (2): Whether, immediately after the transfers of funds on 21 December 2007, the former trustees (or TDT) were subject to binding obligations in respect of the Oscatello loan.

117. I have explained earlier in this judgment that, on 21 December 2007, immediately following the framework agreement and the overdraft loan agreement, Oscatello instructed Kaupthing to make a number of payments amounting in aggregate to £293,984,107. Those payments included a payment £39,366,791 to the Investec Trust loan account 5962.

118. The payments to be made by Kaupthing pursuant to the instruction given by Oscatello on 21 December 2007 were to be funded (i) from the £150 million profit participation loans made by Isis and New Orland to Eliza (the proceeds of which were made available to Oscatello by Eliza) and (ii) as to the balance, by drawing on the facility available to Oscatello under the overdraft loan agreement dated 19 December 2007. The overdraft loan agreement had provided, at article 2.2, that "the purpose of the loan was to refinance current debt as listed in Schedule 1". Schedule 1 to that agreement included an amount of £39,366,791 (the aggregate of £38,667,697 in respect of principal and £699,274 in respect of interest) due from "Investec Trust (Guernsey Limited)" as borrower under loan account 5962. It has not been in dispute that that debt represents the liability of the former trustees (as trustees of the TDT) to Kaupthing as at 19

December 2007 under the August 2007 Kaupthing loan facility agreement; nor that that liability was the subject of a personal guarantee given by Robert Tchenguiz at the time the facility was agreed.

119. Kaupthing acted on the payment instruction by applying £39,386,354 to the credit of loan account 5962: thereby discharging the debt owed by the former trustees (as trustees of the TDT) under the August 2007 Kaupthing loan facility agreement; and releasing Robert Tchenguiz from his liability as guarantor. In substance, therefore, monies borrowed by Oscatello from Kaupthing – or, perhaps, monies made available to Oscatello by Eliza out of the proceeds of the profit participating loans – were used to repay the debt owed by the former trustees to Kaupthing. That invited the question: what, as between the former trustees, Eliza, Oscatello and Kaupthing, were the obligations which arose from that transaction.

120. That question was addressed by Mrs Bleasdale in a memorandum dated 7 January 2008 to "Tchenguiz Bookkeepers". She instructed the bookkeepers that Eliza had made two interest free loans of £75,000,000 to Oscatello; and, so far as material, (i) that Oscatello had used that £150 million, together with part of the overdraft available from Kaupthing, to make an interest free loan of £39,386,354 to the TDT and (ii) that the TDT had used that £39,386,354 to repay the balance on loan account 5962 with Kaupthing. She explained that a Funds Flow was signed on 21 December 2007; and attached a copy of that document. She went on to say that "A few changes to the payments were made, and all are backed up with copies of the statements from Kaupthing and an email from Kaupthing (all copies attached)". She instructed the bookkeepers to post the relevant entries.

121. Mr Davies explained that some effect, at least, was given to that instruction. At paragraph 73 of his witness statement, he stated that it was recorded in the general ledger of Oscatello that, on 21 December 2007, Oscatello drew down £293,984,107.42 under the overdraft facility "of which £39,386,354.80 was paid to the Former Trustees which the Former Trustees used to repay the balance owing to Kaupthing on the 2007 Loan". He went on:

> "74. ITGL confirm in their letter dated 12 March 2010 (Exhibit 123) that part of the overdraft proceeds of £39,386,354.80 was used to repay existing lending from Kaupthing which had been made to TDT.
>
> 75. Based on records which I have seen, this payment should have been recorded in the books of account of Oscatello and the Former Trustees as a

loan from Oscatello to the Former Trustees. However, on 27 February 2008, this debt was posted in the Oscatello accounting ledger as a loan to Eliza, and Eliza recorded in its books a debt due to Oscatello and a corresponding liability due from the Former Trustees.

76. The Overdraft Agreement which was authorised and signed by Oscatello and the Former Trustees records that Oscatello was to utilise the overdraft facility to repay the Former Trustees' indebtedness to Kaupthing under the 2007 Loan. However, there do not appear to be any separate minutes/resolutions of Oscatello, the Former Trustees or Eliza in relation to this loan."

122. On the evidence before the Court there is no doubt that, on the basis of the payment instruction signed on behalf of Isis, New Ortland, Eliza and Oscatello, Kaupthing did apply £39,386,354 to the repayment of the debt owed by the former trustees (as trustees of the TDT) on loan account 5962. On the basis of the memorandum of 7 January 2008 and the instructions given to the bookkeepers by Mrs Bleasdale on behalf of the former trustees in that memorandum, it is said on behalf of the BVI Companies that that sum, £39,386,354, represented an interest free loan by Oscatello to the former trustees (as trustees of the TDT) which was applied by the former trustees to discharge the debt. The former trustees accept that that is the true position (paragraph 30 of their amended application): the present trustee does not.

123. The BVI Companies rely on the evidence of Mrs Bleasdale. At paragraphs 131 to 134 of her witness statement she said this:

"131. On 20 December 2007, following execution [of the framework agreement], I received an email from Helen Olafsdottir at Kaupthing asking me to sign a funds flow document on behalf of Eliza and Oscatello. . . . Following correspondence between Aaron [Aaron Brown of R20] and Kaupthing, Aaron copied me into an email on the morning of 21 December 2007 and confirmed that he was happy for me to sign the funds flow document. . . .

132. On 21 December 2007, and in accordance with the funds flow document, approved by Kaupthing, the Former Trustees' liability to Kaupthing under the 20 August 2007 Loan, of £39,386,354, was repaid using new borrowing. No moneys flowed through any of the companies, but payment was made from one Kaupthing bank account to another. This was accounted for as a loan from Oscatello to the Former Trustees and became the Oscatello Arrangement.. Again, as with all shareholder loans, it was never the intention of the Former Trustees that they would be personally liable for this loan as they only ever acted in their capacity as trustees.

133. Early in 2008, I summarised the effects of the Framework Agreement restructuring in a memo addressed to the 'Tchenguiz Bookkeepers'. . . . I thought this was necessary given the complexity of the transaction both to help the bookkeepers and also to act as an aide memoire for the administration

team.

> 134. In that memo, I explained that the sums from Isis and New Orland pursuant to the profit participation loans should be booked as received by Eliza, with Eliza then making an interest free loan to Oscatello. I also instructed that various payments by Oscatello be booked, including an interest-free loan to the TDT in the sum of £39,386,354.80 (being the full amount of the Oscatello Arrangement). This seemed the way to account for the money moving up to the Former Trustees in order to discharge the pre-existing borrowing to Kaupthing. The lending which enabled the repayment of this borrowing was to Oscatello, and so the payment by it to the Former Trustees had to be accounted for in an appropriate way."

Mrs Bleasdale confirmed that evidence in the course of the trial. It was not challenged by Advocate Swan in the course of his cross-examination (transcript, 14 June 2012, page 150, line 12, to page 152, line 4).

124. In the alternative, the BVI Companies submit that, in the absence of a loan of the £39,386,354 by Oscatello to the former trustees, Oscatello would have a claim in restitution on the basis that it had discharged the debt of the former trustees at their request or with their consent. Reliance is placed on observations of Lord Justice Cotton in *Falcke v Scottish Imperial Insurance* 34 Ch.D 234, 241:

> "Now let us see what the general law is. It is not disputed that if a stranger pays a premium on a policy that payment gives him no lien on the policy. A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment. If he does work upon a house without request he gets no lien on the house for the work done. If the money has been paid or the work done at the request of the person entitled to the property, the person paying the money or doing the work has a right of action against the owner for the money paid or for the work done at his request. If here there had been circumstances to lead to the conclusion that there was a request by *Falcke* that this premium should be paid by *Emanuel*, then there would be a claim against *Falcke* or his representative for the money, and I do not say that there might not be a lien on the policy."

Lord Justice Bowen and Lord Justice Fry were of the same view. Lord Justice Bowen said this (*ibid*, 249):

> "With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, as it seems to me, according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien. It is perfectly true that the inference of an understanding between the parties - which you may translate into other language by calling it an implied contract - is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words,

> you must have circumstances from which the proper inference is that there was a request to perform the service."

It is said that there can be no doubt as to the former trustees' request or consent to the discharge of the debit balance on loan account 5962: the entire refinancing transaction in December 2007, involving the framework agreement and the overdraft loan agreement, was recommended to the former trustees by R20 and implemented by them for the purpose of discharging the liabilities under the August 2007 Kaupthing loan facility agreement. It should not be overlooked that those liabilities were secured by the personal guarantee of Robert Tchenguiz.

125. In its written opening submissions the present trustee submitted (at paragraph 3.23) that Mrs Bleasdale's evidence does not support a case that either Eliza or Oscatello "actually lent (i.e. transferred)" any sums to the former trustees. It is said that her evidence is clear: "No moneys flowed through any of the companies . . . payment was made from one Kaupthing bank account to another". It is said (paragraph 3.24 that the mere fact that accounting entries may have been made in the ledgers of Oscatello or Eliza purporting to record the flow of funds as a loan to the former trustees is not enough: more is needed to show a contractual liability. At paragraph 3.25 of its written opening submissions the present trustee observed:

> "It may be said that Kaupthing has a claim against the Former Trustees for repayment of this sum. That, however, is not a claim by Oscatello or Eliza, and Kaupthing, which has not participated in these proceedings, does not make (and has not intimated) any such claim."

126. In his oral closing submissions Advocate Swan submitted that, had it been intended to create a loan between Oscatello and the former trustees, that would have been recorded in a document. He pointed out (transcript, 27 June 2012, page 157, lines 14 - 21) that it can be seen from the Funds Flow document that payments were made to discharge the liabilities of Limebook, Thorson, Daniella and Violet Capital under the August 2007 Kaupthing loan facility; and that new loan agreements were entered into between each of those four companies and Oscatello to record the basis upon which that was done. There was, he submitted, no reason why the payment by Oscatello to Kaupthing to discharge the former trustees' liability under the August 2007 Kaupthing loan facility agreement should have been treated as a loan by Oscatello to the former trustees so as to enable the former trustees to discharge that liability. As he put it (*ibid*, page 157, line 24 to page 158, line 4), there was no reason why the payment should have been regarded as a loan. Oscatello was a dormant company which, as a result of the

framework agreement, received very substantial assets valued in hundreds of millions of pounds. There was no commercial reason why, as a quid pro quo for receiving those assets, Oscatello should not have discharged the trustees' liability to Kaupthing without creating any liability on the part of the trustees to repay Oscatello. It was not as though this was a purely voluntary act on the part of Oscatello: it was receiving very real and substantial benefit itself. That really was the whole point of the financing agreement: that the existing borrowing on overdraft under the August 2007 Kaupthing loan facility was to be paid off. So there was no commercial rationale for creating this loan; and no document which supports the case that it was created.

127. Advocate Swan submitted, further, that there was no basis for a restitutionary claim based on unjust enrichment. He asked, rhetorically, "what enrichment?" He submitted that, properly understood, the former trustees (or the TDT) were not enriched by the repayment of the debit balance on loan account 5962 by monies provided by Oscatello or Eliza. He analysed the transaction as follows (transcript, 27 June 2012, page 158, lines 19-25): (i) the TDT trustees owned Oscatello; (ii) they owed £39 million to Kaupthing, (iii) so they had a debt of £39 million; (iv) Oscatello paid £39 million to Kaupthing; (v) so the TDT trustee no longer had a liability to Kaupthing; (vi), but its asset, Oscatello, was then worth £39 million less; (vii) so the TDT trustee was no better off as a result of the transaction; and (viii) so there was not even enrichment, let alone unjust enrichment. The evidence, it is said, pointed to no request that the balance on loan account 5962 be repaid by Oscatello; there was no necessity driving a restitutionary claim: that was just how it was done. The money flowed through Oscatello, and there was no reason why that needed to be treated either as a loan or as giving rise to a restitutionary claim as against the trustee. Properly understood, the Oscatello loan simply never arose. The claim under this head falls away.

128. I reject the submission, made on behalf of the present trustee, that the application of £39,386,354, out of monies made available to Oscatello by Eliza out of the proceeds of the profit participation loans and/or monies borrowed by Oscatello from Kaupthing under the overdraft loan agreement of 19 December 2007, to discharge the debt owed by the former trustees to Kaupthing on loan account 5962 is to be treated either (i) as part of the consideration for the transfer of assets to Oscatello under the framework agreement or (ii) as an officious act unsolicited by the former trustees. The framework agreement contains a clear a statement of the consideration payable by Oscatello for the

assets to be transferred to it pursuant to that agreement (clause 3.2(A)): that consideration does not include the repayment by Oscatello of debts owed by the former trustees to Kaupthing. The framework agreement refers to the overdraft loan agreement to be made between Kaupthing and Oscatello; and it is a stated purpose of that overdraft loan agreement that the overdraft facility shall be used (in part) to repay the debt originally owed by ITGL (but subsequently assumed by the former trustees) on loan account 5962. In my view it is clear, on the material before the Court, that the debt on loan account 5962 was discharged by Oscatello at the request (or, at the least, with the knowledge and consent) of the former trustees; and that that was not done in consideration of the transfer of assets to Oscatello under the framework agreement. I reject, also, the submission that the discharge of the former trustees' debt on loan account 5962 was intended by Oscatello (or seen by the former trustees) as a gratuitous benefit to be conferred on the former trustees by Oscatello. That, as it seems to me, would be wholly inconsistent with the evidence of Mrs Bleasdale.

129. I see force in the submission that there is nothing in the evidence before the Court to support a finding that Mrs Bleasdale had authority to agree, either on behalf of the former trustees or on behalf of Oscatello, terms of an agreement under which Oscatello lent £39,386,354 to the former trustees for the purpose of enabling the former trustees to discharge the debt on loan account 5962 (or for any other purpose). There is no evidence to suggest that a loan agreement was approved by the former trustees (acting through their respective directors) or by the board of directors of Oscatello. I am not persuaded that the BVI Companies have established that that sum was paid by Oscatello under the terms of a loan agreement.

130. Nevertheless, as it seems to me, the BVI Companies are entitled to succeed on their alternative case: that, under the general law, payment by one party (A) of the debt owed by another party (B) to a third party (C) at the request or with the consent of (B) gives rise to an obligation on (B) to repay to (A) an amount equal to the amount so paid. It follows that I conclude, on issue (2), that, immediately after the transfers of funds on 21 December 2007, the former trustees (or TDT) were subject to binding obligations in respect of what has been described as the Oscatello loan.

Issue (3): Whether the former trustees (or TDT) remained subject to such binding obligations (if any) notwithstanding the July 2008 book entries, the October 2008 book entries and the March 2009 assignment

The July 2008 book entries

131. It was not until some eleven months after the novations on 24 August 2007 that the general ledgers of Glenalla and Thorson were updated to reflect the assumption by the former trustees of the debts formerly owed by ITGL as trustee of the TFT. The position in relation to the Glenalla loan is described by Mr Davies at paragraph 40 of his witness statement:

> "40. The general ledger of Glenalla was not updated contemporaneously with the novation. The accounting entries following the novation on 24 August 2007 recording the transfer of the loan balance from ITGL to the Former Trustees was only entered in the Glenalla general ledger on 9 July 2008 (with an effective date of 25 August 2007). The ledger narrative describes the accounting entries as "*Transfer of loan to reflect structure move from TFT – TDT*". The general ledgers of ITGL (TDT) (*sic*) record the transfer resulting from the novation as "*Transfer of loan to reflect structure move from TFT to TDT* " under the intercompany accounts for "Glenalla Properties Ltd re Castel (Luxembourg) S.A.R.L. (Exhibit 137). The transaction was posted in July 2008, with an effective date of 24 August 2007 that accorded with the date of the novation".

Mr Davies describes the position in relation to the Thorson loan in similar terms (at paragraph 63 of his witness statement):

> "63. Following the novation, the general ledger of Thorson was not updated immediately. The accounting entries recording the novation and transfer of the loan balances from ITGL (TFT) to the Former Trustees (TDT) were entered in the general ledger of Thorson on 4 July 2008 with an effective date of 25 August 2007. The ledger narrative states "*Transfer of loan account to reflect structure*".

132. It is common ground that, also in July 2008, further accounting entries were made in the ledgers of Glenalla and Thorson which purported to adjust the position in relation to the Glenalla loan and the Thorson loan by recording those loans as owing by Oscatello rather than owing by the former trustees. Those entries are described by Mr Davies at paragraphs 41 and 64 of his witness statement:

> "41. In July 2008, the €78.8 million debt due from the Former Trustees to Glenalla was purportedly adjusted and following the adjustment was recorded as a loan due from Oscatello to Glenalla (and from Eliza to Oscatello and from the Former Trustees to Eliza) as at 21 December 2007. The debt was recorded as £57,066,524 due from Oscatello in the accounting ledger of Glenalla at 21 December 2007. The ledger records the adjustment as "*Transfer of loan account to reflect new structure*".
>
> 64. In July 2008, the £80.6 million debt due from the Former Trustees to Thorson was purportedly adjusted and following the adjustment was recorded as a loan due from Oscatello to Thorson (and from Oscatello to Eliza and from Eliza to the Former Trustees) as at 21 December 2007. The ledger records the

adjustment as "*Transfer of loan account to reflect new structure*".

It is, I think, clear that, in paragraph 64, the words in parenthesis have been juxtaposed: the parenthesis should read "(and from Eliza to Oscatello and from the Former Trustees to Eliza)" as in paragraph 41. But nothing turns on that.

133. In relation to the entries to which he had referred at paragraphs 41 and 64 of his witness statement ("the July 2008 Entries"), Mr Davies said this:

> "42. Unlike the accounting entries recording the novation of the Glenalla Loan from ITGL to the Former Trustees, there are no minutes or resolutions of the directors of Glenalla or ITGL or the Former Trustees nor a deed of novation (or any other documents) which support the July 2008 Entries. I have not seen in the documents provided to me any instructions given to those individuals who made these adjustments so at present I am unable to comment further on the authorisation or the reasons for these adjustments".
>
> "65. Unlike the accounting entries recording the Thorson novation referred to above [at paragraph 46], there are no minutes or resolutions or a deed of novation (or any other documents signed by the directors of Thorson or ITGL or the Former Trustees to support the July 2008 Entries. The July 2008 Entries are not supported by minutes/resolutions of Thorson, the Former Trustees or Oscatello, a deed of novation or any other documents. I have not seen in the documents provided to me any instructions given to those individuals who made these adjustments so at present I am unable to comment further on the authorisation or the reasons for these adjustments".

134. As I have said, Mr Davies had stated, at paragraph 75 of his witness statement, that the application of £39,386,354 to discharge the debt owed by the former trustees to Kaupthing on loan account 5962 should have been recorded in the books of account of Oscatello and the former trustees as a loan from Oscatello to the former trustees; but that, in fact, on 27 February 2008, that debt was posted in the Oscatello accounting ledger as a loan to Eliza, and Eliza recorded in its books a debt due to Oscatello and a corresponding liability due from the Former Trustees. At paragraph 89 he stated that:

> "89. In the case of the Oscatello Loan the July 2008 Entries adjusted the accounting records by a transfer to Eliza of the loan balance from the former Trustees to Oscatello."

The apparent inconsistency between that statement and his statement at paragraph 75 – which suggests that that adjustment was made in February 2008, rather than in July 2008 – was not put to him in cross-examination: and it was not suggested that that inconsistency (if it be such) was material in the present context. Mr Davies went on to state, at paragraph 90.2 of his witness statement, that there was no deed of novation under which the former trustees were released from liability in respect of what has been

described as the Oscatello loan and Eliza agreed to accept liability for that loan.

135. Mrs Bleasdale was uncertain as to the date on which she first became aware of the July 2008 book entries. At paragraph 150 of her witness statement she said this:

> "150. I am now aware that in early July 2008, Louw Rabie made a series of accounting entries in the ledgers of the companies within the Oscatello Structure, and also in ITGL's trustee ledgers (the "July 2008 Entries"), with a value date of 21 December 2007. I do not know what prompted him to make the July 2008 Entries. I cannot recall discussing them at any meeting before or at any time in the months after they were made and there were certainly no resolutions approving them. As to when I became aware of them, it is possible that Louw mentioned them to me but I cannot recall a specific conversation."

In the course of her oral evidence at trial, she said (transcript, 15 June 2012, page 45, line 3 to page 46, line 1) that the July 2008 entries did not reflect anything that had actually happened. She thought that the entries had been made to reflect "what the bookkeepers and accountant thought should have happened to those loans in moving with its new shareholder, post the framework agreement". In that, Mr Rabie was "following our general practice within the team that the loans follow the shareholder".

136. The "general practice" to which Mrs Bleasdale referred in her evidence had been drawn to the attention of the Tchenguiz team in an email from Gina Bynam sent on 21 April 2008. The email was in these terms:

> "Just a reminder that when transferring shares between ITGL Tchenguiz managed entities . . . that the existing shareholders loans must be taken into account when effecting the share transfer. Traditionally, and unless advice is otherwise received, the incoming shareholder will accept the assignment of the existing shareholder's loan immediately on transfer of the shares. Any relevant minutes in both the Company, the seller and the purchaser must include both the share transfer details and the loan assignment details. A memo advising of the change of shareholder and assignment of loans should also be prepared to the bookkeepers and any relevant structure charts/TLOA should also be amended to reflect the new structure ownership."

The email tends to support the view that if, on a change of share ownership, there was to be a corresponding change in the identity of the parties to an existing shareholder loan, that change would be effected formally; by an assignment and resolutions of the boards of directors the relevant parties. There is nothing in the memorandum to support the proposition that that change could be effected by book entries made in the accounting records. The book entries would record what had happened: they would not, of themselves, effect the change in the legal relationships between the parties, by recording what might be expected to happen. As Mr Clifford observed (at paragraph 82 of his witness statement): "I do not believe that a bookkeeper or accountant would have

the authority to create or amend the loan arrangements".

137. In its opening written submissions (at paragraph 3.35) it was submitted on behalf of the present trustee that Mr Rabie must have been authorised to carry out the necessary changes in July 2008 with the intention of novating the liabilities. It is said that he had joined ITGL only recently before July 2008 and that it was inherently unlikely that he would have taken the decision upon himself to carry out these changes; and much more likely that he had been authorised by someone in a position of authority to make such a decision. By the time that he came to make his closing oral submissions Advocate Swan had, I think, accepted (transcript, 27 June 2012, page 159, line 13 to page 160, line 9) that – on the evidence that had been adduced - he could not ask the Court to find that Mr Rabie was authorised to effect any change in the pre-existing legal relationships Glenalla, Thorson and Oscatello, on the one hand, and the former trustees, on the other hand. In my view there is, indeed, no basis to make such a finding. I hold that the July 2008 book entries did not, of themselves, have the effect of novating the liabilities of the former trustees under the Glenalla loan, the Thorson loan or the Oscatello loan.

138. Nevertheless, it is said (also at paragraph 3.35 of the present trustee's written opening submissions) that, because the changes made by the July 2008 book entries were reflected in balance sheets, prepared by Mr Rabie, which purported to show the financial position of the companies within the Oscatello structure as at 31 August 2008, those entries did have the effect of novating the liabilities of the former trustees to Oscatello (in relation, at least to the Glenalla loan and the Thorson loan) in the circumstances that (i) the balance sheets of Glenalla and Thorson showed no loans owing to the TDT or to the former trustees (but did show loans owing to Oscatello) and (ii) the balance sheets were considered at board meetings of Glenalla and Thorson held on 3 October 2008 and decisions were made on the basis that they did show the true financial position of those companies as at 31 August 2008.

139. The minutes of meetings of the boards of directors of Glenalla, Thorson and Oscatello held on 10 September 2008 (each chaired by Mrs Bleasdale) record that it was resolved that the first balance sheets for the company and (in the case of Oscatello, its subsidiaries) would be prepared as at 31 August 2008. The minutes of meetings of the boards of directors of Glenalla and Thorson held on 3 October 2008 each record that it was noted that "the balance sheet for the company at 31August 2008 had been received, of copy of which (*sic*) is attached, and the purpose of this meeting was to review the

financial position of the Company". The balance sheet of Glenalla as at 31 August 2008 (attached to the minutes) included, under "non-current assets", the entry "Shareholders Loan - Oscatello Investments Limited : £63,256,645". The balance sheet of Thorson as at 31 August 2008 included, under "non-current liabilities", the entry "Shareholders Loan – Oscatello Investments Limited : £126,001,378". Neither balance sheet showed the former trustees (or the TDT) as a debtor of the company. Minutes of meetings of the former trustees (as trustees of the TDT), contained no reference to the balance sheets of Glenalla or Thorson (or of Oscatello): each recorded that the meeting had been called "to discuss the potential concerns over Kaupthing Bank hf, . . .".

140. The minutes of the board of directors of Glenalla held on 3 October 2008 record that the chairman had brought to the attention of the meeting that the company had a positive equity of £92,269,624. It was resolved to provide the balance sheet to "the Shareholder", meaning Oscatello, for information. The minutes of the board of directors of Thorson held on 3 October 2008 record that the chairman had brought to the attention of the meeting that the company had a negative equity of £112,523,524. The minutes continued:

> "After discussions, it was agreed that this was not a good position and talks were had with regard to the options available in order to improve the balance sheet of the Company:-
>
> 1. Approach the Shareholder to write off the loan from the Shareholder of £126,001,378 (the 'Loan')
> 2. Approach the Shareholder to subordinate the Loan from the Shareholder in the Company
> 3. Approach the Shareholder to convert the Loan from the Shareholder into equity
>
> After consultation with the in-house accountants . . . it was felt that the best option out of the three to approach the Shareholder with was to convert the Loan from the Shareholder into equity, 10 shares of US$1 par, at a premium of £12,500,000 per share giving a total conversion of approximately £125,000,005.
>
> It was resolved to approach the Shareholder with this request . . ."

The minutes record that the meeting adjourned. When it reconvened the chairman informed the meeting that the Shareholder had given consent to the company to convert £125,000,005 loan from the Shareholder into equity; and it was resolved that that be done with immediate effect.

141. There are minutes of two meetings of the directors of Oscatello held on 3 October 2008. The minutes of the first meeting contained no reference to the balance sheets of

Glenalla, Thorson or Oscatello. It recorded that the meeting had been called "to discuss the potential concerns over Kaupthing Bank hf, . . ."; and it recorded that it was resolved "that Investec should be in urgent contact with Kaupthing Bank hf and the Trust's Investment advisers, R20 Limited, in order to try and better understand the current position of Kaupthing Bank hf and Iceland as a whole . . ." The minutes of the second meeting recorded that it was noted that "the balance sheets for the Company and the majority of its subsidiaries as at 31 August 2008 had been received, copies of which are attached, and the purpose of this meeting was to review the financial position of the Company and its subsidiaries". The minutes recorded that the chairman had brought to the attention of the meeting that the company had negative equity of £647,137,753. The meeting reviewed the balance sheets of some of the subsidiaries in the Oscatello structure; including, in particular, the balance sheets of Glenalla and Thorson. It was noted that that Glenalla had a net asset value of £29,002,979; and that Thorson had a net asset value of £13,477,854. The minutes recorded that the directors of Thorson had approached the Company (Oscatello), as shareholder, to consider converting £125,000,005 of the loan issued to Thorson by the Company into equity; and that it was resolved that consent be given to convert that debt into equity on condition that the directors of Thorson reviewed the framework agreement and Share Charge, signed in December 2007, "with regards to obtaining any consents Kaupthing Bank hf may be required to give . . .".

142. There is a difference between the "positive equity" of £92,269,624 reported to the directors of Glenalla and the "net asset value" of Glenalla (£29,002,979) reported to the directors of Oscatello. The difference is explained (although not in the minutes) by examination of the draft balance sheet of Glenalla as at 31 August 2008. £29,269,624 is shown in the balance sheet as the "Amount recoverable by Shareholder" after deducting from the "NAV of Glenalla Properties Limited" (£92,269,624) the sum of £63,266,646, described as "Cancellation of Intercompany Shareholder's loan". And there is a difference between the "negative equity" of £112,523,624 reported to the directors of Thorson and the "net asset value" of Thorson (£13,477,854) reported to the directors of Oscatello. In the draft balance sheet of Thorson as at 31 August 2008 £112,523,624 is shown as the (negative) figure in respect of "Equity and Reserves" before deducting liabilities (current and non-current). It was suggested by Advocate Swan, in the course of his cross-examination of Mrs Bleasdale (transcript, 15 June 2012, page 10, lines 7-11) that, in reaching the figure of £112,523,624, account has been taken of a net

liability to Oscatello of £126,001,378. It is not easy (as a matter of arithmetic) to reconcile that suggestion with the other figures in the draft balance sheet – and Mrs Bleasdale was not able to confirm that it is correct – but I am content to assume that it is correct. The figure of £13,477,854, shown in the draft balance sheet as the "Amount recoverable by Shareholder", is derived by adding back the shareholder loan (£126,001,378) to convert a negative "Equity and Reserves" figure (£112,523,624) into a positive figure. In summary, the directors of Oscatello took the view that, for the purposes of that company, (i) in arriving at a net asset value of its subsidiary, Glenalla, they should disregard (or net-off) a loan of £63,266,646 owing by Oscatello to Glenalla (shown in the balance sheet of Glenalla as a non-current asset) and (ii) in arriving at a net asset value of its subsidiary, Thorson, they should disregard (or add back) a loan of £126,001,378 owing to Oscatello by Thorson (shown in the balance sheet of Thorson as a non-current liability).

143. I accept that the non-current asset "Shareholder's Loan – Oscatello Investments Limited: £63,266,646" shown in the balance sheet of Glenalla as at 31 August 2008 must be taken to reflect the adjustment made by Mr Rabie in July 2008 to entries in Glenalla's ledgers: in that, absent that adjustment, Oscatello would not have appeared in a balance sheet of Glenalla as a debtor in the amount of £63,266,646. Rather, although the amount of the non-current asset would have remained the same (£63,266,646), it could be expected to have been represented as the aggregate of a debt of £57,066,524 owing to Glenalla by the former trustees (or the TDT) and a debt of £6,200,122 (being the amount of the balance) owing to Glenalla by Oscatello (or by another company within the structure). I accept, also, that the non-current liability "Shareholder's Loan – Oscatello: £126,001,378" shown in the balance sheet of Thorson as at 31 August 2008 must be taken to reflect the adjustment made by Mr Rabie in July 2008 to entries in Thorson's ledgers: in that, absent that adjustment, Oscatello would not have appeared in the balance sheet of Thorson as a creditor in the amount of £126,001,378. Rather, although the overall position would have remained the same, the debt owing by the former trustees (or the TDT) (£80,541,936) could be expected to have appeared as a non-current asset in that amount; and the non-current liability "Shareholder's loan – Oscatello Investments Limited" could be expected to have been in the amount of £206,543, 314 (after adding back the amount (£80,541,936) that must be taken to have been netted-off as a result of the adjustment).

144. It follows that I accept that, but for the adjustments made by Mr Rabie to the ledgers of

Glenalla and Thorson in July 2008 and the incorporation of those adjustments in the balance sheets of those companies as at 31 August 2008, the minutes of the meetings of the directors of Oscatello and Thorson held on 3 October 2008 would not have taken the form that they did in, at least, the following respects: (i) the directors of Oscatello would not have taken the view that the net asset value of Glenalla was £29,002,979 (because there would have been no basis on which to disregard (or net-off or cancel) the whole of the intercompany shareholder's loan); (ii) the directors of Oscatello would not have taken the view that the net asset value of Thorson was £13,477,854 (because the intercompany loan which was disregarded (or added back) to reach that figure would have been some £80.6 million greater than the figure shown in the balance sheet); and (iii) it may be that the directors of Thorson would have sought, and the directors of Oscatello would have given, consent to the conversion of a greater amount of shareholder debt into equity than they did.

145. The question is whether, as the present trustee submits, those findings should lead to the conclusion that the changes made by the July 2008 book entries and reflected in balance sheets which were considered (and acted upon) by the directors on 3 October 2008 did have the effect of novating the liabilities of the former trustees to Oscatello in relation to the Glenalla loan and the Thorson loan. It is not, I think, submitted that there is a basis, in those findings, for a conclusion that the changes made had the effect of novating the Oscatello loan.

146. At paragraphs 152 to 154 of her witness statement Mrs Bleasdale set out her recollection of the board meetings held on 3 October 2008. She said this:

> "152. Shortly afterwards, on 3 October 2008, a number of meetings were held for the trust and the companies within the Oscatello Structure. The minutes for these meetings, which I believe I drafted are exhibited . . . Although I am not listed on the minutes as an attendee, I believe that I was also present at these meetings. I do not recall any of the bookkeeping team being present.
>
> 153. Attached to each of the minutes was a draft balance sheet for the company concerned, which Louw Rabie had prepared beforehand. Those balance sheets were designed as management accounts, for internal purposes. They were intended to allow the directors of each company concerned to ascertain whether or not the company was balance sheet insolvent and resolve, where appropriate, to convert loans into equity. Although the position as set out in the balance sheets was not questioned, these statements were never going to be signed off or approved in any way. The October 2008 Meetings were not held for that purpose.
>
> 154. The balance sheets for each of the Oscatello subsidiary companies

> listed shareholder loans owing to or owing by Oscatello. That would not have seemed surprising at the time because it was known that there were internal loan positions, and that Oscatello was the immediate shareholder of these companies following the December 2007 restructuring. However no thought was given as to how the position had been reached with the shareholder loans and I do not recall any discussion of the July 2008 Entries. From my perspective, the balance sheets would have reflected the general practice (as I have described above) that shareholder loans followed the shareholder. How the position shown in the balance sheets had been reached did not enter my mind."

Mrs Bleasdale was taken to that evidence in the course of cross-examination (transcript, 15 June 2012, page 2, line 16, to page 3, line 10; page 9, line 10, to page 10, line 13; page 11, line 3, to page 12, line 2; page 13, line 11 to page 15, line 6); but it was not challenged in any material respect.

147. In advancing its contention that the changes made by the July 2008 book entries and reflected in balance sheets which were considered (and acted upon) by the directors on 3 October 2008 did have the effect of novating the liabilities of the former trustees to Oscatello in relation to the Glenalla loan and the Thorson loan, the present trustee makes the following points in its written opening submissions. First, the directors of Oscatello consented to the conversion of shareholder loans into equity on the basis that the position of the relevant companies was as it appeared in the balance sheets. Second, that the balance sheets showed that the shareholder loans which were to be converted in equity were loans by Oscatello (as the immediate shareholder) to the relevant company. Third, that the position shown was consistent with the general practice (or, as the present trustee would assert, the general policy) of the former trustees that loans followed the shareholding; so that the directors would have expected the shareholder loans to be loans made by Oscatello (as the immediate shareholder). Fourth, that the fact that the directors "did not focus on the exact methodology of how the changes had been made is neither here nor there": it is enough, it is said, is that the directors approved the result of those changes. It is said that there is good authority in English law, which should be followed in Guernsey, for the proposition that a meeting of the board of directors of a company can ratify the act of a director who, when he or she acted, had no authority to bind the company. Reliance is placed on the decisions in *In re Portugese Consolidated Copper Mines Ltd* (1890) LR 45 Ch.D 16 and *Municipal Mutual Insurance Ltd v Harrop* [1998] 2 BCLC 540; and on observations in the Court of Session in *Sneddon v McCallum* [2011] CSOH 59.

148. In his oral closing submissions, Advocate Swan re-iterated the first three of those points; which, on the basis of the evidence given by Mrs Bleasdale, were not in dispute. He pointed out, correctly, that Mrs Bleasdale had accepted in the course of her evidence (transcript, June 2012, page 193, lines 14-21) that, on 10 September 2008, the board of directors of Oscatello had resolved to have balance sheets prepared for its subsidiaries in order that in future the directors of the various companies could take decisions on the basis of the financial information in them. He went on to submit that those balance sheets were before the boards of the various companies on 3 October 2008; and that, on the strength of them, the directors took formal steps consistent only with such novation having occurred. As he put it, by way of example, "they capitalised loans which, absent a novation, did not exist". He submitted that the decision to capitalise the loans was a formal resolution "impliedly ratifying the effect of those entries"; with the result that, even though the entries themselves purported to record transactions which did not, in fact, take place (and so could not, and did not, effect a novation of the loans), the subsequent resolution was to be treated as an implied ratification of the earlier novation.

149. As I have said, Advocate Swan relied upon observations in the judgments of the Court of Appeal of England and Wales in in *In re Portugese Consolidated Copper Mines Ltd* (1890) LR 45 Ch.D 16 and in the judgment of Mr Justice Rimer in *Municipal Mutual Insurance Ltd v Harrop* [1998] 2 BCLC 540; [1998] Pens LR 149 for the proposition that a meeting of the board of directors of a company can ratify the act of a director who, when he or she acted, had no authority to bind the company. On the basis of that proposition, he submitted that the board of directors could ratify the acts of an employee (in the present case, a bookkeeper) who had acted without authority. The proposition, itself, is not in doubt. But, in my view, it provides no assistance to the present trustee on the facts in this case. First, it provides no assistance because, in the present case, the boards of directors of Oscatello, Glenalla and Thorson were not aware that the draft balance sheets which were before them for consideration on 3 October 2008 had been prepared on the basis of transactions which had not, in fact, taken place. Second, it provides no assistance because the acts of the bookkeeper (Mr Rabie) which the boards of those companies might be said to have ratified were not the entry into the underlying transactions themselves. On a true analysis, in making the July 2008 book entries, Mr Rabie did not, himself, purport to effect novations between the former trustees and Oscatello in respect of the Glenalla debt and the Thorson debt which had not, in fact, already taken place: rather, in making the July 2008 book entries, he

purported to record the effect of novations which he must be taken to have assumed had, in fact, already taken place (notwithstanding the absence of documentation).

150. The relevant facts in the first of the cases on which Advocate Swan relied, *In re Portugese Consolidated Copper Mines,* (so far as material in the present context) may be taken from the headnote to the report (*ibid*):

> "The articles of association of a company provided that the shares should be allotted by the directors, and that the first directors should be appointed by the subscribers to the memorandum of association. On the 22nd of October, 1888, the subscribers to the memorandum appointed four persons directors. On the 24th of October a meeting of directors was held, at which two only attended, and they allotted shares to . . . B, who had sent in [an application]. The Court subsequently held that this meeting was irregular, and that the [allotment was] invalid. . . . On the 7th of January, 1889, another meeting of directors was held, at which two only attended, and they passed a resolution that the certificates of the shares allotted should be sealed and issued to the [allottee]. . . . On the 16th of January another meeting of directors was held, at which all four directors attended, and the chairman signed the minutes of the last meeting. On the 7th of March a resolution was passed at a duly constituted meeting of the directors, formally confirming the allotment of shares made on the 24th of October.

In proceedings brought by the allottee to rectify the register of shares of the company by deleting his name it was held by the Court of Appeal (affirming the decision of Mr Justice North) that, although the original allotment of shares at the meeting on 24 October 1888 was invalid, that allotment had been ratified by the company at the meeting held on 16 January 1889. Lord Justice Cotton said this (at pages 29 and 30 of his judgment):

> "It is very true that in the minutes of the 16th of January there is nothing said about the minutes of the last preceding meeting being read and confirmed; but we know what is the ordinary and regular course of business at meetings of this kind; that the minutes are not signed until they have been read, and that they are signed for the purpose of confirming them; and therefore as those minutes shew that these directors recognised and adopted the contract with Mr Bosanquet, that if not effectually done by the meeting of the 7th of January, was ratified and made effectual by the signature given on the 16th of January by the direction of a meeting of all the directors. Therefore, I think we may consider that the meeting of the 16th of January at the latest was a ratification and adoption of the contract purporting to be made on behalf of the company by those who acted in October, and that from that time at least there was an effectual ratification; that is to say, an election, to put it in another way, by the company to be bound by the act of those who had acted on the 24th and 25th of October."

Lord Justice Bowen agreed with that approach. He said this (at page 36 of his judgment):

> "With regard to Bosanquet's case, I take it that the real ratification was either on the 7th of January or on the 16th of January. With regard to the 7th of January, I can only say that I desire to reserve the point whether what took place on the 7th of January, praying in aid such presumption as ought to be made with regard to the irregular conduct of the business of the company, was not in itself valid. I do not dispute it, because it is not necessary to do so; but I should not like to say whether it was invalid if it stood alone. But it was made good, I think, by what took place on the 16th of January, for the reasons which Lord Justice Cotton has given at greater length. . . ."

151. The facts in the second of the cases on which Advocate Swan relied, *Municipal Mutual Insurance Ltd v Harrop*, may be summarised as follows: (i) the company ("MMI") had power, with the consent of the trustees, to amend the Rules of its pension scheme by a resolution of its board of directors; (ii) on 27 June 1996 the deputy chief executive (Mr Barber) circulated a memorandum to the directors, pointing out the circumstances that had given rise to the need to amend the Rules so as to alter the definition of Scheme Salary and inviting approval of a proposed resolution for that purpose; (iii) by 5 July 1996, five of the seven MMI directors had informally indicated their agreement to the proposed resolution; the other two directors had abstained from expressing any view (on the basis – wrongly, as the judge held - that they had a personal interest which prevented them from voting on the resolution); (iv) in those circumstances there was neither (a) a written resolution of the board for the purposes of article 66 of MMI's articles of association nor (b) a resolution passed at a properly constituted board meeting; (v) on 9 July 1996 the trustees resolved in favour of a resolution in the same terms as that proposed in Mr Barber's memorandum; (vi) on 16 July 1996 there was a properly convened board meeting of MMI attended by all seven directors; (vii) the minutes of the meeting of 16 July 2008 – which were approved at the next meeting held on 3 September 2008 and signed by the chairman – recorded that it had been reported that "Directors had endorsed the two proposals contained in [Mr Barber's] paper dated 27 June 1996. Thus Directors had formally approved the following resolution" and set out the proposed resolution in the terms in which it had appeared in the memorandum of 27 June 1996; (viii) the minutes of the meeting of 3 September 2008 were themselves approved at the next meeting, held on 16 October 2008.

152. At paragraphs 38 to 47 of his judgment Mr Justice Rimer addressed the question "was the July 1996 amendment validly made". In particular, he addressed the submission that, by its meeting of 16 July 1996, the MMI board ratified the prior informal resolution of the five directors: a ratification which, it was said, was implicit in the

adoption in the minutes of the 16 July 1996 of the reported statement that the directors had "formally approved" the relevant corrective resolution as set out in the memorandum of 26 June 2008. He observed that:

> "41. . . . Although the adoption into the minutes of that statement did not involve the passing by the board on 16 July 1996 of any relevant resolution, the proposition is that such adoption turned what had hitherto not been any sort of a resolution into a valid one for the purposes of rule 47."

And he went on to say this:

> "42. If I had been required to rule on that submission unaided by authority, I think my inclination would have been against it. For example, I should have thought that there was much to be said for the view that, when a board meeting approves the minutes of a prior board meeting and authorises the chairman to sign them, all that it is doing is providing the board's confirmation that the minutes represent a true record of what happened at the prior meeting. Resolutions purportedly passed at that meeting will be either valid or void, depending on the facts surrounding them; but, assuming them to be void, I find it in principle quite difficult to see that the board's subsequent approval of the minutes purporting to record such void resolutions could somehow impliedly validate them. My inclination would be that any such ratification would have to be the subject of an express resolution to that effect. If this is right, then all that would have happened at the meeting of 16 July 1996 would have been that Mr Groocock made a misstatement to the board that it had earlier validly resolved upon an amendment of the definition, and all that would have happened on 3 September 1996 would have been that the minutes were then signed as correctly recording that Mr Groocock had furnished the board with that misstatement."

Nevertheless, Mr Justice Rimer reached the conclusion that he was constrained by the reasoning of Lord Justice Cotton in *In re Portugese Consolidated Copper Mines Ltd* (1890) LR 45 Ch.D 16 (with which Lord Justice Bowen had agreed) to accept the submission that, on 16 July 1996, the MMI board impliedly resolved to, and did, ratify the prior purported resolution of the five board members to amend the Scheme Salary definition. After summarising the facts in that case and setting out the passages in the judgments of Lord Justice Cotton and Lord Justice Bowen which I have already cited, he said this:

> "45 Both Cotton and Bowen LJJ therefore proceeded on the basis that, assuming the resolution purportedly passed on 7 January to have been invalid as an act of ratification, the signing of the minutes of such meeting at the validly convened board meeting held on 16 January amounted to a ratification of such resolution. The reasoning seems to have been that, by authorising the minutes to be signed, the directors were impliedly resolving to lend the authority of the board to the resolution, whether or not it had been validly passed at the prior meeting.
>
> 46 Mr Rowley urged that the approach of the two Lords Justices must be equally applicable in the present case. It is not in dispute that the informal, oral

> resolution of the five directors was invalid and ineffective. However, at the duly convened board meeting held on 16 July, the board was informed that the relevant resolution had been validly passed, the minutes of the meeting duly recorded that and on 3 September the board resolved to authorise the chairman to sign the minutes of 16 July as correct. Mr Rowley submits that the board was thereby resolving to lend its authority to that purported resolution, and that it was just as effective a ratification of it as was the ratification effected by the board on 16 January 1889 in the *Copper Mines* case. In particular, the board did not expressly resolve to validate the prior informal resolution any more than in the *Copper Mines* case the board expressly resolved on 16 January to ratify the resolution purportedly passed on 7 January.
>
> 47 In my judgment, Mr Rowley is correct. I consider that the approach of both Cotton and Bowen LJJ does support his submission and I consider that I ought to apply their reasoning in the present case. . . ."

153. Advocate Swan accepts that the present case is not "four square" within the reasoning in *MMI v Harrop*. He is right to do so. The issue in *MMI v Harrop* (so far as material in the present context) was whether the approval, at a subsequent board meeting, of the minutes of an earlier board meeting which recorded (wrongly on a true analysis of the facts) that a resolution had been validly passed by the board had the effect of ratifying that resolution. Mr Justice Rimer, following the decision of the Court of Appeal of England and Wales in *In re Portugese Consolidated Copper Mines*, held that it did. In my view, for the reasons explained by Mr Justice Rimer at paragraph 42 of his judgment, there is no principled reason for extending the proposition beyond what was actually decided in those cases. In particular, neither *MMI v Harrop* nor *In re Portugese Consolidated Copper Mines* provide support for the proposition advanced on behalf of the present trustee: that a decision by the board which is taken on the false assumption that the financial position of the company is as presented in a draft balance sheet (which the board does not purport to approve) has the effect of ratifying supposed transactions (which did not, in fact take place) on which basis of which (but unknown to the board) the draft balance sheet has been prepared.

154. Advocate Swan seeks to avoid submitting that, on 3 October 2008, the boards of Oscatello, Glenalla and Thorson ratified supposed transactions (the novations of the Glenalla and Thorson loans) of which they were then unaware by asserting (transcript, 27 June 2012, page 167, line 22 to page 168, line 16) that this is not a case in which it can be said "the bookkeepers can do whatever they like and if nobody knows, and there's a subsequent act, that ratifies it": rather, he submits, the position in the present case is that what the bookkeepers did "was precisely what the policy required to be

done, and what in fact had the effect of giving effect to what the commercial intention, as understood by those who had not been let into the secret by Mrs Bleasdale, thought was the basis of the agreement in the framework agreement". But there is nothing in the evidence to support the submission that the directors of Oscatello, Glenalla or Thorson thought that, following the implementation of the framework agreement in December 2007, unauthorised novations of the Glenalla loan or the Thorson loan had taken place; or that they intended to ratify those supposed transactions. In particular, there is nothing that suggests that the directors of Oscatello, Glenalla or Thorson thought that Mr Rabie had, himself, caused the companies (or the former trustees) to enter into transactions which effected novations of the Glenalla loan or the Thorson loan. In any event, if (contrary to my view) the reasoning in *In re Portugese Consolidated Copper Mines* and *MMI v Harrop*, provides any support for the proposition that the directors of Oscatello, Glenalla or Thorson intended to ratify what (unknown to them) Mr Rabie had done; then the most that could be said is that the decisions taken at the board meetings held on 3 October 2008 had the effect of ratifying Mr Rabie's action in making book entries which purported to record transactions which had not, in fact, taken place. I am not persuaded that the ratification of book entries which purported to record transactions which had not, in fact, taken place provides a basis, in the circumstances of this case, for treating the book entries as sufficient evidence that the transactions did take place.

155. For those reasons I reject the submission that findings that the changes made by the July 2008 book entries were reflected in balance sheets which were considered (and acted upon) by the directors on 3 October 2008 lead to the conclusion that those changes did have the effect of novating the liabilities of the former trustees to Oscatello in relation to the Glenalla loan and the Thorson loan.

The October 2008 book entries

156. As I have said, the effect of the entries made in the accounting records of the companies within the Oscatello structure in July 2008 was to show (i) a balance of some £242 million owed by Eliza to Silverville and (ii) a balance of some £90 million owed by the TDT to Eliza. On 6 October 2008 Mr Rabie made (or caused to be made) further entries in the accounting records of Eliza and Silverville (the October 2008 book entries) which purported to show (i) that approximately £188 million of the £242 million owed by Eliza to Silverville had been transferred by Silverville to the TDT and (ii) that that £188

million had been netted off against the £90 million formerly shown as owed by the TDT to Eliza, leaving a balance of some £98 million in favour of the TDT.

157. It is submitted on behalf of the present trustee (at paragraph 3.51 of its written opening submissions) that those entries were made with the knowledge and approval of senior managers within the Tchenguiz Team: in particular, with the knowledge and approval of Mr Clifford, Ms Kerins, Ms Gurney and Mrs Bleasdale; and that, accordingly, the changes "would have had the effect of altering the liabilities as between the Former Trustees and Eliza". In support of that submission, the present trustee relies upon the following documents:

(1) An email sent by Mr Rabie at 09.20 on 6 October 2008 to persons who are said to be "accountants/bookkeepers within Investec on the Tchenguiz team":

> "With reference with previous discussion we had.
>
> Please make sure that all loans to Eliza are posted 64.16/35.84 through the TDT/Silverville loans.
>
> I know I said it did not matter if we post it just direct between TDT – Eliza but things have changed a bit.
>
> I am going through all the previous postings to make sure we correct all previous postings. There are not a lot of these transaction but please make sure the few there is, is posted correctly."

(2) An email sent by Mrs Bleasdale to Mr Clifford at 13.01 on 6 October 2008:

> "I would like your advice on the following please. It is something I think that needs to be resolved sooner rather than later.
>
> Up until now, the Eliza structure accounts have been done on a consolidation basis. The balance sheets that have just been prepared as at 31/8/08 is the first time the balance sheets have been done on an individual company basis.
>
> When reviewing the Eliza b/s (see attached PDF and extract below), alarm bells rang when you see that Eliza has an asset of £90m in the form of a loan due from the TDT. The big concern here is that should any creditors come [knocking], the TDT asset would be called in – meaning that that the Eliza structure is 'not' ring-fenced from the other TDT assets.
>
> Upon further review, you will see there is a loan owing to Eliza from Silverville of £242m. You will recall that TDT and Silverville were the original 2 entities that put assets into the Eliza structure. We believe that it has always been the intention that the loans put into the sub co's of Eliza originally from TDT and Silverville should have been apportioned in accordance with their % holding in Eliza i.e. TDT 64%, Silverville 36%. Simply due to incorrect book keeping, this has not happened, resulting in the current position.
>
> It is our proposal that since the intention was always to apportion out the loans in line with the % holdings, that the book keeping be corrected accordingly, which would mean no asset of £90m in Eliza's books, but a reduction in the Silverville creditor to £152 m instead.

This intention could be demonstrated as follows:-

1. The monies/loans TDT and Silverville put in before the JV with Kaupthing was not included in the £264m NAV figure used by Kaupthing in Dec 2007, so these loans into the structure have never been seen as an 'asset' by Kaupthing
2. Some of the book keeping does show a split between TDT and Silverville – just not all
3. When consolidation was done, these loans were netted off, further showing that we never considered them to be separate

R20 are not aware of this. I suspect they would assume that the loans made originally would have been netted off – they certainly would not expect to see a £90m asset in Eliza.

. . ."

(3) An email sent by Mr Clifford to Mrs Bleasdale at 15.13 on 6 October 2008, in these terms:

> "I can't see the accounts at the moment but if the intention was to effectively net off and end up with the smaller loan in Silverville the fact that we have posted incorrectly to date is not material. It looks like we need to adjust to get to the correct position. I am back on Wednesday and will look more closely then … But if you need to correct in the meantime I would press on with it."

Those exchanges were followed by two further emails on 8 October 2008 to which I refer in order to complete the picture:

(4) An email sent by Mr Clifford to Mrs Bleasdale at 10.38 on 8 October 2008, which included the sentence:

> "Where we need to start please is what was the loan position before the Eliza/Oscatello restructure and what happened to the then existing loans as part of that exercise?

(5) Mrs Bleasdale's response, in an email sent to Mr Clifford at 10.59 on the same day:

> "Louw [Rabie] will work on the picture of the loans prior to the Eliza structure set up in Dec 07"

158. Mrs Bleasdale's evidence, at paragraph 155 of her witness statement, was that her email to Mr Clifford of 6 October 2008 (set out under sub-paragraph (2) above) was sent as a result of discussion of the Eliza draft balance sheet amongst those present at the meetings on 3 October 2008: discussion which, she said, took place at the end of those meetings. She went on to say this:

> "156. The figures provided in this email would have come from Louw Rabie when we sat down to discuss the amounts appearing to be owing as shareholder loans. I cannot be certain if I was aware of the July 2008 entries at this point, but I think I was aware that some changes had been made. In the email, I referred to what I described as '*incorrect bookkeeping*'. By that, I was

trying to convey that the bookkeeping [as] it appeared did not reflect the position I would have expected it to have done at December 2007."

At paragraph 157 of her witness statement she referred to Mr Clifford's email of 6 October 2008; and (at paragraph 158) she said this;

> "158. I did not feel that Robert had quite understood what I was getting at. Rather than rushing through a possible solution, I wanted to sit down and go through it with him. I was very conscious that we had to make the right changes at this point. Following further exchanges . . . we agreed that we would meet later that week, which we did when Robert was in Guernsey, and that Louw would work on clarifying the position up to the signing of the Framework Agreement. As far as I am aware, no final position was ever reached in working out what ought to be done about the shareholder loans."

And she went on to say this:

> "159. I understand that on that same day, 6 October 2008, Louw Rabie made further accounting entries (the 'October 2008 Entries'). I now know that those entries had the effect of netting off the balances under the loans such that in line with their shareholdings in Eliza, the Former Trustees and Silverville were owed approximately £97m and £54m respectively by Eliza.
>
> 160. I cannot remember Louw or anyone else informing me of the October 2008 Entries before they were carried out, or in the period after they had been carried out. Further, I cannot recall any resolution or discussion during any meeting where the October 2008 Entries were approved. As I have previously mentioned, such entries would (in the absence of specific resolutions) ordinarily only be approved when annual accounts were prepared and resolutions approving those accounts were passed.
>
> 161. I cannot be certain of the exact date, but I did not learn of the October 2008 Entries until many months later, I believe in around June or July 2009. This is made clear in the correspondence around this period. . . ."

159. Under cross-examination by Advocate Swan (transcript, 15 June 2012, page 19, line 20 to page 33, line 1) Mrs Bleasdale expanded (in some respects), but did not depart from, the account which she had given in her witness statement. Her evidence was that, after the board meetings on 3 October 2008, Mr Rabie had drawn her attention to the £90 million loan which appeared as an asset in the draft balance sheet which he had prepared in respect of Eliza; that that came as a surprise to her; that it needed to be discussed; and that, accordingly, a second board meeting of Eliza (which had been planned for 3 October 2008) did not take place that day. Ms Gurney took part in the discussion; which was inconclusive. The matter was left on the basis that she (Mrs Bleasdale) would raise the matter with Mr Clifford (who was on holiday at the time) on 6 October 2008; and that no action was to be taken in the meantime. She expected that, after discussion with Mr Clifford, advice would be sought from Mourant Ozannes. She was not copied in on Mr Rabie's email of 6 October 2008; but she thought – from the

observation in that email that "things have changed a bit" – that that email was probably sent as a result of the discussion on 3 October 2008. She accepted that Mr Rabie's proposed course of action – "I am going through all the previous postings to make sure we correct all previous postings" – indicated that he was intending to do what she had, herself, suggested to Mr Clifford should be done; but she emphasised that no agreement that that should be done had been reached on 3 October 2008 and that neither she (nor, to her knowledge, anyone else) had instructed Mr Rabie to carry out that course of action. She denied that she had acted on Mr Clifford's suggestion, in his email of 6 October 2008, that (if necessary) she should press on with making the correction which had been proposed. She said that she did not feel that Mr Clifford had all the facts which he needed in order to address the problem; and that she wanted to discuss it with him properly before any action was taken. She accepted that corrective entries were made to the accounting records on 6 October 2008; but said that she did not know that at the time.

160. On 10 October 2008 Mr Clifford, Ms Gurney, and Mrs Bleasdale met Advocate Wessels to discuss the position of the former trustees (as trustees of the TDT) following the collapse of Kaupthing. An attendance note of that meeting records that Advocate Wessels advised that the former trustees should take the position that no funds should be moved at that stage without careful scrutiny: in particular he drew attention to the risk of wrongful trading if that were done. Mrs Bleasdale was cross-examined about that meeting (transcript, 15 June 2012, page 35, line 11 to page 37, line 16). She was asked whether it was at that meeting that she had begun to have some concerns about what had already been done: that is to say, the adjustments to loans through accounting entries. Her answer was that she did not think she had "put two and two together on that point". She rejected the suggestion that, when it became clear that there might be some problems for the directors in terms of liability for wrongful trading, she started to become not only very cautious about what she did in the future but very cautious about how she analysed what had happened in the past. She said this:

> "No, that wasn't my thought. What I took from that meeting is that we had to be careful what we did now, and that's precisely what I was doing by not doing anything about the Eliza 90 million problem until we had the appropriate advice."

She agreed that the immediate problem was the Eliza £90 million loan: and that it was that which had set the alarm bells ringing a week earlier. But she did not think that the

meeting with Ozannes on 10 October 2008 was called to consider that problem; or that it did so.

161. Mr Clifford's evidence, at paragraph 79 of his witness statement, was that he was not aware of the October 2008 book entries at the time that they were made. At paragraph 82 he said this:

> "Following Lydia's 6 October 2008 email, she and I looked at the TDT accounting records with Louw Rabie and his accounting team. This was the first time my attention had been drawn to these accounting entries and I did not initially understand them. I wanted to understand how the £90 million had come to appear as it did in the balance sheets; we tried to understand and rationalise the position. Louw prepared a summary of the inter company loan positions prior to the creation of the Oscatello structure . . . There was some discussion then about the accounting entries made by Louw in July 2008. I do not believe that a bookkeeper or accountant would have the authority to create or amend the loan arrangements."

Mr Clifford was cross-examined as to his understanding of the position following the e-mail of 6 October 2008 (transcript, 14 June 2012, page 136, line 1 to page 148, line 12). He accepted that he was concerned to learn from that e-mail, for the first time, that there was an asset outside the Oscatello structure which was vulnerable to attack by a creditor. His response was to seek to understand how that situation might have arisen. If there had been an incorrect accounting entry, he would expect that entry to be corrected; but he did not have the facts. His view at the time was that it was necessary to understand what the loan structure had been before the Eliza/Oscatello restructure in December 2007; and what had happened to the then existing loans in the course of that restructure. When asked by Advocate Swan whether he thought that there was a problem to be investigated or that the problem had been dealt with, he said this:

> "There was clearly an issue which needed to be investigated and understood. I wanted that to be done with advice fully and properly. . . .
>
> What I understood when I was on holiday was that there was a question of accounting entries. . . . I hadn't investigated it, I don't believe. I didn't know the issues, I wanted advice, I wanted to know what had happened, I wanted to go up to review the files, I wanted to get the right people involved."

Mr Clifford was not questioned as to the meeting with Advocate Wessels on 10 October 2008. There was no challenge to the evidence which he had given at paragraph 82 of his witness statement.

162. No evidence was given by Ms Kerins or by Ms Gurney. I am not satisfied, from the evidence that was adduced at the trial, that, at the time when the October 2008 book entries were made, they were made with the knowledge and approval of senior

managers within the Tchenguiz team; as submitted on behalf of the present trustee at paragraph 3.51 of its written opening submissions. Accordingly, I hold that there is no basis of fact on which it can be said that the changes made by those entries "would have had the effect of altering the liabilities as between the Former Trustees and Eliza". I should add that, even if the present trustee had established on the evidence that senior managers within the Tchenguiz team had known and approved of the October 2008 book entries at the time that those entries were made, I am not persuaded that that, of itself, would lead to the conclusion for which the present trustee contends.

The March 2009 assignment

163. As I have said, the effect of the entries made in October 2008 was to leave a balance of some £54 million shown as owed by Eliza to Silverville. On 2 March 2009, in a written resolution signed on behalf of the directors of Silverville, it was noted that, following the Framework Agreement, "a loan position remained in place whereby the Company [Silverville] was owed by Eliza the sum of £53,523,371.80 ('the loan') and that this loan position had arisen as a consequence of various loans which had previously existed between TDT and the Company". It was resolved to approve the assignment of the loan to the TDT "by way of a capital distribution receipt to the Shareholder [the TDT]". At a meeting of the former trustees, held on the same day, they agreed to accept the proposed assignment of the loan on that basis. A deed of assignment by which Silverville assigned that loan to the former trustees, as trustees of the TDT, was executed on the same day (2 March 2009) by ITGL, Bayeux and Silverville.

164. It was submitted on behalf of the present trustee (at paragraph 3.53 of its written opening submissions) that, "by noting that this loan position [that is, the indebtedness of Eliza to Silverville in the sum of £53,523,371.80] was owed by Eliza to Silverville and by resolving to assign that sum, the directors [of Silverville] were thereby impliedly affirming the steps that Mr Rabie implemented in October 2008 to arrive at that sum"; and that "this affirmation amounted to a ratification of an assignment of approximately £188 million from Silverville to the Former Trustees of the debt owing by Eliza which had been effected by Mr Rabie when he transferred approximately £188 million from Silverville to the Former Trustees".

165. I am unable to accept that submission. The directors of Silverville on 2 March 2009 were GFT Directors Limited and Finistere Directors Limited. The written resolution of

that date was signed on behalf of GFT Directors Limited by Ms Kerins and on behalf of Finistere Directors Limited by Tracey Walker. As I have said, Ms Kerins did not give evidence; nor did Ms Walker. There was nothing to suggest that, in signing the written resolution on 2 March 2009, either of them gave any thought to the circumstances which had led to a debt of £53,523,571.80 from Eliza to Silverville being recorded in the ledgers of Silverville and Eliza; other than to accept the position recited in the written resolution itself:

> "ASSIGNMENT OF LOAN
>
> IT IS NOTED that in December 2007 the Company [Silverville] had entered into a Framework Agreement with Investec Trust (Guernsey) Limited and Bayeaux Trustees Limited as trustees of the Tchenguiz Discretionary Trust ('TDT'), Oscatello Investments Limited ('Oscatello') (which was, at that time, ultimately owned by TDT), Kaupthing Bank Hf, Isis Investments Limited, New Ortland II Equity Limited and Eliza Limited ('Eliza'). At that time and at all times since TDT was the sole beneficial owner of the Company ('the Shareholder')
>
> Oscatello acquired from TDT and the Company shares in certain of TDT's and the Company's respective subsidiary companies in exchange for the issue of further shares in Oscatello to the Company and TDT. The Company and TDT subsequently transferred these Oscatello shares to Eliza and, in exchange, Eliza issued further shares in itself to the Company and TDT. TDT then transferred its holding of one share in Oscatello to Eliza and Eliza issued one share in itself to TDT.
>
> IT IS FURTHER NOTED that a loan position remained in place whereby the Company was owed by Eliza Limited the sum of £53,532,371.80 ('the loan') and that this loan position had arisen as a consequence of various loans which had previously existed between TDT and the Company
>
> IT IS FURTHER NOTED that upon advice received it is recommended that the Company assign the loan to TDT, which has the effect of distributing capital to the Shareholder by way of capital distribution
>
> IT IS FURTHER NOTED that Macfarlanes had advised that it was important that the assignment be characterised as a capital distribution
>
> IT IS FURTHER NOTED that Macfarlanes had reviewed the mechanics of the proposed assignment and were permissible (*sic*) under BVI law (the Company and Eliza being companies incorporated in the British Virgin Islands) and it was their recommendation that the Company and TDT execute the Assignment, as drafted by Ozannes, Guernsey appointed lawyers to TDT (a copy of which is attached hereto and forms part of this Minute)"

There is nothing in those recitals which draws attention to the true position: that the "loan position" shown in the ledgers of Eliza and Silverville had not arisen "as a consequence of various loans which had previously existed between TDT and the Company [Silverville]", but rather as a consequence of unauthorised book entries (purporting to record transactions which had not taken place) made by Mr Rabie in July

and October 2008.

166. Mrs Bleasdale knew little of the circumstances in which the assignment took place in March 2009: at paragraph 164 of her witness statement dated 30 March 2012 she said this:

> "Although I was aware of the assignment which took place in March 2009, my involvement was minimal. I can remember answering a few queries on questions of detail while it was being considered, but otherwise it was handled by Tracey Walker. In particular, I do not recall being present at any meetings on 2 March 2009."

In the course of her oral evidence, in answer to questions put by Advocate Swan, she accepted (transcript, 15 June 2012, page 51, line 9, to page 53, line 14) that she had provided a figure for the amount of the loan (£53,523,374.80) in response to a request from Mr Clifford (contained in an e-mail sent to her on 18 February 2009). That request was, itself, made in response to a request from Advocate Wessels who had written, in an e-mail to Mr Clifford sent on 29 January 2009:

> "I assume we will do the Silverville/TDT assignment anyway.
> . . .
> I attach a draft assignment. I need ITG to fill in the precise loan figures . . ."

Mr Clifford did not respond immediately; but, in his e-mail to Mrs Bleasdale, sent on 18 February 2009, he asked:

> "Could you please confirm the numbers and have an engrossment prepared Lydia, plus relevant minutes?"

On 20 February 2009, after seeking confirmation from Jacobus (Cobus) Josling, one of the accounting team, that the amount of loan was as shown in the Concept ledgers of Silverville and Eliza was £53,532,374.80 (*sic*), Mrs Bleasdale provided that figure to Advocate Wessels; and asked him to provide an engrossed assignment. In the evidence which she gave at the trial she said this:

> "As Robert asked me directly to have a look at the numbers, I think he felt I was probably the person initially to go for that as I had the experience on the structure. My colleague Tracey Walker was dealing with this matter more generally and had the overall responsibility for it. I think I did what I was asked. I looked at the ledgers, saw the figure, but I didn't want to confirm that that was the true figure which is why I asked Cobus Josling as an accountant to confirm those figures."

In answer to the question: "Do you understand how that figure was derived?", she said that she did not remember whether she looked to see how that figure was made up: "that was a figure that obviously appeared on the ledgers of those two entities, Silverville and Eliza". She was not asked to explain, and did not explain, why the figure which was

included in the written resolution (£53,532,571.80) differed from the figure which she had provided (£53,532,374.80); or why the figure which she had provided, rather than the figure in the written resolution, subsequently appeared in the assignment itself. I am left to conclude that the difference between the figure in the written resolution and the figure in the assignment is indicative of a lack of attention to detail on the part of those (Ms Kerins and Ms Walker) who signed those documents.

167. Mr Clifford addressed the circumstances in which the March 2009 assignment came to be made at paragraphs 88 to 92 of his witness statement dated 30 March 2012. He said this:

> "88. On 2 March 2009 Silverville Limited assigned £53,532,375.80 (*sic*) to ITGL and Bayeux as the then trustees of the TDT (the 'March 2009 Assignment'). . . .As the resolution of the Former Trustees dated 2 March 2009 . . . suggests, this assignment was driven by legal advice the Former Trustees had received from Ozannes. The Former Trustees wanted to do what they properly could to protect the TDT. At this point in time, the Trustees and the Corporate Directors sought legal advice before taking any significant action in relation to the TDT because they were aware of the need to consider the insolvency rules applicable in the BVI.
>
> 89. Even at this time, I considered that the enquiry into the inter-company loan arrangements, and the accounting entries already made, were an attempt to work out what ought to have happened in relation to the loans at the time of the Framework Agreement. In other words what the intentions of the parties at that time actually was. At no time did I consider that a final decision had been made either as to what was the true position or as to what could be done in relation to the loan arrangements.
>
> 90. As far as I was concerned, the March 2009 Assignment was conditional on the ascertainment that Eliza did owe Silverville a loan of the amount stated in the deed of assignment. I expressed my understanding of the conditionality of the March 2009 Assignment in my e-mail to Luis Gonzales and Lydia Bleasdale on 20 February 2009 . . . My understanding was based on advice from Ozannes.
>
> 91. The March Assignment was drafted by Ozannes as the Tchenguiz Team and ITGL generally were exceptionally busy attending to this and other issues arising in relation to the TDT and other trusts. I do not recollect where the figure of £53,532,375.80 came from.
>
> 92. In March 2009 I still did not have an independent understanding of the accounting entries made in July and October 2008. I relied heavily on information provided to me by the Tchenguiz Team in this respect. In particular I reviewed the note prepared by Jacobus (Cobus) Josling . . . As far as I can remember, this note was produced in an effort to understand and to detail what had happened. I do not remember conducting a detailed analysis of Cobus Josling's note. The note was part of ITGL's process of working through the issues to achieve a better understanding of the July and October 2008 accounting entries. I do not believe that ITGL ever reached a conclusive

position before my departure."

168. The "e-mail to Luis Gonzales and Lydia Bleasdale on 20 February 2009" to which Mr Clifford referred at paragraph 90 of his witness statement was in these terms:

> "FYI and the file I spoke to Jeremy [Wessels] who has been in touch with Sebastian regarding the Eliza/Silverville/TDT position. Seb has suggested the possibility of a Hastings Bass approach to the loan situation – the main potential difficulty being a potential aggrieved creditor in the form of Kaupthing involved in the process. It seems to me that we must explore every avenue and I have asked Jeremy to check whether Simon Taube QC can advise promptly – Jeremy has a fulsome briefing note. In the meantime we need to take such steps in relation to the possible assignment of the loan as we can. Here Seb has advised a slightly different structure and is providing Jeremy with a document Jeremy can work on for us. I queried how we can deal with the inconsistency inherent in two possible different approaches and Jeremy feels the assignment/buy back can be done on a conditional basis – i.e. if it is the position that these loans are held in this way then this rearrangement follows. Expect some convoluted documents … … … …"

Whatever may have been Mr Clifford's expectation at the time he sent that e-mail on 20 February 2009, the March 2009 assignment cannot be described as a "convoluted document". It is, on its face, an unconditional assignment by Silverville to the former trustees of "all its legal and beneficial title to and interest in the Loan". "The Loan" is a defined term: it is "a loan in the sum of £53,532,374.80 . . . due by Eliza . . .".

169. The "note prepared by Jacobus (Cobus) Josling" to which Mr Clifford referred at paragraph 92 of his witness statement is dated 16 January 2009. It is headed "History behind loan movements". The introductory paragraphs ("General") explain that:

> "When TDT and Silverville transferred its assets (*sic*) into the new Eliza/Oscatello structure the consideration for their assets and purchase price for their new investment was determined with reference to Net Asset value of the underlying assets determined at the time between the parties. This net asset value excluded any intercompany loan balances at the time between TDT and Silverville with their underlying investments. Whether this (and the fact that these loans were excluded from calculations of NAV) was correct is open to question. The purpose of this document is just to state the treatment of those intercompany loans after the transfer of the assets. This document is only for information purposes and not final.
>
> The date of the transfer of the assets was 19/12/2007.
>
> The intercompany balances as at 21/12/2007 were moved on that date to reflect the loans according to the structural changes that happened."

In the body of the note, under the heading "Loans that were moved", Mr Josling first identified the loans in the TDT that were moved from the TDT to Oscatello (as the new shareholder of the relevant companies); and then identified the loans in Silverville that

were moved to Oscatello (again, as the new shareholder of the relevant companies). The loans in the TDT included a loan owed by the TDT to Glenalla in the amount of £56,983,105.28 (the Glenalla loan), a loan owed by the TDT to Thorson in the amount of £80,613,837.74 (the Thorson Loan) and a loan owed by the TDT to Oscatello in the amount of £39,337,521.60 (the Oscatello loan). The aggregate amount of the loans in the TDT (after netting those owed to the TDT (loans receivable) against those owed by the TDT (loans payable)) was £90,202,950.72 (owed by the TDT). He recorded (or purported to record) the following:

"Transaction done in TDT

Loans payable

DR Loans payable — Because TDT will not owe these companies anymore, but will now owe Eliza and Eliza will owe Oscatello

CR Eliza

Loans receivable

DR Eliza — Because these companies will not owe TDT anymore, but will now owe their new shareholder Oscatello and Oscatello will owe Eliza

CR Loans receivable

Transaction done in Eliza

Loans payable

DR TDT
CR Oscatello

Loans receivable

DR Oscatello
CR TDT

Transaction done in Oscatello

Loans payable

DR Eliza
CR Loans with individual companies

Loans receivable

DR Loans with individual companies
CR Eliza"

He recorded similar transaction in respect of the loans in Silverville; and concluded:

"After the above:

TDT should have a loan payable to Eliza of GBP 90,202,950.72 (refer to p14/47 of ledger print, balance according to ledger (GBP 90,202,951.02 – diff = i/m)

Silverville should have a loan receivable from Eliza of GBP 242,207,647.26 (refer to p5/16 of ledger print)"

But nowhere in his note did Mr Josling point out that the book entries recorded under

"Transaction done in TDT", "Transaction done in Eliza" and "Transaction done in Oscatello" did not reflect transactions which had actually taken place between those entities (or between those entities and the individual subsidiary companies listed in the note). The note ignores the principle (to which Mr Clifford referred at paragraph 28 of his witness statement) that "accounting entries do not create loans, they simply reflect them".

170. Mr Clifford was cross-examined on the matters to which he had referred in paragraphs 88 to 92 of his witness statement (transcript, 13 June 2012, page 168, line 21 to page 180, line 5). It was put to him that, when the possibility of an assignment to the TDT of the benefit of a loan owed by Eliza to Silverville was first raised by Mourant Ozannes in January 2009, there had been no suggestion that the assignment would be conditional or provisional. His response was that "what we were doing was exploring anything that we could possibly do as trustees to preserve the trust fund properly". He explained that, at that stage, he did not know "whether there were Eliza loans or Oscatello loans or TDT loans or Silverville loans", and that that was what he meant by conditionality. He said that he believed that he questioned at the time of, or after, the assignment where the figure for the amount assigned (£53,532,374.80) had come from; but he did not get an answer. He said that his understanding at the time was that "we as trustees and directors were trying to do anything that we could properly to preserve the value of the trust fund and that involved trying to set off part of the debt that Eliza - that, I'm sorry, TDT - owed to whomever". He had no real idea where the figure in the assignment had come from. He pointed out that, at the time, he was one week away from resigning: as he put it "my life was rather difficult with a lot of issues to be dealt with and I was not - my head was not - in the detail of those numbers".

171. As I have said, I reject the submission, advanced on behalf of the present trustee, that, by noting that that the accounting records of the company showed that the sum of £53,523,371.80 was owed by Eliza to Silverville and by resolving to assign £53,523,374.80 to the TDT, the directors of Silverville were thereby impliedly affirming the steps that Mr Rabie implemented in October 2008 to arrive at the sum assigned. There is no evidence to support the proposition that the directors of Silverville knew how that sum had arisen. It follows, also, that I reject the submission that this supposed affirmation amounted to a ratification of an assignment of approximately £188 million from Silverville to the TDT of the debt owing by Eliza which had been

effected by Mr Rabie when he transferred approximately £188 million from Silverville to the TDT.

Issue (4): Whether the former trustees have a claim against Eliza in the sum of approximately £151 million which is an asset of the TDT

172. At paragraph 3.54 of the present trustee's written opening submissions it is said that "the effect of the March 2009 assignment was to make Eliza indebted to the Former Trustees in the sum of £53,532,371.80 (*sic*)". Paragraphs 3.55 and 3.64 contain the assertion that:

> "3.55 Therefore by 2 March 2009, the Former Trustees would have been the assignees of two sums owed to Silverville by Eliza: (i) a sum of approximately £188 million; and (ii) £53,532,371.80. Thus it was an assignee for a total sum of approximately £242 million.
>
> 3.56 The net effect is that the Former Trustees would have a claim against Eliza for approximately £242 million, and, if the accounting records for Eliza are correct and approved, Eliza had a claim against them for approximately £90 million."

After addressing (and dismissing) the submission advanced on behalf of the former trustees - that the March 2009 assignment was conditional on the ratification of the July 2008 book entries and the October 2008 book entries – it is said, at paragraph 3.65 of the present trustee's written opening submissions, that:

> "3.65 If the Court is . . . satisfied of the assignment effected by the October 2008 Entries or the March 2009 Assignment, then the Former Trustees would have a claim against Eliza for a substantial sum. . . ."

The relief sought by the present trustee against the former trustees (by way of counterclaim) – and the relief sought by the present trustee against the BVI Companies (by third party claim) – includes a declaration that the former trustees have a claim against Eliza in the sum of approximately £151 million and that such a claim is an asset of the TDT.

173. In addressing that claim for relief it is important to keep in mind, first, that what the present trustee describes as "the assignment effected by the October 2008 book entries" is no more than a reference to the purported effect of entries made (or caused to be made) by Mr Rabie in the accounting records of Eliza and Silverville on 6 October 2008; and, second, that the March 2009 assignment did not, itself, do more than purport to assign to the former trustees the benefit of an existing debt (if any) owed by Eliza to Silverville.

174. As I have said, the effect of the entries made in the accounting records of the companies within the Oscatello structure in July 2008 (the July 2008 book entries) was to show a balance of some £242 million owed by Eliza to Silverville. But, those entries did not reflect transactions which had actually taken place: they were made (without the authority of the directors of the relevant companies) in order to record what Mr Rabie thought would (or should) have been done in accordance with his understanding of the "policy" or "practice" usually followed within the Oscatello structure that "the loans follow the shareholder". On 6 October 2008 Mr Rabie made (or caused to be made) further entries in the accounting records of Eliza and Silverville (the October 2008 book entries) which purported to show that approximately £188 million of the £242 million which (as the accounting records of those companies showed, following the July book entries) was owed by Eliza to Silverville had been transferred by Silverville to the TDT. Again, those entries did not reflect a transaction which had actually taken place: again, they were made (without the authority of the directors of those companies) to record what Mr Rabie thought would (or should) have been done consistently with the policy or practice, given that Eliza was owned in part by the TDT and in part by Silverville.

175. The amount of the debt said to be owed by Eliza to Silverville (some £54 million) which was the subject of the March 2009 assignment was the balance (following the supposed assignment of approximately £188 million "effected by the October 2008 book entries") of the £242 million which had been shown in the accounting records of those companies to be owing by Eliza following the July 2008 book entries. But, as I have said, the July 2008 book entries did not reflect transactions which had actually taken place. Although I would accept, contrary to the submissions made on behalf of the former trustees, that the March 2009 assignment was unconditional, the most that could be achieved by that assignment was the transfer of whatever debt (if any) was then owing by Eliza to Silverville (up to a limit of £53,532,374.80): it could not transfer debt which did not exist. In that sense, Mr Clifford was correct when he stated (at paragraph 90 of his witness statement) that ". . . the March 2009 Assignment was conditional on the ascertainment that Eliza did owe Silverville a loan of the amount stated in the deed of assignment"; although it may be said that that was not the "conditionality" to which he was referring in his e-mail of 20 February 2009.

176. The present trustee has not sought to establish, other than by reliance upon the July 2008 book entries and the October 2008 book entries, that, at the date of the March

2009 assignment, Eliza was indebted to Silverville in an amount equal to or in excess of £53,532,374.80 (or in any other amount); and, as I have said, it has failed to establish that an assignment of approximately £188 million of debt owed by Eliza was effected by the October 2008 book entries. In particular, it has failed to establish that whatever debt owed by Eliza was transferred by Silverville to the former trustees by the March 2009 assignment exceeded the debt (some £90 million) which, as it appears to accept, was then owed by the TDT to Eliza. In those circumstances I find it impossible to conclude that the former trustees have a claim against Eliza in the sum of approximately £151 million (or in any other sum).

177. I should, perhaps, add that, if I had been persuaded that the former trustees had a monetary claim against Eliza, I would have regarded it as self-evident that that claim was an asset of the TDT. But it does not follow that, in the circumstances that Eliza has been in liquidation since 22 February 2010, pursuant to the order of the court in the British Virgin Islands, that I would have thought it appropriate to make declarations to that effect. My provisional view is that any claim which the TDT may have against Eliza should be pursued in that liquidation. But I do not need to decide that question; and I do not do so.

Issue (5): (A) Whether the former trustees are entitled to rely (as against the BVI Companies) on article 32 of the Trusts (Jersey) Law 1984 (as amended) in these proceedings; and, if (or to the extent that) the former trustees are not so entitled, (B) whether it was a term of the legal obligations assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson loan and/or the Oscatello loan that they were not personally liable.

178. In order to determine whether the former trustees are entitled to rely on article 32 of the Trusts (Jersey) Law 1984 in these proceedings it is necessary to ask, first, why this Court should treat the rights to which the BVI Companies claim to be entitled and which they seek to enforce against the former trustees as governed by the law of Jersey, rather than by the law of Guernsey or (if different) by the proper law of the contract or other transaction under which those rights arise. As the former trustees recognise (at paragraph 101 of their skeleton argument dated 25 May 2012): "There is an unresolved question as to whether the Guernsey Court would apply the Jersey statutory provision in limiting a trustee's liability under a contract governed by either Guernsey or English law."

The proper law of the transactions under which the BVI Companies' rights arose

179. In order to address that question, it is convenient, first, to identify the proper law of the contract or other transaction under which the BVI Companies' rights arose. The obligations of the former trustees in relation to the Glenalla loan and the Thorson loan arose, respectively, under the Glenalla Deed of Novation and the Thorson Deed of Novation. Each of those deeds of novation were, by their express terms (clauses 3.4), governed by and to be construed in accordance with English law. It is accepted on behalf of the former trustees (at paragraph 115 of their skeleton argument) that the deeds of novation operated to discharge the agreements (or arrangements) formerly in place between ITGL (as trustee of the TFT) and Glenalla or Thorson (as the case might be) and to replace those agreements (or arrangements) with new contracts between the former trustees (as trustees of the TDT) and Glenalla and Thorson respectively. But it is said that, properly understood, the terms of the new contracts between the former trustees and Glenalla and Thorson (which arose under the deeds of novation) were the same as those of the contracts which they respectively replaced: "a novation changes the parties, not the terms of the contract" (paragraph 116.1 of the skeleton). So, it is said, notwithstanding the express choice of law made in the deeds of novation, the proper law of the new contracts was not (or not necessarily) English law: the proper law of the new contracts must be taken to be the same as the proper law of the contracts which they replace.

180. The loan agreements (or arrangements) between ITGL (as trustee of the TFT) and Glenalla or Thorson (as the case might be) were not made in writing: they are not the subject of an express choice of law clause. The TFT was established under the laws of the British Virgin Islands. ITGL is a company incorporated in Guernsey. Glenalla and Thorson are companies incorporated in the British Virgin Islands. It is common ground that the TFT, Glenalla and Thorson were administered in Guernsey. In those circumstances it is said, on behalf of the former trustees, that the proper law of the loan agreements (or arrangements) between ITGL (as trustee of the TFT) and Glenalla and Thorson (as the case might be) – and so the proper law of the new contracts between the former trustees and Glenalla and Thorson which arose under the deeds of novation - was the law of Guernsey.

181. I am content to assume (without finding it necessary to decide) that that submission is correct. The possible alternatives are the law of the British Virgin Islands (as the place

with which each of the parties was most closely connected) or the law of England (as the proper law of the deeds of novation). It cannot be suggested that the law of Jersey is a possible alternative. In those circumstances it is unnecessary to decide which – as between the law of Guernsey, the law of England and the law of the British Virgin Islands should be taken to be the proper law of the new contracts which arose under the deeds of novation: it is sufficient to decide – as I do – that the law of Jersey was not the proper law of those new contracts.

182. I have held that the obligations of the former trustees in respect of the Oscatello loan do not arise – or, at least, do not arise directly - under a contract to which they and Oscatello were parties. As I have explained, those obligations arise under the general law: payment by one party (A) of the debt owed by another party (B) to a third party (C) at the request or with the consent of (B) gives rise to an obligation on (B) to repay to (A) an amount equal to the amount so paid. In the present case, those obligations arose in circumstances where Oscatello, a company incorporated in the British Virgin Islands, paid the debt owed by the former trustees, as trustees of the TDT, a settlement established in Jersey, to Kaupthing, a bank incorporated in Iceland. Oscatello and the TDT were administered in Guernsey. There is, I think, little or no doubt that the proper law of the debt paid by Oscatello was the law of England: the August 2007 Kaupthing loan facility agreement was to be governed by and construed in accordance with English law (clause 29); the deed of novation dated 24 August 2007 under which the former trustees undertook the liabilities of ITGL (as trustee of the TFT) under the August 2007 Kaupthing loan facility agreement was also to be governed by and construed in accordance with English law (clause 11). So, also, was the framework agreement, following which the payment was made (clause 18.1). Given that it was not suggested that there was any difference between the law of England and the law of Guernsey in relation to the imposition, under the general law, of an obligation to repay, it has not been necessary to decide under which of those laws that obligation arose. I am content to assume (without deciding) that it arose under the law of Guernsey. There is no basis for holding that the obligation to repay the Oscatello loan arose under the law of Jersey; and I hold that it did not do so.

Should the claims of the BVI Companies be treated as governed by the law of Jersey notwithstanding that the law of Jersey is not the proper law of the transactions under which those claims arose.

183. Clause 3.1 of the declaration of trust, dated 26 March 2007, by which the TDT was

established, provides that "this Trust is established under and shall be governed in all respects by the laws of the Island of Jersey which shall be the proper law of this Trust . . .". It follows that the TDT is a "foreign trust" for the purposes of the Trusts (Guernsey) Law 2007: sections 3(1)(a) and 80(1) of that Law. Accordingly, it is not a trust to which the provisions in Part II of the Law apply; in particular, it is not a trust to which section 42 of the Law ("Dealings by trustees with third parties") has any application.

184. Part III of the Trusts (Guernsey) Law ("Provisions applicable only to foreign trusts") includes section 65 ("Enforceability of foreign trusts"). Section 65(1) provides that, subject to subsection (2), "a foreign trust is governed by, and shall be interpreted in accordance with, its proper law". Subsection (2) provides that a foreign trust is unenforceable in Guernsey to the extent that – (a) it purports to do anything contrary to the law of Guernsey, (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey, or (c) the Royal Court declares that it is immoral or contrary to public policy. It is not suggested that, in the present case, section 65(2) would prevent this Court from enforcing the provisions of the TDT in accordance with its proper law; that is to say, in accordance with the law of Jersey. But nor, as it seems to me, is there anything in Part III of the Trusts (Guernsey) Law which requires this Court to apply provisions of Jersey law – and, in particular, provisions in the Jersey (Trusts) Law 1984 - which go beyond the enforcement of the trusts of the TDT.

185. I have set out the terms of article 32 of the Jersey (Trusts) Law 1984 (as amended) earlier in this judgment; but (at the risk of unnecessary repetition) it is convenient to do so again.

> "32 Trustee's liability to third parties
>
> (1) Where a trustee is a party to any transaction or matter affecting the trust –
>
> (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
>
> (b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).
>
> (2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust."

The article falls within Part II of the Trusts (Jersey) Law (Provisions applicable only to a Jersey trust).

186. I am content to assume (but, again, without finding it necessary to decide) that, in proceedings brought in Jersey by a third party against the trustee of a Jersey trust, article 32 of the Trusts (Jersey) Law would be held to apply whatever the lex causae (or proper law) of the transaction to which the trustee and the third party were parties, unless (perhaps) the terms of the transaction expressly provided to the contrary; notwithstanding that article 32 - unlike the comparable provision in the Trusts (Guernsey) Law (section 42) – does not so provide in terms (see section 42(4) of the Trusts (Guernsey) Law). So I assume that, if these proceedings had been brought by the BVI Companies in the Jersey Courts, the former trustees would have been entitled to rely on article 32 of the Trusts (Jersey) Law – and, in particular on the protection from personal liability which article 32(1)(a) affords – notwithstanding that, as I have held, the proper law of the transactions which give rise to the claims of the BVI Companies is not the law of Jersey. But that is not this case. I am content to assume, also, that if, in proceedings brought in Guernsey by a third party against the trustee of a Jersey trust, the proper law of the transaction to which the trustee and the third party were parties were the law of Jersey, this Court would hold that the trustee was entitled to rely on article 32 of the Trusts (Jersey) Law. But, again, that is not this case. And, of course, if the trust were a Guernsey trust, this Court would hold that the trustee was entitled to rely on section 42 of the Trusts (Guernsey) Law. But neither is that the position in this case. The question, in the present case, is whether in proceedings brought in Guernsey by a third party against the trustee, or former trustee, of a Jersey trust to enforce claims which arise under transactions the proper law of which is said to be the law of Guernsey, this Court should hold that the trustee is entitled to rely on article 32 of the Trusts (Jersey) Law.

187. The answer to that question turns, as it seems to me, on whether section 65 of the Trusts (Guernsey) Law requires this Court to apply article 32 of the Trusts (Jersey) Law to the claims brought by the BVI Companies against the former trustees; and that, in my view, turns on whether the enforcement of those claims can be said to be the enforcement of the trusts of the TDT. In my judgment, the answer to those questions is “No”. I am not persuaded that, in seeking to enforce their claims in relation to the Glenalla loan, the Thorson loan and the Oscatello loan against the former trustees, the BVI Companies can properly be said to seeking to enforce the trusts of the TDT. The claims do not arise under the trusts of the TDT: they are claims brought by third parties who are not settlors, trustees or beneficiaries of, or otherwise interested in, the TDT. The fact that

the shares of the BVI Companies were owned, directly or indirectly, by the former trustees as trustees of the TDT is, in my view, irrelevant in this context.

188. In reaching that conclusion I have had regard to the submissions made on behalf of the BVI Companies; but I have not found those submissions persuasive. At paragraph 44 of the skeleton argument filed on their behalf it is said, correctly, that the proper law of the TDT is that of Jersey; and that, under the Guernsey choice of law rules, that express choice of law must be fully respected. Reference is made to section 3(1)(a) of the Trusts (Guernsey) Law. At paragraph 46 it is said, again correctly, that the Glenalla, Thorson and Oscatello loans are all "transactions" for the purposes of article 32 of the Trusts (Jersey) Law; and that each of Glenalla, Thorson and Oscatello is the "other party" to those transactions for the purposes of article 32(1)(a) of that Law. Further, it is said that each of those companies knew that, in entering into the transactions (in the case of Glenalla and Thorson, the deeds of novation and in the case of Oscatello the discharge of the former trustees liability to Kaupthing), the former trustees were acting as trustees. In those circumstances, it is said (at paragraph 47): "Article 32(1)(a) is mandatory and will apply regardless of other factors". That assertion, if I may say so, is not well founded. As I have sought to explain, the question whether this Court is required to apply article 32 of the Trusts (Jersey) Law is not determined (without more) by the fact that the proper law of the TDT is the law of Jersey: that question turns on whether, in the circumstances of this case, section 65 of the Trusts (Guernsey) Law requires this Court to treat the enforcement of third party claims against the former trustees as governed by the proper law of the transactions under which those claims arise or by the proper law of the trust of which the parties against whom those claims are made are (or were) trustees.

189. The BVI Companies go on to submit (at paragraph 47 of their skeleton) that the effect of article 32(1)(a) of the Trusts (Jersey) Law, being mandatory, is (i) that any claim by the lender shall be "against the trustee as trustee" and (ii) that the claim shall "extend only to the trust property". It is said that:

> "49. The first of these, read in conjunction with subparagraph (1)(b) (which provides, in those circumstances, that a claim 'may be made against the trustee personally') is intended to distinguish between a trustee's personal liability and its liability as trustee, with the effect of Article 32(1)(a) being to limit the liability of a trustee, in relation to transactions falling within the article, to liability only *as trustee*. This has the further effect of rendering irrelevant the state of account which may exist between the trustee, personally, and the trust

fund.

50. The second consequence limits the liability of the trustee as trustee to the trust property. With the removal of the trustee's personal liability, the limitation of the liability, as trustee, to the trust property must result in the counterparty to the relevant transaction being entitled to have its claim satisfied out of the trust property and, consequentially, to the imposition of an obligation on the trustee to have regard to the liability to the transaction counterparty in the administration of the trust fund.

51. Anything less would put the counterparty at a massive disadvantage and would leave the transaction counterparty/creditor entirely at the mercy of the trustee and the beneficiaries who would be free to deal with the trust fund in any way they wished, without regard to any obligation to the trust creditors. It would be absurd to suggest that Article 32(1) merely caps the trustee's personal liability to the value of the trust property, leaving all other aspects of the non-statutory regime in place. There is no reason to think that the legislature would have intended to so seriously prejudice trust creditors in this way whilst seeking to protect trustees. This is all the more so given the mandatory nature of the article, permitting no avoidance, even by agreement. This analysis, relying on what is in effect the trustee's representative position, is coherent and fits without difficulty in what is the obvious scheme of Article 32."

I have to confess that I have not found that analysis easy to follow. I think that it is being said that the effect of article 32(1)(a) of the Trusts (Jersey) Law – in a case to which that article applies – is to impose on the trustee an obligation, owed to the third party creditor, to ensure that the value of the trust property is preserved to the extent necessary to satisfy the debt; and that, if the trustee fails to ensure that the trust property is preserved to the extent necessary to satisfy the debt, then it is not entitled to rely on the article. That reflects the contention advanced at paragraph 56.3 of the Further Amended Defences. But I may have misunderstood the point. What is, I think, plain is that the BVI Companies do not accept that the former trustees are entitled to rely on article 32(1)(a) to limit their personal liability: the issue raised by paragraph 55 of the Further Amended Defences. I have reached the conclusion that the BVI Companies are correct to take the position that the former trustees cannot rely on article 32(1)(a); but I am conscious that I have done so by a different route.

190. I should, perhaps, add that the question whether the former trustees are entitled to rely on article 32 of the Trusts (Jersey) Law arises because they - being Guernsey corporations, based in Guernsey, but trustees of a Jersey trust - have chosen to carry out the administration of that trust in Guernsey; and, in the course of so doing, have entered into transactions of which the proper law – as they contend and I have been content to assume - is the law of Guernsey (and, on any view, is not the law of Jersey). No doubt

there were good reasons for that choice; but, having made the choice, the former trustees have denied themselves the protection from personal liability which would have been afforded by article 32(1)(a) of the Trusts (Jersey) Law if they had insisted (as, no doubt, they could have done) that the transactions were effected by agreements in writing which contained a term that the proper law of the transactions was the law of Jersey.

Was it a term of the legal obligations assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson loan and/or the Oscatello loan that they were not personally liable.

191. I turn, now, to address what Advocate Wessels, on behalf of the former trustees, described (transcript, 28 June 2012, page 136, lines 1 - 13) as their "fallback position": that it was a term of the legal obligations assumed or undertaken by the former trustees in respect of the Glenalla loan, the Thorson loan and/or the Oscatello loan that they were not personally liable as borrowers in respect of such loans. The issue is raised by sub-paragraph 15.5 of the Amended Application. In the circumstances that (i) it is common ground that the loans were interest free and (ii) sub-paragraphs 15.2, 15.3 and 15.4 of the Amended Application have been withdrawn (so that paragraph 15 of that pleading must be read as if those sub-paragraphs had been deleted by amendment), it is the only issue under the second head of relief claimed which remains for determination. In the circumstances that it was accepted on behalf of the former trustees (transcript, 28 June 2012, page 32, lines 19-22) that "not personally liable as borrowers" meant no more than "not liable as borrowers beyond the extent of the trust assets", it is not, I think, submitted that the implied contractual term (if any) would differ in scope from the provision in article 32(2)(a) of the Trusts (Jersey) Law 1984 as amended (if that provision were applicable).

192. The former trustees submit (at paragraph 43 of their outline closing written submissions) that "on their true construction, and/or by virtue of an implication of a term of the loan arrangements, they are not personally liable to the BVI Companies on the shareholder loan arrangements". It may, perhaps, be said that, in so far as that is the effect of the loan arrangements "on their true construction", there is no room for an implied term: if, as a matter of construction that is the effect of the words which the parties have used, there is no need to imply a term. But I am content to approach the submission on the basis that, in the present context, construction/implied term are to be treated as two ways of putting the same point.

The position in relation to the Glenalla loan and the Thorson loan

193. The submissions advanced on behalf of the former trustees (in this context) were developed at paragraphs 102 to 108 of their opening skeleton argument; and, briefly, in the oral closing submissions made on their behalf (transcript, 28 June 2012, page 152, line 7, to page 153, line 12). They may be summarised as follows:

(1) ITGL was party to both the Glenalla loan and the Thorson loan in its capacity as trustee of the TFT.

(2) Although neither the Glenalla loan nor the Thorson loan (at the time when those loans were made by Glenalla and Thorson to the TFT) were the subject of written agreements, the obligations of the former trustees, as trustees of the TDT, in respect of those loans arise under the deeds of novation executed on 24 August 2007. The deeds of novation did contain express statements that ITGL was entering into the deeds in its capacity as trustee of the TFT and that the former trustees were entering into the deeds in their capacity as trustee of the TDT.

(3) The loans were internal arrangements "between the Former Trustees (acting as such) and companies in which the TFT (*sic*) held shares – that is, companies within the trust structure." Their purpose was to move funds within the structure, from those companies (particularly Thorson) which had funds available to them to those companies which required them; and to do so in a manner that did not give rise to potentially adverse taxation consequences by generating income within the structure. Furthermore, the purpose of moving the funds was to use the money for the benefit of the trust estate, by permitting investments to be purchased or serviced, or for the payment of necessary administrative expenses.

(4) Accordingly, as in *Brown v Rysaffe Trustee Company (CI) Limited* [2011] Scots CS CSOH 26, the relevant agreements were entirely internal to, and solely for the purposes of the trust. Unlike the transactions in the earlier Scottish cases of *Lumsden v Buchanan* (1865) Macq 950 and *Muir v City of Glasgow Bank* (1879) LR 4 App Cas 337 – to which extensive reference was made in *Rysaffe* - the loan transactions were not transactions with external third parties who could reasonably have expected that ITGL (or the former trustees) would be assuming a personal liability.

(5) Given that, at the material times the directors of both Thorson and Glenalla were GFT and Finistere – companies owned and controlled by ITGL - all of the parties were aware that ITGL was acting as trustee of the TFT and that the purpose of the

transactions was as described.

(6) The individuals concerned were all operating in a jurisdiction (Guernsey) which made statutory provision for the exclusion of a trustee's personal liability in circumstances where the party with whom the trustee is contracting knows that he is contracting in that capacity; and in the context of a trust (the TDT) governed by Jersey law, which contains a similar provision.

(7) Mrs Bleasdale did not have authority to bind ITGL personally.

(8) The loans were recorded in "trust" ledgers and not in ITGL's own corporate books of account; and were not reflected in ITGL's own balance sheet.

In those circumstances, it is said, the proper inference is that the parties to the loan arrangements did not intend that ITGL should incur a liability which extended to its own assets.

194. The submissions advanced under sub-paragraphs (1), (2) and (5) of that summary are not in dispute. In support of the submissions advanced under sub-paragraphs (3), (7) and (8) the former trustees rely on the evidence of Mrs Bleasdale and Mr Clifford. At paragraphs 59 to 61 of her witness statement (in a section headed "The terms of the intra-structure loans") Mrs Bleasdale stated:

> "59 The loan arrangements were referred to internally as shareholder loans and they were always stated to be interest-free, unsecured and repayable on demand. There were also no formal loan agreement documents for loans between companies of which GFT and Finistere were the directors and/or the trustee(s) of the TFT or the TDT, with the terms instead recorded in the relevant resolutions approving the making or receiving of such a loan. It was ITGL's policy that resolution should be made by the trustees (of the TFT and then the TDT), the borrower and lender companies, and all other companies through which the funds passed.
>
> 60 I understood the way the shareholder loans worked in practice was that, if a company to whom a loan was made did not have sufficient funds to repay that loan, no enforcement action would be taken and no demand for repayment would be made. No real consideration was being given to how those loans were going to be repaid precisely because they were intra-group loans. Consideration of repayment would only arise in the circumstances where the borrower company had funds available and these funds were required elsewhere. This was, in my experience, not an uncommon practice to adopt in a trust structure.
>
> 61 It was also consistent with Investec Trust Group policy. This policy was set out in a written document dated 1 August 2007 (and, to the best of my knowledge, a similar policy applied before this date . . .) . . . . For intra-group loans where the group is managed by ITGL, it states:
>
> > '- We will not require a loan agreement to be drawn up unless there is a legal, tax or client requirement to do so.

> -The approval, payment and receipt of such loans will be noted and recorded by way of trustee resolutions and/or company minutes (as appropriate)."
>
> Under the category of loans to trust beneficiaries or company shareholders, it is stated that 'Loans may be made on terms appropriate to the circumstances whereby they may be at interest or interest free, secured or unsecured, repayable on demand or otherwise'."

At the trial, in the course of cross-examination by Advocate Greenfield on behalf of the BVI Companies (transcript, 13 June 2012, page 200, lines 1-6), Mrs Bleasdale told the Court that the policy stated in the second sub-paragraph of paragraph 61 had no application to loans made between a company within the trust structure and the trustee itself. At paragraph 68 of her witness statement she said this:

> "68 Although ITGL, as trustee of the TFT or the TDT, was often one of the parties to a shareholder loan, there was no concern on my part that we were placing ITGL under a personal liability to repay a shareholder loan. The shareholder loans were internal arrangements between the Former Trustees, acting as trustees, and companies held within a trust structure. It would not have crossed my mind that, in those circumstances, a trustee could be personally liable and I knew I did not have authority to bind ITGL personally. The shareholder loans were never reflected on ITGL's own balance sheet because ITGL was only acting in the capacity of trustee and I was always careful to ensure that ITGL was stated to be only acting in its capacity as trustee. This was something I had learnt in my previous employment and it was the practice at ITGL. . . ."

Mr Clifford's evidence was to the same effect. At paragraph 33 of his witness statement he said this:

> "33 I never considered that the Former Trustees would have become personally liable as a result of any of the inter-company loan arrangements. I would be surprised if it was the position under Guernsey law that in entering into the inter-company loans or in the making of any entries in relation to them the Former Trustees were assuming personal liability – but I am not an expert."

195. I accept that Mrs Bleasdale saw the loans, when made, as internal arrangements between ITGL (as trustee of the TFT) and the companies (Glenalla and Thorson) in which the TFT held shares; that she saw the purpose of those arrangements as being to move funds within the group structure in a manner that did not give rise to potentially adverse taxation consequences by generating income within the structure; and that the purpose of moving the funds was to use the money for the benefit of the trust estate, by permitting investments to be purchased or serviced, or for the payment of necessary administrative expenses. I do not accept that was the position as between the former

trustees (as trustees of the TDT) and Glenalla and Thorson, in relation to the Glenalla and Thorson loans, after 24 August 2007 (submission (3)): there was no movement of funds between Glenalla, Thorson and the TDT after that date.

196. I accept that the legislation in both Guernsey and Jersey contains provisions which limit the liability of the trustee of a Guernsey or a Jersey trust (as the case may be) to a third party creditor in a case where the third party knows that the trustee is contracting as such (submission (6)); but I do not accept (i) that that is of relevance in relation to the agreements or arrangements between ITGL (as trustee of the TFT) and Glenalla or Thorson – the TFT was neither a Guernsey nor a Jersey trust (it was established in the British Virgin Islands) - or (ii), so far as alleged (or material), that the individuals concerned with those agreements or arrangements appreciated that that the liability of the trustee of a Guernsey or a Jersey trust (as the case might be) to third party creditors was limited by legislation. In particular, there was nothing in the evidence to suggest that either Mrs Bleasdale or Mr Clifford were aware of the provisions in article 32(2)(a) of the Trusts (Jersey) Law 1984, as amended; or, so far as relevant, the equivalent provisions in section 37 of the Trusts (Guernsey) Law 1989 and its statutory successor, section 42(1) of the Trusts (Guernsey) Law 2007.

197. In advancing those submissions the former trustees rely on observations of Lord Glennie, sitting in the Court of Session (Outer House) in *Brown v Rysaffe Trustee Company (CI) Limited* [2011] Scots CS CSOH 26; and, in particular, on his analysis of the decisions of the House of Lords in *Lumsden v Buchanan* (1865) Macq 950 and *Muir v City of Glasgow Bank* (1879) LR 4 App Cas 337 (submission (4)).

198. In *Lumsden* v *Buchanan* (1865) Macq 950; (1865) 3 M (HL) 89, the defenders were trustees of the marriage settlement of Mr and Mrs Brown. They were authorised to invest money assigned to them in the purchase of shares. They invested the trust funds in acquiring shares in the Western Bank on the terms and conditions specified in a deed to which they subscribed as "Trustees for Mrs E.B. . . ." The Bank was wound up. The liquidators of the Bank brought an action against the trustees for payment of calls. It was held by the trial judge (Lord Kinloch) that the trustees did not undertake any personal liability; and were liable only to such extent as they possessed funds belonging to the trust estate. The Inner House upheld that decision. The House of Lords took a different view. Addressing the argument that trustees who enter into a contract on behalf of the trust estate are not personally answerable for the consequences of that

contract, Lord Westbury, Lord Chancellor, held that there was "no such general rule".

He went on to say this ((1865) 3 M (HL) 89, 93):

> "A trustee may, both in England and in Scotland, so limit and restrict any contract he may enter into, so as to exclude (as between himself and the other parties to such contract) personal liability. But this must be the result of express stipulation, and whether this be or be not the effect of any particular contract, is a question depending on the construction of the instrument, and the nature of the contract."

Lord Cranworth expressed himself in similar terms (*ibid,* 95):

> "... trustees in dealing with third persons may so contract as to exempt themselves from personal responsibility, and to confine those with whom they are dealing to such as they can obtain from the trust funds; whether this is the true effect of any contract into which they are entering, must in every case be a question of construction . . ."

And, he went on (*ibid,* 96) to say this:

> "The true question to be resolved in every case is, whether the circumstances do fairly shew that the contracting parties were dealing only as trustees, and were not intending to incur liability beyond the amount of the trust funds."

The House of Lords held (as appears from the headnote) that:

> ". . . that trustees entering into a trading partnership of this kind were personally liable in the obligations incumbent on the partners both towards creditors and also *inter socios,* unless their liability was expressly limited by special stipulation, and that in this case there was nothing to limit their responsibility."

Commenting on that decision, in *Rysaffe,* Lord Glennie said this ([2011] CSOH 26, at [25]):

> "Lord Wrenbury LC (*sic*) began by identifying the nature of the obligation entered into by the defenders. By signing the deed of annexation, it was as if they had signed the original contract of partnership. He characterised the contention of the defenders as being 'that they became parties to the deed of partnership, and therefore partners in the bank, as trustees only, without any personal liability', with no liability to contribute beyond the amount of money held by them on trust. He described that position is being 'wholly at variance with the spirit and intent of the partnership contract'. It would involve the creation of 'two distinct classes of partners', one class being of partners with unlimited liability and the other of partners with limited liability. It was not in the power of the directors to enter into such a contract or to admit persons as shareholders upon those terms without the agreement of every other shareholder. In those circumstances, the argument that by designing themselves as trustees the defenders excluded their personal liability was inconsistent with the contract entered into. The designation of the defenders as trustees was not useless; it served a purpose of marking the property in the shares as belonging to the trust estate. That purpose was quite consistent with the personal liability of trustees."

199. In *Muir* v *City of Glasgow Bank* (1879) 6 R (HL) 21 the petitioners were the trustees of

a deed of trust-disposition and settlement made by John Murdoch. He held shares in the City of Glasgow Bank. On the death of Mr Murdoch, his daughters, as executrices-dative, executed a supplementary deed of trust making over to the trustees, the whole estate of their father, including those shares. A transfer of the shares was executed to complete their legal title. The transfer described the transferees as "trust-disponees"; and in the stock ledger of the Bank they were entered by their names and addresses followed by the words "as trust-disponees". The Bank went into liquidation and the liquidators entered the trust-disponees in the list of contributories, in effect making them personally answerable for calls. It was held both in the Court of Session and in the House of Lords that, as a result of the transfer and the entry in the register of members, the petitioners became, as individuals, partners of the Company and were subject to calls as contributories in their own right. Lord Cairns, Lord Chancellor said this (*ibid,* 22):

> "Whether in a particular case the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case, the nature of the contract, the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or in the other. I know of no reason why an executor . . . entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the testator."

Lord Blackburn (*ibid*), having referred to the decision in *Lumsden* v *Buchanan*, said this:

> "I have carefully considered the judgments in that case, and I think this much at least must be considered as decided and settled, *viz.*, that trustees (not created by a statute) are by the law of Scotland a body corporate, or, as it has been loosely said, a *quasi* corporation. I have myself no doubt that if individuals enter into a contract because they are trustees and for the benefit of trust it would be prudent in them to stipulate that though they bind themselves to see that the trust-funds are properly applied to fulfil the contract their contract shall extend no further, and that they will not be personally liable to make good the deficiency, if any; and if they express such a limitation with sufficient clearness, and the other contracting party . . . accepts such a limited engagement, he cannot call on the trustees to do more than to fulfil that limited engagement. There was an opinion entertained by many Scotch lawyers, and to some extent countenanced by the decision in this House of *Gordon* v *Campbell* (1 Bell's Appeals, 428), that by the law of Scotland a mere statement on the face of the contract that the contractors were trustees and entered into the contract because they were trustees, was, as a matter of law, enough to express that the engagement was of this limited kind. I do not (speaking for myself) doubt that it is an important element to be taken into consideration in

construing the contract, but I think the decision of *Lumsden* v *Buchanan* determines that it is not by itself enough to give any contract this limited effect, and certainly that it is not enough to do so when the contract is a contract of copartnership, the nature of which would make such a limited engagement, to say the least, very inconvenient."

200. After citing those passages in *Rysaffe*, Lord Glennie went on to say this (*ibid*, [26], [27] and [28]:

> "[26] . . . Another case along the same lines, to which I was referred, is *Brown* v *Sutherland* 1875 2 R 615 in which, again, it was emphasised that if a party wished to bind another and not himself 'he should take care to say so'. It was 'never to be implied'. It is not generally sufficient to add words such as 'as agent' or 'as trustee'.
>
> [27] Mr Richardson [counsel for the pursuer] argued that, even if the Loan Agreement was to be construed so as to show that the defenders entered into it as Trustee for the Trust, that would not restrict their liability in the manner sought. I do not think that the position is as simple as that. Lord Blackburn in *Muir* v *City of Glasgow Bank* said that it was not always enough of itself; but it was an important element to be taken into account in construing the contract. The nature of the contract was important. Lord Cairns LC clearly thought that it was a question to be determined having regard to all the circumstances, including the nature and the subject matter of the contract. So too did Lord Wrenbury LC (*sic*) and Lord Cranworth in *Lumsden* v *Buchanan*. The contracts in those cases were contracts of copartnership. In such contracts there are obvious difficulties, highlighted in the speech of Lord Wrenbury LC, in one party seeking to limit his liability. So too in many, possibly most, everyday contracts. The circumstances of the present case are, however, very special. They point clearly to the defenders having contracted as trustees only. That was the nature of the Scheme. The Trust was making the loan available to the employee. Why would the defender advance the loan at all if it were not acting as Trustee? On what basis could be thought that the defender, though advancing the loan as Trustee, was assuming personal liability for the tax consequences of waiving repayment of that loan?
>
> [28] For those reasons I am satisfied that on a proper construction of the Loan Agreement the defenders did not assume any personal liability. To adapt the expression used by Lord Cairns LC in *Muir* v *City of Glasgow Bank*, they entered into the Loan Agreement and undertook obligations thereunder as trustee only."

201. It is submitted on behalf of the BVI Companies (transcript, 28 June 2012, page 32, line 23, to page 24, line 2, page 57, line 20, to page 62, line 12) that *Rysaffe* was wrongly decided. But, it is not, I think, necessary, to decide that point. It is plain that *Rysaffe* was decided upon its own facts: and it is plain, from the decisions of the House of Lords in *Muir* and in *Lumsden*, that the question whether, in a contract made with a trustee the parties have agreed that the liability of the trustee is limited to the extent of the trust assets is to be determined by construing the contract in the light of all the circumstances

of the particular case. Decisions in other cases, on their own particular facts, are of limited assistance.

202. The BVI Companies point to Recital (A) in the deeds of novation; and, in particular, to the sentence: "The Loan Facility is unsecured, interest free and repayable on demand ('the Terms'). They point to the second sentence in Recital (C): "The Company has agreed to release the Trustee from the performance of the Loan Facility upon the terms that the Transferee Trustees shall jointly and severally undertake to perform the Loan Facility and to be bound by the Terms." And they point to the obligation of the Transferee Trustees under clause 1: "The Transferee Trustees jointly and severally undertake to perform all the obligations of the Trustee under the Loan Facility and to be bound by the Terms in every way. It is submitted on their behalf, that there is no basis on which to imply an additional term – that the former trustees are not to be personally liable in respect of the obligations assumed under the deeds of novation beyond the extent of the trust assets – by way of qualification or limitation of the express obligation to repay in accordance with "The Terms"; which, themselves, contain no mention of such limitation.

203. The BVI Companies referred the Court to the principles recently restated by the Judicial Committee of the Privy Council in *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10; [2009] 1 WLR 1988 and to the observations of Lord Clarke of Stone-cum-Ebony, Master of the Rolls, in *Mediterranean Salvage and Tonnage Limited v Seamar Trading and Commerce Inc* [2009] EWCA Civ 531; [2009] 2 Lloyd's Rep 639.

204. In *Attorney General of Belize*, Lord Hoffmann, delivering the judgment of the Judicial Committee, said this ([2009] UKPC 10, [16] to [27]):

> "[16] Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of

Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

[17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

[18] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority.

[19] In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:

> '[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'

[20] More recently, in *Equitable Life Assurance Society v Hyman* [2002]1 AC 408, 459, Lord Steyn said:

> 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'

[21] It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the

implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

[22] There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is 'necessary to give business efficacy' to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word 'business', is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which Equitable *Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word 'necessary', is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[23] The danger lies, however, in detaching the phrase 'necessary to give business efficacy' from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p. 459) when he said that in that case an implication was necessary 'to give effect to the reasonable expectations of the parties.'

[24] The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68:

> 'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men'.

[25] Likewise, the requirement that the implied term must 'go without saying' is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 is celebrated throughout the common law world. Like the phrase 'necessary to give business efficacy', it vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the

Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander 'Could you please explain that again?' does not matter.

[26] In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282-283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was 'not … necessary to review exhaustively the authorities on the implication of a term in a contract' but that the following conditions ('which may overlap') must be satisfied:

> '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'.

[27] The Board considers that this list is best regarded, not as series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of 'necessary to give business efficacy' and 'goes without saying'. As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant."

205. In *Mediterranean Salvage and Tonnage Limited v Seamar Trading and Commerce Inc* [2009] EWCA Civ 531 Lord Clarke, Master of the Rolls, observed (at paragraph [9]) that Lord Hoffmann's analysis in *Attorney General of Belize* (as set out in the paragraphs just cited) "repays detailed study"; but that for the purposes of the appeal with which he was concerned it was sufficient to say "that the implication of a term is an exercise in the construction of the contract as a whole". He went on to say (at paragraph [12]]) that the central part of Lord Hoffmann's reasoning was to be found in the passage from paragraph [21] to the first part of paragraph [25]. At paragraph [13] he drew attention to Lord Hoffmann's warning against considering the subjective state of mind of the parties or their representatives; and emphasised that "the question how the actual parties would have reacted to the proposed amendment was irrelevant" and "that it was not necessary for the implied term to be obvious in the sense of being

immediately apparent". And, at paragraphs [14] and [15], after referring to Lord Hoffmann's reference to the observations of Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*, he set out the conclusion reached in paragraph [27] of Lord Hoffmann's analysis and said this:

> "[15] It is thus clear that the various formulations of the test identified by Lord Simon are to be treated as different ways of saying much the same thing. Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable. This point is clear, for example, from the well-known speech of Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, where he rejected at page 253H to 254A the approach of Lord Denning, which was to permit the implication of reasonable terms. He identified two classes of implied term in the case (as here) of a complete, bilateral contract. He said that in a case of established usage the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. That is not, in my opinion, this case. Lord Wilberforce added at page 253G:
>
> > 'In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it, the contract will not work – this is the case, if not of *The Moorcock* . . .itself on its facts, at least of the doctrine of *The Moorcock* as usually applied.'
>
> Lord Wilberforce stressed that the test is one of necessity. Is it necessary to make the contract work?"

206. Lord Clarke went on to say this:

> "[16] I should also note that, since the end of the argument, Rix LJ has drawn my attention to what he described in *Socimer Bank Limited v Standard Bank Limited* [2008] EWCA Civ 116, [2008] Bus LR 1304, [105] as a useful and authoritative modern restatement of the relevant principles by Sir Thomas Bingham MR, giving the judgment of this court, which also comprised Stuart-Smith and Leggatt LJJ, in *Phelps Electronique Grand Public SA v British Sky Broadcasting Limited* [1995] EMLR 472.
>
> [17] Rix LJ quoted an extensive passage at pages 480 to 482 in *Phelps*. So I will not do the same but will content myself with these few points, which seem to me to underline the principles stated by Lord Hoffmann but also to stress the importance of the test of necessity. Thus, after saying that both parties accepted the propositions stated by Lord Simon in the *BP Refinery* case (and quoted by Lord Hoffmann), Sir Thomas Bingham said that they distilled the essence of much learning on implied terms but that their simplicity could be almost misleading. He then said this: '
>
> > 'The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties

themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power.'

[18] Reference was then made to cases in which terms are routinely and unquestionably implied, as in the case of a term that a surgeon will exercise all reasonable care and skill. He added:

'But the difficulties increase the further one moves away from these paradigm examples. … It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue. Given the rules which restrict evidence of the parties' intention when negotiating a contract, it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.

The question of whether a term is to be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. For, as Scrutton LJ said in *Reigate v Union Manufacturing Co (Ramsbottom) Limited* [1918] 1 KB 592 at 605:

'A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties have not themselves expressed . . .'

And it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown that one of several possible solutions would without doubt have been preferred: *Trollope & Colls* . . . . at 609-10, 613-14.'

The significance of both *Liverpool City Council v Irwin* and the *Phillips Electronique* case is that they both stress the importance of the test of necessity. Is the proposed implied term necessary to make the contract work? That seems to me to be an entirely appropriate question to ask in considering whether a term should be implied on the assumed facts in this case."

207. Applying those principles to the circumstances of the present case, it is submitted on behalf of the BVI Companies that there is no basis for construing the deeds of novation so as to limit the liability of the former trustees (as Transferee Trustees) in respect of the obligations in respect of the Glenalla loan and the Thorson loan which they were

assuming (or undertaking) to the extent of the assets of the TDT; or for implying a term to that effect. I accept that submission: in the sense that, if the obligations of ITGL (as trustee of the TFT) in relation to the Glenalla loan and the Thorson loan which the former trustees assumed (or undertook to discharge) under the terms of the deeds of novation were not, themselves, such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT), there would be no basis for holding that the effect of the deeds of novation was that, following novation, the obligations of the former trustees (as trustees of the TDT) in relation to those loans were such that the former trustees were not personally liable (but liable only to the extent of the assets of the TDT).

208. Nevertheless, as I have said, it is submitted on behalf of the former trustees that, properly understood, the terms of the new contracts between the former trustees and Glenalla and Thorson (which arose under the deeds of novation) were the same as those of the contracts which they respectively replaced. So, it is submitted, it is not enough to ask whether, on the true construction of the deeds of novation (or by reason of a term to be implied in those deeds), the obligations of the former trustees in relation to the Glenalla loan and the Thorson loan were such that the former trustees were not personally liable (but only to the extent of the assets of the TDT). There is a prior question: whether the obligations of ITGL (as trustee of the TFT) in relation to those loans were such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT). If the answer to that prior question is "Yes", then, it is said, the deeds of novation must be construed so that the obligations which are assumed or undertaken by the former trustees are such that they are not personally liable (but liable only to the extent of the assets of the TDT); or a term must be implied to that effect.

209. In my view the former trustees are correct to submit that it is not enough to ask whether, on the true construction of the deeds of novation (or by reason of a term to be implied in those deeds), the obligations of the former trustees in relation to the Glenalla loan and the Thorson loan were such that the former trustees were not personally liable (but only to the extent of the assets of the TDT): there is a prior question. But, as it seems to me, the answer to that prior question - whether the obligations of ITGL (as trustee of the TFT) in relation to those loans were such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT) – is "No".

210. I reach that conclusion on the premise that, as the former trustees contend, the proper

law of the agreements (or arrangements) between ITGL (as trustee of the TFT) and Glenalla or Thorson (as the case may be) is the law of Guernsey. But, given that it has not been suggested that the law of Guernsey in relation to the implication of terms differs from the law of the British Virgin Islands (or that the law of either Guernsey or the law of the British Virgin Islands differs from the law of England) nothing turns on whether that premise is correct.

211. It seems to me obvious that the question – "is ITGL (as trustee of the TFT) to be personally liable to repay the monies lent by Glenalla (or Thorson, as the case may be)?" – would have received no consideration at all by those individuals involved in the transactions at the time when the obligations of ITGL arose. For so long as ITGL controlled Glenalla and Thorson and those companies remained solvent, the question would not arise: repayment of the loans would not be sought by Glenalla or Thorson in circumstances in which it did not suit ITGL to repay out of the assets of the TFT. The question only arises in circumstances in which ITGL (or the borrower for the time being) ceases (or the group of which it is a member ceases) to control the lender: typically, where the lender becomes insolvent. The relevant question, therefore, as it seems to me, is whether a reasonable man – informed of all the circumstances – would understand that, in the event that the borrower for the time being ceased to control the lender (and, in particular, in the event that the lender had become insolvent), the obligations of the borrower for the time being, if a trustee, was to be limited to the assets of the trust. Or, to put the point in the terms favoured by the Court of Appeal of England and Wales in the *Mediterranean Salvage and Tonnage Limited* case, whether a term to that effect was "necessary to make the contract work". As I have indicted, I think that the answer to that question is "No". If that is the correct view, then there is no basis on which the Court can hold that the obligations of ITGL (as trustee of the TFT) in relation to the Glenalla loan and the Thorson loan were such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT); and so no basis upon which it can be held that the obligations of the former trustees in relation to those loans are such that the former trustees are not personally liable (but liable only to the extent of the assets of the TDT) .

The position in relation to the Oscatello loan

212. I have held that the obligations of the former trustees in respect of the Oscatello loan do not arise – or, at least, do not arise directly - under a contract to which they and

Oscatello were parties. As I have explained, those obligations arise under the general law. The relevant question in that context, as it seems to me, is whether, in the circumstances in which Oscatello instructed Kaupthing to pay £39,366,791 to the Investec Trust loan account 5962 in settlement of the debt owed by the former trustees to Kaupthing on that account, the obligation of the former trustees to repay to Oscatello an amount equal to that sum which arose under the general law is to be treated as subject to the limitation that the former trustees were not to be personally liable beyond the extent of the trust assets. The answer to that question does not turn on the implication of a contractual term into a loan contract between the former trustees and Oscatello (there was no such contract); but, in determining whether the obligation which arises under the general law is to be treated as subject to the limitation on which the former trustees seek to rely, it is, I think, relevant to consider whether there was a contractual term to that effect in the contract between the former trustees and Kaupthing under which the debt which the former trustees owed to Kaupthing (and which was paid by Oscatello at the request or with the consent of the former trustees) was payable. Absent an express term agreed between the former trustees and Oscatello at the time when Oscatello paid that debt (and so relieved the former trustees of their obligation to Kaupthing), it would be inconsistent with the restitutionary principles upon which the general law imposes an obligation on (B) to repay (A) an amount equal to the amount which (A), at the request or with the consent of (B), has paid (C) in discharge of the debt owed by (B) to (C) if that obligation were more (or less) burdensome than (B)'s obligation in respect of the debt which has been discharged.

213. The former trustees' obligations to Kaupthing in respect of the monies owing on Investec Trust loan account 5962 arose under a deed of novation, also dated 24 August 2007, made between ITGL (as trustee of the TFT) (the "Transferor"), the former trustees (as trustees of the TDT) (the "Transferee") and Kaupthing (the "Lender"). As recited in that deed, its purpose was to transfer by novation to the former trustees (*inter alia*) the obligations of ITGL (as trustee of the TFT) under the August 2007 Kaupthing loan facility agreement. By clause 2(b) of the deed of novation the former trustees (as Transferee) undertook with Kaupthing (as Lender) to accept, observe, perform and discharge all of the Transferor's duties, liabilities and obligations arising under the terms of the loan facility agreement.

214. For reasons similar to those already set out in relation to the Glenalla Deed of Novation

and the Thorson Deed of Novation, I am satisfied that there is no basis for construing the Kaupthing deed of novation so as to limit the liability of the former trustees (as Transferee) in respect of the obligations in respect of the August 2007 Kaupthing loan facility agreement which they were assuming (or undertaking) to the extent of the assets of the TDT - or for implying a term to that effect – unless it can be said that the obligations of ITGL (as trustee of the TFT) in relation to the August 2007 Kaupthing loan facility were, themselves, such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT).

215. The August 2007 Kaupthing loan facility agreement is governed by English law (clause 29). It is, plainly, a professionally drawn document of some complexity. It contains no express provision to the effect that ITGL will not be personally liable upon its covenant (as a "Borrower") to repay the amount of any "Loan" made under the facility (clause 8); and, in my view it is impossible, consistently with the principles set out in the English cases to which I have referred - *Attorney General of Belize* and *Mediterranean Salvage and Tonnage Limited* to construe the agreement so as to impose such a limitation or to imply a term to that effect. I do not understand the former trustees to contend otherwise.

216. In those circumstances I am satisfied that there is no basis on which the Court can hold that the obligations of ITGL (as trustee of the TFT) in relation to the 2007 Kaupthing loan facility agreement were such that ITGL was not personally liable (but liable only to the extent of the assets of the TFT); and so no basis upon which it can be held that the obligations of the former trustees in relation to Oscatello loan are such that the former trustees are not personally liable (but liable only to the extent of the assets of the TDT).

Issue 6: (A) Whether, on the basis of any of the matters alleged to constitute unreasonable or improper conduct (if established) and, if so, which of those matters ("the relevant matters"), it would be open to the Court, as a matter of law, to hold that the liabilities (if any) incurred by the former trustees in relation to the Glenalla loan, the Thorson loan and the Oscatello loan were not liabilities "reasonably incurred in connection with the TDT" for the purposes of article 26(2) of the Trusts (Jersey) Law 1984; and, if so (B) whether any of the relevant matters (and, if so, which) did constitute unreasonable conduct on the part of the former trustees so as to deprive them of the right to rely on article 26(2) of that Law.

217. Section 26(2) of the Trusts (Jersey) Law provides that:

> "A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust."

In contrast to section 32 of the Law - which, as I have sought to explain, is directed to the rights of third parties (strangers to the trust) against the trustees - section 26(2) is concerned with the trustees' rights against the trust fund: that is to say, with rights as between the trustees and the beneficiaries which are internal to the trust. There is, in my view, no doubt that this Court is required, by section 65(2) of the Trusts (Guernsey) Law, to give effect to section 26(2) of the Trusts (Jersey) Law. The contrary has not been suggested. The section gives effect to the general principle, explained in *In re Internine and Intertraders Trusts* [2006] JLR 176, [18], that a trustee acting reasonably and in the exercise of his duties is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred.

218. Practical effect is given to that right by the terms of the declaration of trust, dated 26 March 2007, by which the TDT was established. Clause 10.4 provides that:

> "10.4 Any Trustee hereof shall have the right upon ceasing to be a Trustee or upon a distribution of assets forming part or all of the Trust Fund to withhold such assets as it shall in good faith consider necessary in respect of any liability, whether contingent or otherwise, which is properly chargeable against the Trust Fund or the income thereof and to which it may by virtue of having acted as a Trustee hereof be or become subject."

The former trustees rely upon that provision: see paragraph 38B of the Amended Application.

219. The present trustee asserts (at clause 5.9 of its written opening submissions) that, under the law of Jersey, a trustee may be deprived of his or her right to indemnity in circumstances where (i) the trustee has incurred the liabilities or expenses for his or her own benefit rather than for the benefit of the trust or the beneficiaries; (ii) where, in incurring the liabilities or expenses, the trustee has committed a breach of trust (save where the breach is an innocent breach of trust); and (iii) where the liabilities were not "reasonably incurred": *Alhamrani v JP Morgan Trust Co (Jersey) Ltd* [2007] JLR 527, [53], [57]–[62]; *In re E, L, O and R Trusts* [2008] JLR 360, [42]. It points out that, in the latter case, it was said that "the general approach remains that a trustee which is acting in good faith in what it appears to be the best interests of the trust and the beneficiaries as a whole will not be deprived of its costs unless it has behaved unreasonably".

220. As I have said, earlier in this judgment, the matters said to constitute unreasonable or improper conduct by the former trustees – and so to disentitle them to any right of indemnity or exoneration to which they might otherwise be entitled – go beyond conduct directly related to the entry into the transactions by which the liabilities in respect of which the former trustees seek indemnity or exoneration arose. It is clear that the present trustee contends that a trustee who has acted unreasonably or improperly in relation to the liabilities incurred (whether or not that conduct related directly to the entry into the transactions by which the liabilities in respect of which the former trustees seek indemnity or exoneration arose) is unable to rely on the right conferred by article 26(2) of the Trusts (Jersey) Law 1984. In particular, the present trustee contends that the former trustees are unable to rely on the right conferred by article 26(2) of that law because, it is said, they have acted unreasonably or improperly in failing to extinguish (or otherwise divest themselves of) the liabilities in relation to the Glenalla loan, the Thorson loan and the Oscatello loan which they incurred, assumed or undertook to discharge. I do not accept that contention. It seeks to import into article 26(2) of the Trusts (Jersey) Law words of limitation which the legislature has not thought fit to include. I am not persuaded that the right conferred by that article is to be cut down by reading it as if the phrase "liabilities reasonably incurred" was qualified by the words "and reasonably permitted to subsist". If a person interested in the trust - the present trustee or a beneficiary – contends that a trustee has acted unreasonably in permitting liabilities reasonably incurred to persist (when, for example, there was an opportunity to extinguish those liabilities), the remedy is to claim damages for breach of trust or equitable compensation. But, in a case such as the present, the question, then, is not whether the former trustees acted unreasonably in failing to extinguish the liabilities; but whether they were guilty of wilful default or gross negligence: clause 9.1 of the declaration of trust. Reading into article 26(2) of the Trusts (Jersey) Law words of limitation which the legislature has not thought fit to include would have the effect of depriving trustees, in this context, of the protection against liability for breach of trust (absent wilful default or gross negligence) which is afforded by provisions commonly included in trust instruments for the protection of professional trustees.

221. As I have said, the former trustees incurred liabilities in relation to the Glenalla loan and the Thorson loan when they entered into the Glenalla Deed of Novation and the Thorson Deed of Novation (respectively) on 24 August 2007. To state the obvious, liabilities in relation to those loans incurred by ITGL (as trustee of the TFT) before 24

August 2007 were not liabilities incurred by the former trustees (as trustees of the TDT) until 24 August 2007. In addressing the issue "were those liabilities reasonably incurred by the former trustees", the relevant question is whether the liabilities were reasonably incurred by the former trustees on 24 August 2007; not whether the liabilities were reasonably incurred by ITGL (as trustee of the TFT).

222. The former trustees incurred liabilities for loans made by Kaupthing under the August 2007 Kaupthing loan facility agreement when they assumed, or undertook, those liabilities under the relevant deed of novation with ITGL and Kaupthing on 24 August 2007. They incurred liabilities in relation to what has been described as the Oscatello loan on or about 21 December 2007 when Oscatello discharged their existing liabilities to Kaupthing under the August 2007 Kaupthing loan facility agreement and the deed of novation. In addressing the issue "were those liabilities reasonably incurred by the former trustees", the relevant questions are whether the liabilities were reasonably incurred by the former trustees on or about 21 December 2007 (when they requested, or acquiesced in, the discharge by Oscatello of their existing liabilities to Kaupthing) or, perhaps, on 24 August 2007 (when they assumed, or undertook, those liabilities by entering into the deed of novation).

Whether, on the basis of any of the matters alleged to constitute unreasonable or improper conduct, it would be open to the Court, as a matter of law, to hold that the liabilities (if any) incurred by the former trustees in relation to the Glenalla loan and the Thorson loan were not liabilities reasonably incurred in connection with the TDT.

223. I have set out earlier in this judgment, the matters said to constitute unreasonable conduct by the former trustees, so as to disentitle them to any right to reimbursement out of the assets of the TDT under section 26(2) of the Trusts (Jersey) Law. As I have said, those matters are grouped under three heads: (i) creation and acceptance of accounting entries, (ii) failure to extinguish any liability on or shortly after the creation of the Oscatello structure and (iii) failure to render valid the July book 2008 entries, the October book 2008 entries or the March 2009 transaction.

224. Under the first of those heads it is said that ITGL, as trustee of the TFT, acted unreasonably and/or improperly in making the Accounting Entries which purported to show multiple obligations where no such obligations actually existed, were unnecessary and were not made as a result of any legal, tax or accounting advice (paragraph 70 of the Defence). In my view it is not open to this Court to hold that the conduct of ITGL as

trustee of the TFT at the time when it incurred liabilities to Glenalla and Thorson constituted unreasonable conduct by the former trustees at the time (24 August 2007) when, as trustees of the TDT, they assumed, or undertook to discharge, those liabilities. Further, I reject the submission that, in failing to novate such loan obligations "so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT", the former trustees could be said to have acted unreasonably at the time (24 August 2007) when they assumed, or undertook to discharge those liabilities. I accept that the conduct of the former trustees in "accepting that multiple loan obligations were created 'by virtue of the upstreaming and downstreaming involved in the Accounting Entries'" (if established) and in "accepting a novation of such notional obligations in August 2007 in circumstances where [it is said] the Accounting Entries 'should simply have been replaced by a direct loan obligation by the company which received the funds to the company which actually transferred them before the transfer of assets from the TFT to the TDT' (paragraph 71 of the Defence), if shown to be unreasonable in the circumstances, would, as a matter of law, permit the Court to hold that the former trustees were not entitled to a right to reimbursement out of the assets of the TDT under section 26(2) of the Trusts (Jersey) Law in respect of their liabilities in relation to the Glenalla loan and the Thorson loan. Whether or not their conduct in that respect did have such effect is addressed later in this judgment.

225. Under the second of those heads it is said that the former trustees acted unreasonably or improperly in failing to extinguish their liabilities in relation to the Glenalla loan and the Thorson loan "on or shortly after the creation of the Oscatello structure" in circumstances where, it is said, they and Kaupthing "knew that Kaupthing's further lending to the Oscatello structure was intended to be non-recourse to the rest of the TDT assets"; and, further, in failing to ensure that the July 2008 book entries, the October 2008 book entries and or the March 2009 transaction were "carried out promptly on or shortly after the creation of the Oscatello structure". Plainly, the conduct of the former trustees at or after the creation of the Oscatello structure (in December 2007) cannot be said to be conduct which led to the liabilities in relation to the Glenalla loan and the Thorson loan being "unreasonably incurred" at the time (24 August 2007) when those liabilities were incurred by the former trustees. Nothing which occurred in December 2007, or thereafter, varied or otherwise affected the liabilities of the former trustees in relation to the Glenalla loan or the Thorson loan. In

my view it is not open to this Court to hold that the conduct of the former trustees, in or after December 2007, in failing to divest themselves of their liabilities in relation to the Glenalla loan and the Thorson loan could lead to the conclusion that those liabilities were not "reasonably incurred" in August 2007.

226. Under the third of those heads it is said that the former trustees acted unreasonably and/or improperly "in failing to do more to render the July 2008 entries, the October 2008 entries and the March 2009 transaction valid". For reasons similar to those set out in the preceding paragraph, I take the view that, as a matter of law, it is not open to this Court to hold that the conduct of the former trustees, in failing to ensure that the transactions which the July 2008 book entries (or, so far as material, the October 2008 book entries) purported to record had, in fact, taken place – or to ensure that the March 2009 transaction was effective to achieve its intended purpose – could lead to the conclusion that their liabilities in relation to the Glenalla loan and the Thorson loan were not "reasonably incurred" in August 2007.

Whether, on the basis of any of the matters alleged to constitute unreasonable or improper conduct, it would be open to the Court, as a matter of law, to hold that the liabilities (if any) incurred by the former trustees in relation to the Oscatello loan were not liabilities reasonably incurred in connection with the TDT.

227. Of the matters said to constitute unreasonable conduct by the former trustees, so as to disentitle them to any right to reimbursement out of the assets of the TDT under section 26(2) of the Trusts (Jersey) Law, none of those grouped under the first of the three heads could be said to relate to the circumstances in which the liabilities of the former trustees in relation to the Oscatello loan were incurred.

228. Nor is it said, in terms, that any of the matters grouped under the second of the three heads constituted unreasonable conduct in relation to the liabilities incurred by the former trustees in relation to the Oscatello loan; but it may, perhaps, be inferred that the present trustee submits that it was unreasonable for the former trustees to request, or to acquiesce in, the discharge by Oscatello of their existing debt to Kaupthing (under the August 2007 Kaupthing loan facility agreement) in circumstances in which that led to their incurring liabilities to Oscatello, a company within the Oscatello structure. I accept that, if the allegation of unreasonable conduct in that respect were made out, it would be open to the Court to hold that the liabilities of the former trustees in relation to what has been described as the Oscatello loan were not reasonably incurred at the

time (December 2007) when the debt to Kaupthing was paid by Oscatello.

229. Of the matters grouped under the third of the three heads, it can be said that the failure "to do more to render . . . the October 2008 entries and [perhaps] the March 2009 transaction valid" related to the Oscatello loan. But, again, for reasons similar to those already set out in relation to the Glenalla loan and the Thorson loan, I take the view that, as a matter of law, it is not open to this Court to hold that the conduct of the former trustees, in failing to ensure that the transactions which the October 2008 book entries purported to record had, in fact, taken place – or to ensure that the March 2009 transaction was effective to achieve its intended purpose – could lead to the conclusion that their liabilities in relation to the Oscatello loan were not "reasonably incurred" in December 2007.

W*hether, on the facts, the matters capable of constituting unreasonable conduct on the part of the former trustees so as to deprive them of the right to rely on article 26(2) of the 1984 Law as a matter of law did have that effect.*

230. I turn, therefore, to address the question whether, on the facts, either of the matters capable of constituting unreasonable conduct on the part of the former trustees so as to deprive them of the right to rely on article 26(2) of the 1984 Law as a matter of law which I have identified did have that effect. The two matters which I have identified as capable, in this context, of constituting unreasonable conduct on the part of the former trustees are: (i) in relation to the Glenalla loan and the Thorson loan, the conduct of the former trustees in "accepting that multiple loan obligations were created 'by virtue of the upstreaming and downstreaming involved in the Accounting Entries'" (if established) and in "accepting a novation of such notional obligations in August 2007 in circumstances where [it is said] the Accounting Entries 'should simply have been replaced by a direct loan obligation by the company which received the funds to the company which actually transferred them before the transfer of assets from the TFT to the TDT'"; and (ii) in relation to the Oscatello loan, the conduct of the former trustees in requesting, or acquiescing in, the discharge by Oscatello of their existing debt to Kaupthing (under the August 2007 Kaupthing loan facility agreement) in circumstances in which that led to their incurring liabilities to Oscatello, a company within the Oscatello structure. In my view, the answer to that question is "No".

231. In relation to the first of the two matters, it is important to keep in mind that, at the time when the Glenalla loan was made (on 2 May 2007), Glenalla was a direct subsidiary of

ITGL: the funds were lent by Glenalla to ITGL (as trustee of the TFT): there was no "upstreaming and downstreaming" in relation to that transaction. Thorson was also a direct subsidiary of ITGL at the time when the transactions which, in aggregate, comprised the Thorson loan took place. At paragraph 127.2 of the former trustees' Reply and Defences to Counterclaim of the Fifth Defendant, it is pleaded that "many of the transactions which led to the balance shown in the Former Trustees' books of account as owing pursuant to the Thorson Arrangement were not created by virtue of a process of upstreaming and downstreaming". The contrary has not been established. At paragraphs 127.3 to 127.5 of that Reply and Defences to Counterclaim it is pleaded that:

> "127.3 The Former Trustees do not understand what it is alleged in paragraph 71 [of the Defences to Counterclaim] they (alternatively, ITGL as trustee of the TFT) should have done. If it is suggested that they ought to have carried out a historical accounting exercise for all of the companies within the TDT structure and novated all liabilities so that they became direct obligations by the company which (had) actually received the funds to the company which (had) actually transferred the funds, it is denied that this would have been an appropriate exercise to have undertaken. Furthermore, and in any event, R&H is required to state and to prove what would have been the result of such an exercise and to prove that all companies within the TDT structure were solvent and capable of agreeing to such a novation. It is not admitted that it would have been in the interests of the shareholders of each of the relevant companies for such an exercise to have been carried out;
>
> 127.4 The Former Trustees do not understand the allegation that the Accounting Entries should simply have been replaced by a direct loan obligation by the company which (had) actually received funds to the company which (had) actually transferred them. R&H are required to explain and prove how such a replacement could as a matter of law have been effected;
>
> 127.5 The novation of the liabilities existing under the Arrangements under the Glenalla Deed of Novation and the Thorson Deed of Novation was a key part of the restructuring of the assets of the TFT in order to effect the creation of a new settlement on the trusts of which the RF Assets would be held. The transfer (by novation) of the liabilities attaching to the assets to be appointed so as to be held subject to the trusts declared by the TDT trust instrument was an integral part of the said restructuring, so as to ensure a fair division of the assets of the TFT, in a manner agreed to and requested by the Tchenguiz family."

The present trustee did not address those matters in the course of the trial. At no stage did it seek to establish that, prior to the execution of the Glenalla Deed of Novation or the Thorson Deed of Novation on 24 August 2007, the former trustees could, or should, have taken steps to ensure that the Accounting Entries "should simply have been replaced by a direct loan obligation by the company which received the funds to the company which actually transferred them before the transfer of assets from the TFT to

the TDT"; or that such an exercise, if possible, would have reasonable or sensible for the former trustees to attempt to carry out in the circumstances as they then were. Put shortly, in August 2007, the former trustees were invited to accept the transfer of assets (the Robert Fund) then (with other assets) subject to the trusts of the TFT in order to hold those assets upon the trusts of a new settlement (the TDT) for the benefit of Robert Tchenguiz and his family. The assets were to be transferred on the basis that the liabilities of ITGL (as trustee of the TFT) which were associated with them would pass to the former trustees (as trustees of the TDT). In my view it was not unreasonable, in those circumstances, for the former trustees to accept "the package" without seeking to unpick it in advance of the transfer.

232. In relation to the second of the two matters, it is important to keep in mind that, at the time of the framework agreement (19 December 2007), the former trustees were indebted to Kaupthing, under the August 2007 Kaupthing loan facility agreement, for an amount in excess of £120 million and that Robert Tchenguiz was personally liable as guarantor of that indebtedness. In order to achieve the objectives for which the restructuring under the framework agreement was intended it was necessary that the indebtedness of the former trustees under the August 2007 Kaupthing loan facility agreement be repaid (with the desired and intended consequence that Robert Tchenguiz would be released from his personal guarantee). In those circumstances it cannot be said to have been unreasonable for the former trustees to request, or to acquiesce in, the repayment of the debt. It was plainly contemplated that the debt would be repaid with new borrowing from Kaupthing under the 19 December 2007 overdraft loan agreement. The borrower under that agreement was Oscatello. No other entity – and, in particular, no entity outside the Oscatello structure – has been identified which had funds (or access to funds) with which to repay the debt owed by the former trustees to Kaupthing. The present trustee has offered no suggestion as to the manner in which the debt could have been discharged, in December 2007, without the former trustees becoming indebted to the entity which discharged it. In those circumstances it was not unreasonable, in the circumstances, for the former trustees to request, or to acquiesce in, the discharge of the debt by a payment made by Oscatello to Kaupthing.

233. For those reasons I am satisfied that the former trustees are not deprived, by reason of the matters said to constitute improper or unreasonable conduct, of the right which they would otherwise have to rely on article 26(2) of the Trusts (Jersey) Law.

Issue (7): Whether, in the respects alleged in paragraphs 70 to76 of the present trustee's defence, the former trustees acted in breach of trust, amounting to wilful default or gross negligence.

234. As I have said, clause 9.1 of the Declaration of Trust dated 26 March 2007, by which the TDT was established, provided that:

> "9.1 No Trustee shall be liable for any loss to the Trust Fund or its income unless the loss shall arise by reason of that Trustee's own fraud, wilful misconduct or gross negligence."

At paragraph 83 of the present trustee's Defence and Counterclaim, dated 17 August 2011, it is pleaded that:

> "83. Further, by reason of the matters set out in paragraphs 70-76 above the Former Trustees acted in breach of trust which amounted to wilful default and/or gross negligence in that in conducting the affairs of the TDT in the manner set out above, they:
>
> (a) failed to exercise their powers with the diligence to be expected of a prudent business man, with remunerated expertise in trust administration and to the best of their ability and skill; and/or
>
> (b) failed to preserve the value of the TDT trust property or enhance its value; and
>
> (c) failed to exercise their powers only in the interests of the beneficiaries.

It can be seen that fraud is not alleged.

235. Paragraphs 70 to 72 of the Defence and Counterclaim, set out, under the general heading "Creation and Acceptance of the Accounting Entries", three respects in which it is said that ITGL or the former trustees acted in breach of trust amounting to wilful default and/or gross negligence. Paragraph 70 is in these terms:

> "70. ITGL as trustee of the TFT acted unreasonably or improperly in making the Accounting Entries which purported to show multiple obligations where no such obligations actually existed, were unnecessary, and were not made as the result of any legal, tax or accounting advice".

In that context, as I have said, "Accounting Entries", means the accounting entries described in paragraph 13 of the Amended Application: that is to say, it means accounting entries in the books of account of each relevant company by which were recorded "arrangements . . . as being made from that company to its parent company, and then from that company to its parent company and so on, and then from the ultimate holding company to ITGL as trustee of the TFT.".

236. At paragraph 71 of the Defence and Counterclaim it is pleaded that:

> "71. The Former Trustees acted unreasonably and/or improperly in accepting that multiple loan obligations were created by virtue of the upstreaming and downstreaming involved in the Accounting Entries, and in accepting a novation of such notional obligations in August 2007. The Accounting Entries should simply have been replaced by a direct loan obligation by the company which actually received the funds to the company which actually transferred them before the transfer of assets from the TFT to the TDT."

I have already rejected the submission that it was "unreasonable" for the former trustees to act the manner alleged: I reject, also, the submission that that conduct was in breach of trust and, *a fortiori*, constituted wilful default or gross negligence.

237. At paragraph 72 of the Defence and Counterclaim it is pleaded that:

> "72. If, which is denied, the Accounting Entries created or evidence actual loan obligations, the Former Trustees acted unreasonably and/or improperly in failing to novate such loan obligations so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT."

I have held that, in relation to the Glenalla loan and the Thorson loan, the Accounting Entries did evidence actual loan obligations. Given that it is accepted that the Glenalla loan was made by Glenalla to ITGL (and was not made for the purpose of being re-lent to another company within the trust structure), I find it impossible to see how the former trustees could have "novated" that loan so that it became a direct obligation from the company which actually received the funds to the company which actually transferred them: Glenalla was the "actual" transferor and ITGL was the "actual" recipient.

238. Paragraphs 73 and 74 of the Defence and Counterclaim set out the respects in which it is said that the former trustees acted in breach of trust, amounting to wilful default or gross negligence in "failing to extinguish" the liabilities recorded in the Accounting Entries on or shortly after the Oscatello structure had been created by the framework agreement on or about 19 December 2007. Although it is not stated, in terms, that the liabilities to which those paragraphs relate are the liabilities of the former trustees in relation to the Glenalla and Thorson loans, they must, I think, be understood in that sense. The allegations capable of being construed as allegations of breach of trust are found in paragraph 73 and in sub-paragraphs (f) and (g), (h), (i) and (j) of paragraph 74:

> "73 Further or alternatively, if the Accounting Entries were legally binding loan agreements under which the trustees of the TFT were liable and which were properly transferred to the Former Trustees as trustees of the TDT, then the Former Trustees acted unreasonably and/or improperly in failing to extinguish such liabilities on or shortly after the creation of the Oscatello

Structure.

74. R&H relies upon the following facts and matters:

. . .

(f) Accordingly a trustee acting properly and exercising reasonable care, skill and diligence would have taken steps to preserve the rest of the TDT assets by extinguishing any purported liability under the Accounting Entries or by transferring such liabilities to the Oscatello Structure.

(g) The Former Trustees however took no steps in this regard on the creation of the Oscatello Structure or shortly thereafter. In particular, the Former Trustees failed to amend the accounting or ledger entries, failed to pass any resolutions novating the purported liabilities, and/or failed to execute any written agreements novating the purported liabilities.

(h) Had the Former Trustees sought Kaupthing's consent to the restructuring of the Accounting Entries (if such consent was needed), R&H believes that Kaupthing would have provided such consent. However, although the Former Trustees instructed their English lawyers, Kirkland & Ellis, to raise the matter of these Accounting Entries with Kaupthing's lawyers, Linklaters, which Kirkland & Ellis did, the Former Trustees failed to progress matters when no response was received from Linklaters or Kaupthing.

(i) The Former Trustees warranted, in the Framework Agreement, that the list of assets and liabilities given to Kaupthing, which list did not show any purported loans to the BVI Companies (*sic*), was accurate yet failed to take the steps necessary, or any steps, to render the list accurate (by the extinction of the Accounting Entries and their replacement with documents showing a loan by the company which transferred the funds to the company to which the funds were transferred).

(j) The July 2008 Entries and the October 2008 Entries and/or the March 209 Transaction ought to have been carried out promptly on or shortly after the creation of the Oscatello structure."

It is difficult to understand what is meant by the reference, in sub-paragraph (g), to "novating the purported liabilities". If sub-paragraph 74(g) is read in conjunction with paragraph 72, where the reference is to "[novating] such loan obligations so that they became direct obligations by the company which actually received the funds to the company which actually transferred them after the transfer of assets from the TFT to the TDT", then, for the reasons already set out, I find it impossible to see how the former trustees could have "novated" the Glenalla loan so that it became a direct obligation from the company which actually received the funds to the company which actually transferred them: Glenalla was the "actual" transferor and ITGL was the "actual" recipient. Further, I will assume that the reference in sub-paragraph (i) to "any purported loans *to* the BVI Companies" is a mistake; and that the phrase intended would read "any purported loans *from* the BVI Companies".

239. Paragraphs 75 of the Defence and Counterclaim contains the assertion that, if (contrary to the present trustee's pleaded case) any of the July 2008 book entries, the October 2008 book entries and/or the March 2009 assignment or any of them were invalid, then the former trustees acted unreasonably and/or improperly in failing to do more to render them valid. It is said, at paragraph 76, that the present trustee relies upon the following facts and matters:

> "76. . . .
>
> (a) Between July 2008 and March 2009, the Former Trustees took deliberate steps to relieve themselves of the purported liabilities arising from the Accounting Entries.
>
> (b) As the purported liabilities involved very large sums of money, it was the duty of the Former Trustees to the beneficiaries to exercise reasonable care, skill and diligence to make their transactions effective and to observe all necessary formalities, such as preparing and causing to be properly executed deeds of extinction, extinguishing the purported upstreaming and downstreaming loans, and preparing and causing to be properly executed deed of loan confirming or creating the loan obligation directly between the transferor company and the transferee company.
>
> (c) The formalities were not onerous or expensive or otherwise difficult to achieve."

240. I find it impossible to identify, within paragraph 70 of the present trustee's Defence and Counterclaim, an allegation of breach of trust on the part of the former trustees (as trustees of the TDT). Further, it is admitted that the accounting entries in the books of Glenalla and ITGL show, correctly the Glenalla loan, which (it is admitted) did constitute a liability of ITGL; and, as I have found, the accounting entries in the books of Thorson and ITGL show the transactions which, in aggregate, show the Thorson loan. I find that, for the purposes of paragraph 83 of the Defence and Counterclaim, no reliance can be placed on the allegations in paragraph 70 of that pleading.

241. I find that, for the purposes of paragraph 83 of the Defence and Counterclaim, no reliance can be placed on the allegations in paragraph 71 of that pleading.

242. I find it impossible to accept that, in failing to novate the loan obligations so that, in the case of those transactions comprised in the Thorson loan where ITGL was not the ultimate (or "actual") recipient, they became the direct obligations of the "actual" recipient, the former trustees "failed to exercise their powers only in the interests of the beneficiaries" or "failed to preserve the value of the TDT trust property or enhance its value". Unless ITGL, or the former trustees, or the "actual" recipient became insolvent,

the value of the TDT trust property, as a whole was neither enhanced nor reduced by leaving the obligations where they were. Further, save in the case of those transactions comprised in the Thorson loan where ITGL was not the ultimate (or "actual") recipient, the "replacement [of the Accounting Entries] with documents showing a loan by the company which transferred the funds to the company to which the funds were [actually] transferred" would not have had the effect of "render[ing] the list accurate". In the case of the Glenalla loan, ITGL was the company to which the funds were actually transferred: so also in the case of the Thorson loan, save in respect of those few transactions where it was not. The only basis, as it seems to me, on which the present trustee can place reliance on the allegations in paragraphs 72 and 74(g) and (i) of the pleading is by asserting that, in failing to novate the loan obligations in the case of those transactions comprised in the Thorson loan where ITGL was not the ultimate (or "actual") recipient, so that they became the direct obligations of the "actual" recipient, the former trustees "failed to exercise their powers with the diligence to be expected of a prudent business man, with remunerated expertise in trust administration and to the best of their ability and skill" to a degree sufficiently culpable as to be "wilful default" or "gross negligence" within the meaning of clause 9.1.

243. In the course of his oral closing submissions (transcript, 27 June 2012, page 77, line 14, to page 78, line 5) Advocate Swan submitted that he could establish that the former trustees were guilty of gross negligence in four respects: (i) in creating the Glenalla, Thorson and Oscatello loans; (ii) in accepting liability for the Glenalla and Thorson loans by entering into the deeds of novation on 24 August 2007; (iii) in failing to deal with the "loans problem" when entering into the framework agreement; and (iv) in failing to deal with the loans problem after entering into the framework agreement. "Gross negligence", he submitted (transcript, 27 June 2012, page 43, line 7 to page 44, line 21) meant a "serious or flagrant degree of negligence": it did not equate to "reckless or intentional fault or anything of that nature". Advocate Swan did not pursue a case based on "wilful default". I think he was right not to do so: nothing in the evidence suggested that the former trustees had acted in wilful default.

244. Notwithstanding the terms in which those submissions were advanced, it was accepted that the former trustees cannot be said to have been negligent – let alone grossly negligent – in relation to the creation of the Glenalla Loan and the Thorson Loan. Those loans were made to ITGL as trustee of the TFT. The present trustee's Defence and

Counterclaim does not seek relief against ITGL (save in its capacity as one of the trustees of the TDT). If and so far as the present trustee sought and obtained leave to amend for that purpose – which I do not think that it did - I dismiss the claim. I am not satisfied that ITGL was negligent – let alone grossly negligent – in accepting the Glenalla Loan: in accepting that loan it was, as it seems to me, fulfilling a treasury function for the TFT structure (in the sense that it was the recipient of the proceeds of the sale of an investment which were not, at the time, earmarked for re-investment in any specific project). Nor am I satisfied that ITGL was negligent, or grossly negligent, in accepting the various loans which together made up the Thorson Loan. The circumstances in which those loans were made to ITGL (in those cases where ITGL was not intended to be the ultimate or "actual" recipient of the loan) were not the subject of evidence; and it is impossible to conclude that there were not good reasons for the practice which, as Mrs Bleasdale told the Court, was common in her experience in the offshore trust industry.

245. For reasons already set out earlier in this judgment, I am not satisfied that the former trustees were negligent – let alone grossly negligent – in accepting liabilities in relation to the Glenalla Loan and the Thorson Loan under the deeds of novation executed on 24 August 2007. As I have said, in August 2007, the former trustees were invited to accept the transfer of assets to be held upon the trusts of a new settlement (the TDT) for the benefit of Robert Tchenguiz and his family. The assets were to be transferred on the basis that the liabilities of ITGL (as trustee of the TFT) which were associated with them would pass to the former trustees (as trustees of the TDT). It was not unreasonable, in those circumstances, for the former trustees to accept "the package" without seeking to unpick it in advance of the transfer.

246. Further, also for reasons already set out earlier in this judgment, I am not satisfied that the former trustees were negligent – let alone grossly negligent – in December 2007 in requesting, or acquiescing in, the payment by Oscatello of their indebtedness to Kaupthing under the August 2007 Kaupthing loan facility. As I have explained, it was the payment of that debt by Oscatello which gave rise to what has been described as the Oscatello Loan. It was plainly contemplated that the debt would be repaid with new borrowing from Kaupthing under the 19 December 2007 overdraft loan agreement. The borrower under that agreement was Oscatello. No other entity – and, in particular, no entity outside the Oscatello structure – has been identified which had funds (or access to

funds) with which to repay the debt owed by the former trustees to Kaupthing.

247. Nor am I satisfied that, even if negligent, the former trustees were grossly negligent in failing to in failing to deal with the "loans problem" – meaning their liabilities in relation to the Glenalla Loan and the Thorson Loan - when entering into the framework agreement. Recognition that there might be a future problem (in that assets of the TDT which were outside the Oscatello structure would or might be exposed to claims by Kaupthing if the former trustees remained indebted to companies within that structure) emerged (if at all) at a late stage during the negotiation of the framework agreement. In that respect it may be said that the former trustees fell short of the high standards which, rightly, are to be expected of professional trustees - in that they should have recognised the potential problem earlier - but their failure in that respect cannot, in my view, be described as amounting to a serious and flagrant degree of negligence. By the time the potential problem was recognised, it was, in my view, too late to do anything about it before the execution of the framework agreement. I am satisfied on the evidence given at trial (and on the documents) that, by December 2007, there was an urgent need to have the framework agreement in place; and that it would have been unreasonable, and unacceptable to the other parties involved, for the former trustees to hold up the execution of that agreement while they sought to deal with the loans problem.

248. In their skeleton argument, at paragraphs 146 to 158, the former trustees explain how the present trustee's case in relation to breach of trust amounting to wilful default and/or gross negligence (at least, in relation to the fourth head advanced by Advocate Swan) has evolved since the Defence and Counterclaim of 17 August 2011. The case is now found in three documents (i) the present trustee's Responses dated 30 December 2011 to the former trustees' Request for Further and Better Particulars ("the December 2011 Responses"), (ii) the present trustee's Responses dated 21 February 2012 to the former trustees' Request for Further and Better Particulars ("the February 2012 Responses") and (iii) the present trustees Responses dated 10 April 2012 to the BVI Companies' Request for Further and Better Particulars. In the February 2012 Responses the present trustee stated that it did not "currently . . . rely on any matters other than those contained in the Further Responses [meaning the December 2011 Responses]". As the former trustees point out, at paragraph 147 of their skeleton argument, "the essence of the complaint appears to be that the Former Trustees knew that the Oscatello Structure was intended to be ring-fenced, that the Former Trustees were aware that

there was a risk to the TDT assets if the liabilities [in respect of the Glenalla, Thorson and Oscatello loans] remained in place on the creation of the Oscatello Structure but that they did not take steps to deal with these at that time and ought to have done so".

249. I accept that, in the circumstances that the present trustee seeks to advance a case that, following the framework agreement, the former trustees ought to have taken steps to deal with what has been described as "the loans problem", it is for the present trustee to establish that there were steps which could have been taken for that purpose: that is to say steps which could have been taken unilaterally by the former trustees, or steps in respect of which, if the consent or participation of third parties was required, the necessary consent or participation would have been forthcoming. In the December 2011 Responses - in response to Request 37 made in the Request for Further and Better Particulars for an explanation as to how the present trustees "could properly and lawfully have extinguished or otherwise dealt with the Arrangements" – the present trustee contends that the steps which the former trustees could have taken to extinguish the loans were: (i) by making demand for payment from those companies within the Oscatello structure which owed money to the present trustees under the Accounting Entries, procuring the passing of resolutions by members of those companies that the companies would pay, procuring the companies to pay them as trustees of the TDT, and using those sums to repay the alleged loans to repay the Glenalla, Thorson and Oscatello loans; (ii) by procuring that Eliza, Silverville and Oscatello mutually released each other from any liability under the internal loan arrangements; and (iii) by effecting a set of resolutions with the effect that all liabilities owed by the former trustees be replaced by liabilities owed by Silverville, Eliza or Oscatello. As the former trustees point out, at paragraph 158 of their skeleton argument, the present trustee's case appears to be that the former trustees could have unilaterally extinguished their liabilities in relation to the Glenalla, Thorson and Oscatello loans, that it would have been in the best interests of the companies within the TDT structure (as well as in the best interests of the former trustees themselves) to have done so, and that that could have been done without giving rise to any breach of fiduciary duty.

250. I am not persuaded that the former trustees could have extinguished their liabilities in relation to the Glenalla, Thorson and Oscatello loans without the consent of Kaupthing and the participation of Silverville, Eliza or Oscatello; and, probably, Glenalla and Thorson and the other companies within the Oscatello structure (against whom

demands for payment were to be made). Advocate Swan made no attempt to demonstrate how that could be done; and called no evidence to establish that the consent of Kaupthing would be forthcoming. He sought to rely on the evidence of Robert Tchenguiz and Mr Smalley that they believed that there would be no problem in obtaining that consent; but they offered no convincing explanation why Kaupthing would be likely to act contrary to its own interests by consenting to what would be, in effect, a reduction in the value of the security which it held in respect of the substantial liabilities which could arise under the overdraft facility agreement.

251. What is plain, in my view, is that even if the objective – the extinguishment of the liabilities of the former trustees in relation to the Glenalla, Thorson and Oscatello loans - could have been achieved (with or without the consent of Kaupthing and the participation of companies within the Oscatello structure) the process would have been complex and lengthy. It would have become increasingly more difficult as time went by; given the deteriorating market conditions throughout 2008. It may be said that the former trustees should have done more than they did, following entry into the framework agreement, to achieve that objective; but I am not satisfied that the failure of the former trustees to achieve the objective, before the collapse of Kaupthing in October 2008, can be described as amounting to a serious and flagrant degree of negligence.

252. For those reasons, I do not find that, in the respects alleged in paragraphs 70 to 76 of the present trustee's defence, the former trustees acted in breach of trust, amounting to wilful default or gross negligence.

Conclusions

253. For the reasons set out in this judgment:

(1) I answer the questions question posed for determination by paragraph (1) of the relief sought in the Amended Application as follows:

(i) the obligations assumed by the former trustees in respect of the Glenalla Arrangement and the Thorson Arrangements (as defined in the Amended Application) on 24 August 2007 were obligations as borrowers under legally binding loan agreements;

(ii) the obligations which arose in respect of the Oscatello Arrangement (as defined in the Amended Application) on the transfer of funds on 21 December 2007 following the execution of the Framework Agreement included the

obligation of the former trustees to repay what has been described as the Oscatello Loan; and

(iii) those obligations remained the obligations of the former trustees at all material times after 24 August 2007 or 21 December 2007 (as the case may be).

(2) I make no declaration in the terms sought in paragraph (2) of the relief sought by the Amended Application.

(3) I make no declaration in the terms sought in paragraph (3) of the relief sought by the Amended Application.

(4) I hold that the former trustees may retain and realise such of the assets subject to the trusts of the TDT as remain vested in them in order to satisfy their obligations as borrowers in respect of the Glenalla Arrangement, the Thorson Arrangement and the Oscatello Arrangement.

(5) I hold that the BVI Companies succeed on their counterclaim and direct that the former trustees shall pay (i) to Glenalla Properties Limited the sum of €78,825,988.98 (or the sterling equivalent as at the date of the order), (ii) to Thorson Investments Limited the sum of £80,578.539 and (iii) to Oscatello Investments Limited the sum of £39,386,354.80 with interest on such sums pursuant to the Judgments (Interest) (Bailiwick of Guernsey) Law 1985 from 22 April 2010 until the date of payment at such rate as, in the absence of agreement, the Court may order (after hearing the further submissions of the parties).

(6) I make no declarations in the terms sought in paragraphs (1), (2) or (3) of the relief sought by the present trustee in its Counterclaim.

(7) I direct that, subject to their right to retain and realise such of the assets subject to the trusts of the TDT as remain vested in them in order to satisfy their obligations as borrowers in respect of the Glenalla Arrangement, the Thorson Arrangement and the Oscatello Arrangement the former trustees shall take such steps as may be necessary to vest legal title to such assets in the present trustee as trustee of the TDT.

(8) I dismiss paragraphs (5), (6), (7) and (8) of the relief sought by the present trustee in its Counterclaim.

(9) I make no declarations in the terms sought by the present trustee in paragraphs (1) or (2) of the relief sought by its Third Party Claim.

(10) I think it unnecessary to make declarations sought in the terms sought in paragraphs (1)(a), (1)(b), (1)(c), (1)(d), (3) or (5) of the relief sought by the BVI Companies in their Counterclaim.

(11) I make no declaration in the terms sought in paragraph (2) of the relief sought by the BVI Companies in their Counterclaim to the present trustee's Third Party Claim

(11) I make no order under paragraph (4) of the relief sought by the BVI Companies in their Counterclaim to the present trustee's Third Party Claim.