Investec Trust (Guernsey) Limited et al v Glenalla Properties Limited et al
Court of Appeal
10th August 2015

JUDGMENT 35/2015

Two Appeals and a Respondent's Notice arising out of the judgment issued by the Royal Court (Lieutenant Bailiff Sir John Chadwick PC) on 6 December 2013 in regard to proceedings concerning a discretionary trust.

Approved Judgment
10th August 2015

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division)

(On appeal from the Royal Court of Guernsey, Ordinary Division)

10th August 2015

Before: **James Walker McNeill QC, President**
John Vandeleur Martin QC
Robert Logan Martin QC

(1) Investec Trust (Guernsey) Limited **Plaintiffs**
(2) Bayeux Trustees Limited

and

(1) Glenalla Properties Limited **Defendants**
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscatello Investments Limited
(5) Rawlinson & Hunter Trustees SA

and

(1) Glenalla Properties Limited **Third Parties**
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscatello Investments Limited

Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants/Third Parties
Advocate IC Swan for the Fifth Defendant

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JUDGMENT OF THE COURT

McNeill JA

Introduction

1. The proceedings to which this judgment relates concern the administration of the Tchenguiz Discretionary Trust (the "TDT"). The proceedings were commenced by the plaintiffs who were previously the trustees of the TDT. The Court has before it two Appeals and a Respondent's Notice arising out of the judgment issued by the Royal Court (Lieutenant Bailiff Sir John Chadwick PC) on 6 December 2013. In that judgment, the first named and second named plaintiffs and appellants are referred to together as "the former trustees", the first to fourth defendants are referred to as "the BVI companies" and the fifth named defendant and appellant is referred to as "the present trustee". The same manner of identification will be used in this judgment.

2. The former trustees and the present trustee have appealed to this Court against certain aspects of the decision of the Lieutenant Bailiff. For reasons related to the scope and range of the grounds of appeal, and to some extent because of the nature of incidental applications which were made during the course of the appeals, individual aspects of the appeals have been heard separately. This is the final of three judgments dealing with all of the substantive aspects of the appeals. The first of those judgments is a judgment of the Court delivered by McNeill JA dated 27 June 2014 [28/2014] and the second is a judgment of the Court delivered by Logan Martin JA dated 29 October 2014 [41/2014]. In each of these instances, the Court provided its reasoning on the particular issues raised but it made no Orders consequent upon either judgment. As a consequence of this final judgment, we shall invite the parties to consider the terms of Orders which ought to be made to deal with all aspects of the appeals.

3. The Court has also issued a series of judgments in relation to incidental applications which have been made since the judgment of the Lieutenant Bailiff. These concern matters related to the appeals by the former trustees and the present trustee but do not concern directly the merits of the appeals. The first is a judgment delivered by Logan Martin JA dated 14 January 2014 [07/2014] by which a number of orders was made and in which an application for a stay of execution by the present trustee was granted in part. The second is a judgment on security for costs by Martin JA dated 10 March 2014 [09/2014]. By a further judgment delivered by Martin JA on 11 September 2014 [39/2014] applications by Robert Tchenguiz and another to be permitted to intervene in the hearing of the appeals by way of oral submissions were refused. Leave to appeal to the Privy Council was refused in a judgment of the Court delivered by McNeill JA on 23 September 2014. Applications for costs in respect of those applications were determined in a judgment dated 21January 2015 delivered by Martin JA [04/2015]. The final judgment is one delivered by McNeill JA dated 17th February 2015 [08/2015] by which applications made by the present trustee for leave to amend its Notice of Appeal, to lead further evidence, and for orders for specific disclosure directed respectively against the BVI companies and the former trustees were refused.

4. The structure of this judgment is as follows:

The Background	Paragraphs 5 – 14
The Appeals considered in this judgment	Paragraphs 15 – 19
The Appeal of the Present Trustee	Paragraphs 20 - 21
Delay in giving judgment	Paragraphs 22 – 46
Gross negligence and unreasonableness	Paragraphs 47 – 121
The remainder of the Plaintiff's Appeal	Paragraphs 122 – 127
An obligation of the former trustees to Oscatello	Paragraphs 128 - 132
An obligation to Oscatello in contract	Paragraphs 133 – 145
An obligation to Oscatello through restitution	Paragraphs 146 - 180
Conclusions	Paragraph 181
Orders	Paragraph 182
Appendices	

The background

5. The former trustees were previously the trustees of the TDT, which is a Jersey trust constituted by declaration of trust dated 26 March 2007. The first named plaintiff (which is referred to elsewhere as "ITGL") was initially the only trustee of the TDT. The beneficiaries of the TDT were and are the members of a discretionary class comprising Robert Tchenguiz and his children and remoter issue. The declaration of trust gave power to the trustees, with consent, to add to the membership of the class. The trustees were empowered to deal with the whole capital of the trust fund in any manner for the benefit of all or any one or more of the beneficiaries. Clause 9.1 of the declaration of trust 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.

6. The funding by means of which the TDT was constituted comprised the sum of £5,000 appointed from the Tchenguiz Family Trust (the "TFT"), a trust constituted under the laws of the British Virgin Islands under a declaration of trust made on 25 October 1988. The TFT was one of two settlements by means of which Victor Tchenguiz, the father of Robert Tchenguiz, made financial provision for members of his family.

7. Up until 2007, the property held for the purposes of the TFT was held, in effect, upon discretionary trusts for the benefit of Robert Tchenguiz and his brother, Vincent Tchenguiz. The TDT was then constituted in 2007 as a result of the desire of Victor Tchenguiz to have separate sub-trusts established for each of his two sons.

8. Until about 24 August 2007, the principal funds destined for the TDT continued to be held in the TFT. However a number of transactions or arrangements were made between 20 and 24 August leading up to the completion of transfers. First, on or about 20 August 2007 the first named plaintiff (as, at that date, sole trustee of the TFT) entered into a loan agreement for the borrowing of monies from Kaupthing Bank hf ("Kaupthing"). The Lender's level of commitment was potentially £100 million. Those identified as Borrowers included the first named plaintiff, the second named of the BVI companies ("Thorson"), two other companies namely Heatherville Limited ("Heatherville") and Violet Capital Group Limited ("Violet"), together with any subsidiary of the first named plaintiff in which it owned more than 75 per cent of the ordinary voting shares and which became a Borrower. Clause 11.1 of the agreement provided 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 was to be governed by and construed in accordance with the laws of England. On 21 August 2007 the second named plaintiff became a trustee of the TDT.

9. On 24 August 2007 the first named plaintiff, as sole trustee of the TFT, made an appointment of assets to the TDT. Included within those assets were the share capital in thirty British Virgin Islands companies including Thorson and the first named of the BVI companies ("Glenalla"). Also included were loans owed to the TFT by thirty four specified companies.

10. The following lie at the heart of this litigation. By individual Deeds of Novation each dated 24 August 2007 which were entered into between, on the one hand, the first named plaintiff as trustee of the TFT and, on the other hand, the former trustees as trustees of the TDT, together with respectively Glenalla and Thorson, the former trustees assumed liability for monies owed by the TFT to each of Glenalla and Thorson under certain arrangements or loans. By a further Deed of Novation dated 24 August 2007 between the first named plaintiff as trustee of the TFT, the former trustees and Kaupthing, the former trustees received the beneficial ownership of shares in British Virgin Islands' companies each of which, apart from one, had been included in the list of companies identified in the deed of appointment of 24 August 2007. The former trustees also assumed the liabilities under the loan agreement of 20 August 2007 between the TFT and Kaupthing.

11. Later in 2007, through a document described as a "Framework Agreement" and dated 19

December 2007 between the former trustees as trustees of the TDT, Kaupthing and certain other companies, an existing corporate structure was altered through the interposition of two companies, namely the third named of the BVI companies ("Eliza") and the fourth named of the BVI companies ("Oscatello"), between the TDT and other companies in which underlying assets were held (the "Oscatello Arrangement"). By an overdraft loan agreement of the same date, further funds were made available to Oscatello by Kaupthing for the stated purpose of refinancing certain current debt listed in a Schedule. Among other matters, the Schedule included an amount of £39,366,791 said to be due from the first named plaintiff on a loan account number 5962 as at 19 December 2007.

12. On 20 December 2007, Eliza received £150 million in accordance with the Framework Agreement and on receipt transferred the sum to Oscatello by way of an interest free loan. On 21 December 2007, Oscatello used that sum, together with certain other monies, to make payments amounting in aggregate to £293,984,107.10 in making a payment under the Framework Agreement, making payment of a "structuring fee" to Kaupthing, making certain "collateral" payments to other companies, and making five payments to Kaupthing apparently in repayment of loans owed to Kaupthing. One of the loans specifically identified was loan number 5962.

13. In August 2009, Glenalla and Thorson were placed in liquidation and in April 2010 the joint liquidators wrote demanding payment of the outstanding loans said to be due from the trustees of the TDT. Oscatello was placed in liquidation in February 2010 and in the same month a winding up order was made in the British Virgin Islands for Eliza. In April 2010, the joint liquidators wrote to the former trustees demanding payment of outstanding loans said to be due to those companies.

14. In July 2010 the former trustees were replaced as trustees of the TDT by the present trustee.

The Appeals considered in this judgment

15. The learned Lieutenant Bailiff summarised the issues which were before him for trial as follows:

> "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(l)(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".
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> 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.
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> 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."

16. In his judgment, the Lieutenant Bailiff found that the former trustees were liable under binding obligations in respect of loans to the first, second and fourth defendants (and which were referred to by him in his Conclusions at paragraph 253 of the judgment as "the Glenalla loan", "the Thorson loan" and "the Oscatello Arrangement"). In respect of the former trustees' claim to a right of indemnity, the Lieutenant Bailiff held that the former trustees were not entitled to rely as against the BVI companies on Article 32 of the Trusts (Jersey) Law 1984 as amended (respectively "Article 32" and "the Jersey Law") and thereby to limit their liability to the extent of trust funds and, separately, that it was not a term of the legal obligations assumed or undertaken by the former trustees in respect of the loans that they were not personally liable. He also held that the conduct of the former trustees did not constitute unreasonable or improper conduct or wilful default and that the liabilities incurred by them were liabilities "reasonably incurred in connection with the TDT" for the purposes of Article 26(2) of the Jersey Law.

17. The first of the judgments of this Court, which addressed the merits of the appeals and which was given on 27 June 2014, was concerned primarily with the first ground of appeal for the former trustees which, in summary, was that the Lieutenant Bailiff was in error to find that Article 32 of the Jersey Law did not apply to the relevant transactions. In that judgment at paragraph 116, we addressed our conclusion on that aspect of the appeal for the former trustees as follows:

> "For all these reasons we consider that the former trustees are entitled to succeed in respect of the first ground of appeal and that, in the present proceedings, the provisions of Article 32 of the Trusts (Jersey) Law fall to be applied in considering the liability of the trustees of the TDT under the Glenalla and Thorson loans and the Oscatello Arrangement. The precise consequence of this finding will be subject to our determinations on the grounds of appeal to be considered at a later hearing, but, unless arising from those determinations, the former trustees will have no personal liability in respect of the loans beyond the assets of the TDT."

We reached this conclusion because as a matter of private international law it was our judgment that the courts of this jurisdiction should recognise the applicability of Article 32 in determining the disputes which are raised in these proceedings. In that judgment, we reserved our position on what was said to be a fall-back position for the former trustees that, if Article 32 were not to apply, the loan documents properly construed excluded the personal liability of the former trustees.

18. In the second judgment of the Court, given on 29 October 2014, we considered the meaning and effect of Article 32 and we stated our conclusion in the judgment at paragraph 52 as follows:

> "Where a trustee is a party to a transaction or matter to which Article 32(1)(a) of the Jersey Law applies, it is our opinion (i) that the trustee has no personal liability in respect

of a claim which arises out of the transaction or matter, (ii) that an earlier trustee has a right to recover from a subsequent trustee such trust property as is necessary to satisfy the claim, (iii) that upon satisfying such liability to the extent of the trust property, the trustee is entitled to discharge in respect of the liability, and (iv) that the ability of the trustee to satisfy the liability out of the trust property does not depend upon whether or not there exists at the time any allegation of breach of trust, whether justified or otherwise, against the trustee."

19. This judgment therefore addresses the remaining grounds of appeal. We commence with the appeal of the present trustee.

The Appeal of the present trustee

20. By a Notice of Appeal the present trustee set out, among other matters, the following grounds of appeal. We state them in brief and only insofar as relevant to this judgment, that is, remembering that we have found Article 32 to be applicable and, accordingly, that the liability of the former trustees is limited to the trust assets, subject only to any separate liability which they may be under for grossly negligent breach of trust (there being no case of fraud or wilful misconduct). References are to the paragraphs of the grounds set out in the Notice.

    i. There had been a failure to analyse or articulate the standard of skill, care and diligence expected of a highly paid professional trustee: paragraph 9.

    ii. There had been a failure to apply the correct test to the evidence and an inappropriate emphasis on pleadings and on unsupported assertions: paragraph 9.

    iii. There had been a failure to identify the evidence relied upon, to analyse evidence and to explain reasons for conclusions: paragraph 9.

    iv. There had been error in fact and law in failing to find the former trustees grossly negligent in accepting novation of the Glenalla and Thorson loans in August 2007:

        a. There had been a serious procedural irregularity in deciding this part of the case on pleadings and without reference to evidence or submissions; paragraph 10.1 to 10.3 read together with paragraphs 7.1 and 7.2.
        b. There had been error in concluding that the transfer of liabilities was part of a package in which assets were to be transferred on the basis that liabilities would pass to the former trustees when the evidence did not support the existence of such a package: paragraph 10.4.
        c. That conclusion was also in error in that, for example, the assets and liabilities could have been transferred to a company wholly owned by the former trustees as trustees of the TDT: paragraph 10.5 read together with paragraphs 7.3 and 7.4.
        d. There had been error in failing to find a grossly negligent breach of trust where there was no evidence that the former trustees had considered critically whether they should accept liabilities given their duty to safeguard trust assets: paragraphs 10.6 and 10.7 read together with paragraphs 7.5, 7.6 and 7.7.

    v. There had been error in failing to find a grossly negligent breach of trust:

        a. in circumstances where trustees gave a warranty as to accuracy of a schedule of assets and liabilities, knowing it to be inaccurate: paragraph 11.1.
        b. in failing to consider, adequately or at all, evidence suggesting that breaches of duty were grossly negligent: paragraph 11.2.

    vi. There had been error in finding that by December 2007 it was too late to do anything about the situation in which the former trustees found themselves, the finding being mere assertion, contrary to evidence and irrational: paragraphs 11.3 to 11.9.

vii. There had been error in numerous specified respects in the way in which the court had addressed the mechanics of dealing with unravelling the liabilities to Glenallla, Thorson and Oscatello, principally in failing to address the evidence: paragraph 12.

viii. There had been error in failing to understand the case for the present trustee regarding the alleged failure to enter into real transactions following the recording of certain book entries: paragraph 13.

ix. In paragraph 14 the present trustee raised certain issues as to the liability of the former trustees to Oscatello.

x. There had been serious procedural irregularity and delay:

a. There had been failure to consider or analyse the evidence of numerous witnesses: paragraph 15.
b. Culpability had been dealt with largely by reference to pleadings: paragraph 16 (and see item 4 above).
c. The delay of 18 months in proceeding to hand down judgment was lengthy, unexplained and had been prejudicial: paragraph 17.
d. On several key aspects the judgment proceeded upon assertion without identifying or analysing supporting evidence and without explaining reasons: paragraph 18.

21. It appears to us appropriate to separate out these grounds into those which should be dealt with as complaints about substantive reasoning and those which go to procedural irregularity. It seems to us also that the latter should be divided between the alleged serious procedural irregularity of delay and those which go to the determination itself. Because of the importance of the issue we propose to commence with consideration of the issue of delay in giving judgment.

Procedural Irregularity: Delay in giving judgment

22. The present trustee appeals against the judgment of the Lieutenant Bailiff upon a ground which is referred to in its Notice of Appeal as "Serious procedural irregularity and delay". As has been indicated above, the aspects of this ground concern, in the first place, the alleged failure of the Lieutenant Bailiff properly to consider and analyse the evidence and in particular to deal with the testimony of certain witnesses and, secondly, the "lengthy and unexplained delay" between the ending of the trial and the giving of judgment. We deal first with the ground of appeal based on the delay in issuing the judgment.

23. It is contended that the judgment should be set aside as a result of that delay because it has resulted in serious prejudice to the present trustee. In the Notice of Appeal for the present trustee, it is said that the delay has resulted in the following consequences. First, the Lieutenant Bailiff has forgotten, or there is a real risk that he has forgotten, important aspects of the evidence and has failed to make findings on critical issues which were the subject of evidence. Secondly, he has made findings of fact which are contrary to the weight of the evidence or which are not supported by any evidence. Thirdly, as a result of the delay the Court of Appeal cannot be satisfied that any of the Lieutenant Bailiff's conclusions are explicable by the special advantage usually enjoyed by a trial judge. Finally, the delay has compromised the ability of the Lieutenant Bailiff to deal with the issues fairly and has adversely affected the quality of his decision.

24. It will be apparent that these contentions in respect of delay overlap to some extent with our discussion below on the adequacy of the Lieutenant Bailiff's consideration of the evidence. It is also clear, however, from the way in which the appeal for the present trustee was presented that the delay in giving judgment is being put forward by itself as a form of procedural irregularity which is sufficient to justify the setting aside of the judgment. We therefore deal with the consequences of the delay in giving judgment as an issue in its own right.

25. In order to address these contentions, we begin by describing the circumstances of the trial. The trial commenced on 11th June 2012. The first day and a half were taken up with procedural matters and counsel's opening statements. The evidence began during the afternoon of the second day, 12th June. The Lieutenant Bailiff heard the evidence of seven witnesses whose testimony concluded at the end of the ninth court day, 22nd June. Closing submissions and incidental matters were then heard over three days and the trial concluded on 29th June when the Lieutenant Bailiff reserved judgment. The entire trial occupied twelve court days of which between seven and eight days were taken up with evidence.

26. The judgment was given by the Lieutenant Bailiff on 6th December 2013, that is to say, just over eighteen months after the close of proceedings. During that period, the Lieutenant Bailiff considered a number of incidental applications. In particular, the present trustee applied for specific discovery which was the subject of a hearing before the Lieutenant Bailiff on 20th August 2013.

27. In this situation the present trustee presents a number of arguments. The present trustee asserts that the period whilst judgment was reserved amounted to "a very lengthy and largely unexplained delay". It is submitted that the judgment could not have been prepared or finalised until after August 2013 because of certain observations which the Lieutenant Bailiff made in the course of the hearing on 20th August 2013. At that hearing, he suggested that Article 32(1)(a) of the Jersey Law applied to the dispute and its effect would be to limit the ability to execute judgment against trust property. In contrast, the Lieutenant Bailiff held in his judgment that Article 32(1)(a) did not apply. This means that the judgment could not have been prepared or finalised until more than fourteen months after the end of the trial because, if as at 20th August 2013 he had written his judgment reaching this conclusion, he would not have made the observations which he did at the hearing on that date. His apparent change of mind between August 2013 and the giving of judgment in December 2013 suggested that he had not written his judgment by the earlier date.

28. The present trustee refers to the principles applicable in cases of a delay in giving judgment, in particular the decision of the Privy Council in *Jervis and another* v *Skinner* [2011] UKPC 2, the judgment of the Board at paragraphs 44 – 45, where it was said "that the correct approach to cases of excessive delay is to ask whether, as a result of the delay, the decision under appeal is unsafe and whether 'it would be unfair or unjust to let it stand'". This test was identified by reference to the judgment of the Board given by Lord Scott of Foscote in *Cobham* v *Frett* [2001] 1 WLR 1775 at p 1783. The test has been followed in a number of cases including *Diedrichs-Shurland* v *Talanga Stiftung* [2006] UKPC 58, the judgment of the Board at paragraphs 24 -25, *Habib Bank Ltd* v *Liverpool Freeport (Electronics) Ltd* [2004] EWCA (Civ) 1062, the judgment of Lord Phillips MR at paragraphs 18 and 19, *Boodhoo* v *Attorney-General of Trinidad and Tobago* [2004] UKPC 17, [2004] 1 WLR 1689, the judgment of the Board at paragraph 13, and *Hurndell* v *Hozier and another* [2009] EWCA Civ 67, the judgment of Sir Andrew Morritt C at paragraph 43. The present trustee argues that these cases also show that where there is excessive delay in the giving of judgment, an appeal court must consider the findings of fact of the judge at first instance with particular care. Reference was also made to the judgment of Peter Gibson LJ in *Goose* v *Wilson Standford & Co*, noted in *The Times*, 19th February 1998.

29. The present trustee contends that as a result of the excessive delay in this case, the judgment of the Lieutenant Bailiff is not safe. It is said to have errors which are possibly attributable to the delay and that it would be unfair or unjust to let it stand. In summary, the present trustee submits that the Lieutenant Bailiff had either forgotten, or that there is a real risk that he had forgotten, important aspects of the evidence, that he made findings of fact which are contrary to the weight of the evidence or unsupported by evidence and that he has failed to make findings on critical issues upon which there was evidence at the trial. It is contended that this Court should be satisfied that the Lieutenant Bailiff's conclusions are not explained by reason of the special advantage usually enjoyed by trial judge since it appears that he has forgotten important aspects of the evidence, and that the delay has compromised his ability to deal with the issues

fairly and has adversely affected the quality of his decisions. The present trustee submits that if the complaint of excessive delay is made out, then the Court of Appeal should remit the cause back to first instance for a re-trial. It is said that it would not be appropriate to remit back to the Lieutenant Bailiff for him to articulate his reasons because of the length of time which has now passed since the trial.

30. In his oral submissions for the present trustee, Advocate Swan emphasised that procedural irregularity constituted a free-standing ground of appeal which by itself justified a re-trial. In respect of delay, he referred in particular to the judgment in *Bond* v *Dunster* [2001] EWCA Civ 455, where at paragraph 2 of her judgment Arden LJ referred to the adverse effect of delay on the parties to a litigation and then said "The matter goes further than just the effect on the parties. An unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a whole…"

31. The former trustees oppose the present trustee's appeal on this issue. In their skeleton argument, the former trustees accept that the delay in handing down the judgment was "regrettable". Notwithstanding, delay does not by itself justify the setting aside of a judgment. The decision in *Ramnarine* v *Ramnarine* [2013] UKPC 27 is an example of the Privy Council declining to interfere with a judgment delivered four years after the conclusion of the substantive hearing: see the judgment of the Board at paragraph 22. The basic principle is that the delay must have rendered the decision under review unsafe: see *Jervis and another* v *Skinner*, the judgment of the Board at paragraph 44, and *Bond* v *Dunster*, the judgment of Arden LJ at paragraph 12. It must be shown that there are errors in the judgment which are attributable to delay: see *Cobham* v *Frett*, the judgment of Lord Scott at p 1783. The position for the present trustee is no more than a series of assertions which are either wrong or unsupported by sufficient particularity. The assertions are of a generic character without stating a causal link between the delay and any error in the judgment. The former trustees contend that the position for the present trustee amounts to no more than a complaint that the delay in giving judgment was excessive but that does not demonstrate that the Lieutenant Bailiff overlooked what the present trustee had pleaded and proved.

32. In his oral submissions, Advocate Wessels, for the former trustees, argued that a party is not entitled to a re-trial just because the delay in giving a judgment has passed some point which may be regarded as unacceptable. To be successful, an appellant requires to point to some actual and material failure by the trial judge to deal with the evidence and not just to delay alone.

33. In our view, and insofar as the present trustee has referred in support of its ground based upon delay to decisions of the Privy Council, this Court should adopt the guidance given as being appropriate for the law of Guernsey. To the extent that the present trustee and the former trustees have also referred to decisions of the Court of Appeal in England, these authorities provide further useful guidance which we consider it would be reasonable to consider for the purposes of the law of this jurisdiction. But before addressing these decisions, we consider it to be necessary to express our concern at the delay which did occur in this case between the end of the trial and the delivery of judgment by the Lieutenant Bailiff. Although it might be said that the latter part of that period was disrupted by the applications which were made to the Lieutenant Bailiff, that cannot explain or justify the overall period of eighteen months following the ending of the trial when the judgment remained undelivered. As was said by Arden LJ in *Bond* v *Dunster*, a delay of this sort is prejudicial to the parties and to the system of justice. Although the trial was not without its complications, and it did involve the deciding of a range of legal and factual issues, it was by no means a trial of exceptional length or complexity such as might explain an inordinate delay in the giving of judgment. Furthermore, and as the Lieutenant Bailiff must have known, this case has been fought on all sides with considerable determination and it should have been obvious that there was a strong likelihood (if not a certainty) that one or other (or even all) of the parties would appeal the judgment of the Lieutenant Bailiff whatever the outcome. The delay between the ending of the trial and the giving of judgment has had the effect of providing a ground of appeal which would not have existed otherwise whichever party chose to appeal. We therefore proceed upon the basis that in

this case the present trustee has an arguable ground of appeal based upon delay and that this gives rise to the considerations explained in the decisions of the Privy Council and of the Court of Appeal in England which are referred to.

34. The issue for our determination is what effect this delay had on the outcome of the case. Is it so serious that, regardless of how the Lieutenant Bailiff dealt with the evidence, his decision cannot be allowed to stand because this Court cannot have faith in the justification for his decision, both on the individual matters of fact which arose, and on the outcome as a whole?

35. In order to address this question we consider first the relevant decisions of the Privy Council which have been relied upon and for convenience we do so chronologically. The case of *Cobham* v *Frett* is a decision on an appeal from the Court of Appeal of the British Virgin Islands. The merits concerned a disputed purchase of land and the judge at first instance did not deliver his judgment until over twelve months after the conclusion of the trial. No complaint or inquiry appeared to have been made about the delay and there was no record of any reason for it although it was suggested that the workload on the then single judge in the British Virgin Islands jurisdiction might have been a factor. The Court of Appeal had allowed an appeal upon the basis that, because of the delay in giving judgment and because of certain errors in the judgment, it was entitled to substitute its own conclusions on the merits. In giving the judgment of the Board, Lord Scott of Foscote said at pp 1383H-1384A:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant. In *Boodhoo and another* v *Attorney General of Trinidad and Tobago*, the Privy Council dismissed an appeal where the Court of Appeal of Trinidad and Tobago had failed to give its judgment on an appeal for a period of over thirteen months after the hearing and in a situation where one of the three appeal judges had died, and where the appellants claimed that their constitutional right to due process and to a fair trial in accordance with the laws of Trinidad and Tobago had been infringed. In giving the judgment of the Board, Lord Carswell said at paragraph 12:
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> "In their Lordships' opinion delay in producing a judgment would be capable of depriving an individual of his right to the protection of the law, as provided for in section 4(b) of the Constitution of Trinidad and Tobago, but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should. For example, on an application to prevent the threatened abduction of a child, any delay in giving judgment might deprive both the applicant and the child of the benefit which the legal remedy was there to provide. Their Lordships do not think it profitable to attempt to define more precisely the circumstances in which this may occur or to specify periods of delay which may bring about such a result, since cases vary infinitely and each has to be considered on its merits, applying this principle."
>
> At paragraph 13, his Lordship dealt with the issue of the death of one of the judges and observed that it could not be said that the appellants would have been deprived of the benefit of their appeal if judgment had been given on the day that the judge died nor could it be said that the court would have been unable to prepare a proper judgment. Lord Carswell also considered an argument that, by reference to *Cobham* v *Frett*, a delay of twelve months amounted to a top limit beyond which any further delay "must inevitably give rise to a breach of constitutional rights" but he rejected this argument stating that "Their Lordships consider that no finite period can be prescribed and that the only applicable principle is that which their Lordships have enunciated"".

36. In *Diedrichs-Shurland* v *Talanga Stiftung*, the Privy Council allowed an appeal and remitted back to the Court of Appeal of the Bahamas in circumstances where there was doubt about

whether the trial judge had read and taken into account a particular letter which had been addressed to him directly by one of the parties after he had reserved judgment (and which the Board described as "a grossly improper letter"). The Board also considered the effect of a delay of about fourteen months in giving the judgment after trial, and in that respect Lord Hoffman said in giving the judgment of the Board:

> "24 The next matter upon which the appellants rely is the long delay between the end of submissions and the judgment. It is accepted that delay is not in itself a reason why the proceedings should be regarded as unfair. It is unfair only if there is a real likelihood that it has resulted in a flawed decision: see *Cohham* v *Frett*… The appellants submitted that such a likelihood was shown by mistakes which the judge had made in his reasons for judgment. These showed that he must have forgotten some parts of the evidence.
> 25 Their Lordships have examined these alleged mistakes with care and can find nothing to support a conclusion that the judge had forgotten any significant aspect of the evidence…"
> The judgment of the Board then went on to discuss and consider the consequences of the judge's failure to mention in the course of his judgment particular letters which had been referred to in evidence. Lord Hoffman concluded that "The fact that they were not mentioned is therefore no indication that the judge overlooked evidence favourable to the appellants."

37. The next case is *Jervis and another* v *Skinner* which was another appeal from the Court of Appeal of the Bahamas and in which one of the issues was whether the judgment of the trial judge was unsafe by reason of the delay before it was delivered. The delay in question was over sixteen months during which time the judge had postponed handing down of judgment on a number of occasions and had in open court more than once commented on the length of time that the judgment was taking to prepare and on the quantity of material which he was having to consider. In relation to the approach to be taken in the case of such delay, Lord Hope of Craighead in giving the judgment of the Board said:

> "44 Mr Jervis submits that the decision of the judge is unsafe having regard to the delay before the judgment was delivered. The Board accepts the submission made on behalf of Mr Skinner that the correct approach to cases of excessive delay is to ask whether, as a result of the delay, the decision under appeal is unsafe and whether "it would be unfair or unjust to let it stand". [Lord Hope then quoted the passage from the judgment given by Lord Scott in *Cobham* v *Frett* cited above at paragraph 35 and continued] … This test has been followed in a number of cases: see eg *Deidrichs-Shurland* v *Talana Stiftung…, Habib Bank Ltd* v *Liverpool Freeport (Electronics) Ltd…, Boodhoo* v *A-G of Trinidad and Tobago*… and *Hurndell* v *Hozier & Another…*
> 45 Those cases also show that, where there is excessive delay the appeal court must consider the findings of fact of the judge with particular care: see in particular the Habib Bank case and *Goose* v *Wilson Standford…* In the *Habib Bank* case Lord Phillips MR, giving the judgment of the Court of Appeal, quoted part of the judgment of Lord Scott in *Cobham* v *Frett* set out above and added this further quote:
> "It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party.""

As will be seen, all of the cases referred to by Lord Hope have been put before us in the present appeal.

38. The final decision of the Privy Council on the issue of delay in giving judgment is *Ramnarine* v *Ramnarine* which concerned divorce proceedings in the courts of Trinidad and Tobago. In respect of delay in delivering a judgment, the appellant relied upon the period of four years after the conclusion of the trial before the judge delivered an oral judgment, and upon a further period of one year and ten months thereafter before the issuing of a relatively brief written judgment which was accompanied by the court's notes of evidence. Notwithstanding the extent of these delays, the Board dismissed the appeal. In the judgment of the Board given by Lord

Wilson, his Lordship referred at paragraph 21 to what was said by Lord Scott in *Cobham* v *Frett*, and he then continued:

"22 In the present case, gross though was the judge's delay in its delivery, the Board fails to find significant consequential error in the reasoning of his judgment. It balks at the prospect of a rehearing, which [counsel for the appellant] concedes to be the only realistic outcome of any success in the appeal. The costs of the financial proceedings and the length of their pendency to date are both already out of all proportion to the sums conceivably at stake…"

39. In light of the comprehensive and consistent approach which has been stated by the Privy Council over this series of cases, we do not consider it to be necessary to deal with the decisions of the Court of Appeal in England in any detail. That the separate jurisdictional lines of authority are consistent is demonstrated not least by what was said by Lord Hope in *Jervis and another* v *Skinner* where he referred to *Habib Bank Ltd* v *Liverpool Freeport (Electronics) Ltd*, *Hurndell* v *Hozier and another* and *Goose* v *Wilson Standford & Co.* Having said that, particular reference was made before us by the present trustee to *Bond* v *Dunster* where there had been a delay of some twenty two months without explanation between the conclusion of the hearing and the giving of judgment, and where it was contended that one result was that the judge's findings of fact were against the weight of the evidence. In dealing with the principles, Arden LJ dealt with the "Standard of review on appeal against findings of fact in a seriously delayed judgment" as follows:

> "7 The function, however, of the court on hearing this appeal is not to impose sanctions or to investigate the reasons why the delay occurred. The function of this court on this appeal, which is principally brought against the judge's findings of fact, is to consider whether any of those findings of fact should be set aside and a retrial ordered. Findings of fact are not automatically to be set aside because a judgment was seriously delayed. As in any appeal on fact, the court has to ask whether the judge was plainly wrong. This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. However there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed."

Arden LJ then referred to the judgment of Peter Gibson LJ in *Goose* v *Wilson Sandiford & Co*, including the passage in his judgment at paragraph 113 where the judge said that "Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged…" In succeeding paragraphs of her judgment, Arden LJ referred to passages from the judgments of the Privy Council in *Cobham* v *Frett* and *Boodhoo and another* v *Attorney General of Trinidad and Tobago*.

40. Having considered these authorities at some length because of the range of the issues which arise in connection with the Lieutenant Bailiff's judgment in the present appeal, we are satisfied that they provide comprehensive guidance on the approach which is to be taken by an appeal court in the case of a judgment at first instance which has been significantly delayed. The following principles may be identified. The existence of delay does not by itself provide a reason to quash the decision explained in the judgment. There is no threshold of time beyond which a delayed judgment becomes unacceptable, but it has been recognised that a judgment which has been delivered more than twelve months after the conclusion of a trial gives rise to particular considerations relating to delayed judgments which are to be taken into account by an appeal court. Where these considerations arise, an appeal court must still identify an error or potential error on the part of the judge at first instance and which is apparent from the terms of

his judgment. Where a consideration of the judgment may suggest an error on the part of the trial judge, the existence of delay is a factor which may provide an explanation for that error and may therefore be a reason why an appeal should be allowed. But, and we emphasise this again, the delay by itself is not sufficient however long it may be.

41. What this means in a case such as the present, and that is where the present trustee has suggested errors in the findings and reasoning of the Lieutenant Bailiff, is that we must begin by considering the judgment as we would any other in order to see whether these suggested errors can be confirmed. If we were to be satisfied that the suggestion of errors may be justified, then we would be entitled to take into account, as a reason or potential reason as to why the Lieutenant Bailiff had erred, the delay which took place between his hearing of the evidence and the issuing of his judgment. Where the fact of that delay may provide an explanation for the error, or where it may make it more likely that an error has occurred, then we may find that there has been such an error and deal with it accordingly. Where we do not find the suggestion of an error to be justified having considered the terms of the judgment, then we may not disturb the finding or reasoning just because of the delay.

42. A particular factor in this consideration is that the existence of an unacceptable delay may tend to lessen or remove the respect which an appeal court would normally give to a judge at first instance because of the advantage which he has had in hearing and seeing the witnesses. This may be particularly important where a judgment at first instance has turned on matters of credibility and reliability, and that is because the passage of time before the giving of judgment may have dimmed the judge's recollection of the evidence led before him. Notwithstanding, the present case does not appear to be one principally or even substantially concerned with the credibility and reliability of individual witnesses. Although much of the evidence before the Lieutenant Bailiff was contested, and there was lengthy cross-examination of witnesses, the purpose of this tended to be rather more about the interpretation and effect of documents and events than the truthfulness or reliability of the witnesses themselves.

43. We are therefore satisfied that we need properly to consider the judgment in due course and to assess the findings and reasoning of the Lieutenant Bailiff in order to identify whether he may have fallen into error. In carrying out that exercise, we must take into account the delay which has occurred in giving judgment but should do so mindful of the fundamental principle which is that we should disturb the judgment only if we are satisfied that one or more material errors have occurred. The existence of the delay is no more than one of the factors which ought to be borne in mind in deciding whether any material error has been demonstrated.

44. One particular aspect of the delay relied upon by Advocate Swan is the apparent change of mind of the Lieutenant Bailiff between the hearing on 20th August 2013, where he suggested that Article 32(1)(a) of the Jersey Law would not apply, and his ultimate decision as explained in the judgment where he held to the opposite effect. In our judgment this does not add anything to the considerations which require to be taken into account by us a court of appeal and resulting from the overall delay between the ending of the trial and the issuing of the judgment. On the face of it, the circumstance referred to may suggest that the Lieutenant Bailiff had not written the relevant part of his judgment where he dealt with Article 32 until after August 2013 but, not least because that is a matter of legal reasoning and conclusion rather than the assessment of evidence, it does not give any indication of whether he had already written or was still to write his conclusions based on the evidence. In other words, this particular factor is equally consistent with the fact that by August 2013 the trial judge had already concluded his judgment on matters of evidence as it is with the alternative. Put simply, just because one part of a judgment may have been written rather later does not mean that other parts were not written earlier. We therefore reject this issue as being of any materiality to our ultimate consideration of the evidence.

45. For these reasons we are satisfied that although an unacceptable delay did occur in this case between the ending of the trial and the giving of judgment, that would not justify our allowing the appeal without properly considering the remainder of the issues which we do next, always taking into account the existence of the delay but not regarding it as conclusive or definitive in

its own right. This means that it is correct for the former trustee to put forward delay as an element in its appeal based upon serious procedural irregularity but it is not an element justifying by itself the allowance of the appeal.

46. With reference to the individual contentions put forward by the former trustee in relation to delay, we deal with these as follows. The issue of whether, as a result of the delay, the Lieutenant Bailiff had forgotten or may have forgotten aspects of the evidence, is a matter to be determined by our consideration of his whole reasoning. The fact that he may be said to have made findings of fact which are contrary to the evidence or to the weight of the evidence is similarly a factor to be determined based upon all that he has said. The fact that we may not afford to the Lieutenant Bailiff the special advantage normally enjoyed by a trial judge is once again an aspect to be determined by reference to all that he has said and bearing in mind, as we have already observed, that credibility and reliability may not be significant factors in this particular case. Finally, whether the delay did compromise the Lieutenant Bailiff's ability to deal with the issues fairly will depend upon what he has actually found and how he has justified his conclusions.

Substantive Issues: Gross negligence and unreasonableness

Introduction

47. We now turn to deal with the substantive arguments on which, as we have already remarked, there is overlap with procedural contentions. Thereafter we shall deal with the remaining procedural issues.

48. In paragraph 20 above we set out in short form the various issues raised on appeal. Apart from that relating to delay in giving judgment, with which we have just dealt, it was clear from the oral argument before us that a number of the other issues blended together as different facets of the same point and we propose to approach matters in that way. We commence with the issues in respect of the gross negligence and unreasonableness claims which appeared to be at the forefront of the substantive and procedural arguments for the present trustee.

49. At one level it might be thought that the issues in respect both of gross negligence and unreasonableness should be separate; but in truth almost identical lines of argument arise within the salient sections of the grounds of appeal whether they are being addressed in respect of unreasonableness or gross negligence. The arguments may be characterised as arising properly in relation to unreasonableness if Article 26 rather than Article 32 of the Jersey Law were to be applicable to these matters, and as arising properly in relation to gross negligence if Article 32 were to be applicable. As we have indicated, we have already determined that, in our view, Article 32 is applicable. The learned Lieutenant Bailiff, however, took the other view and his reasoning is expressed in that context. We address matters upon the basis that the test to be met is that of gross negligence.

50. As can be seen from the grounds of appeal which we have already set out in brief, and as was clear from the submissions before us, an argument of considerable importance for the present trustee was that the Lieutenant Bailiff had failed properly to appraise the case for the former trustee, in that he concentrated to an unacceptable degree on the pleadings and did not address the whole panoply of its arguments. The former trustees responded that the points now raised by the present trustee were not in issue at the trial. We have therefore found it necessary to consider in depth the case presented by the present trustee to the Lieutenant Bailiff.

51. As a result of the extensiveness of the arguments presented to us in this part of the appeal we must deal some at length with the issues which seem to us to arise under this head and it may be of assistance, at this point, to summarise the views which we are about to express.

    i. Gross negligence is a most serious allegation and the former trustees were entitled to be informed with precision what was the extent of the duty said to have been broken,

how it had been broken, what should have been done instead, why the breach was said to have been gross and how the breach had given rise to the loss. [see paragraphs 52 to 54 below]

ii. It is for an appellant to show that issues at trial went wider than the pleadings. [paragraph 55 below]

iii. The relevant pleaded breaches for the purpose of this part of the appeal appear to have been (a) failure to ensure that any valid loans were owed by the recipient company to the lender and not otherwise, (b) failure to extinguish any liability still imposed on the former trustees on creation of the Oscatello Arangement or to transfer those liabilities into the Oscatello companies and (c) if any of what are referred to as the July 2008 entries, October 2008 entries or March 2009 transaction were invalid, failure to render them valid. [paragraph 56 below]

iv. The case set out by the present trustee in opening was consistent with the pleaded case. [paragraph 71 below]

v. Much of the Lieutenant Bailiff's consideration of the case for the present trustee accurately summarised the effect of the present trustee's pleadings. [paragraph 80 below]

vi. The Lieutenant Bailiff identified two matters before him which, if established, were capable of suggesting unreasonableness of the former trustees in incurring liabilities: (i) accepting what has been referred to as upstreaming and downstreaming and novation and (ii) incurring liabilities to Oscatello. [paragraph 81 below]

vii. He noted that the case put by the present trustee in closing submissions was for gross negligence of the former trustees (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 Oscatello Arrangement by means of the Framework Agreement; and (iv) in failing to deal with the loans problem after entering into the Framework Agreement. [paragraph 86 (iv) below]

viii. The Lieutenant Bailiff held there could not have been negligence – let alone gross negligence – in relation to heads (i) and (ii). [paragraph 86 (v) below]

ix. As regards head (iii), the Lieutenant Bailiff found that whilst there might have been a falling short of anticipated high standards of professional trustees, this was not a case of gross negligence in the sense of a serious or flagrant degree of negligence. [paragraph 86 (vi) below]

x. The Lieutenant Bailiff was not persuaded that extinction of liabilities could be achieved without third party consent and considered that there was no convincing evidence that such consent would be forthcoming. Nor was he satisfied that, in view of the complexities and a deteriorating market in late 2008, any failure could be described as a serious or flagrant degree of negligence. [paragraph 86 (vii) below]

xi. As to the Grounds of Appeal (insofar as relevant to present issues) and the submissions to us, the principal elements appear to be:

   a. That the Lieutenant Bailiff, in concentrating almost exclusively on the pleaded case, ignored the case for the present trustee that assets and liabilities ought to have been transferred to a wholly owned subsidiary of the TDT. [paragraph 91 (a) and (b) below];
   b. That it could not have been reasonable to become directly liable to Glenalla or Thorson. [paragraph 91 (c) below]
   c. That the Lieutenant Bailiff failed to consider the former trustees' relevant duties and powers and, in reaching many of his conclusions, proceeded upon the basis of assertions unsupported by evidence. [paragraph 89 below]
   d. That the Lieutenant Bailiff was in error in failing to identify a clear breach of trust in the former trustees in their not properly considering whether they should accept the liabilities. [paragraph 91 (d) below].

xii. In our determination –

   a. In respect of points a and b in paragraph xi above, the case that the assets and liabilities of the TFT ought to have been transferred to a wholly owned subsidiary of the TDT was not one presented in pleading or put to witnesses

and cannot be entertained on appeal. [paragraph 101 to 105 below]

b. In the application of point c in paragraph xi above to the creation of the Oscatello Arrangement, the Lieutenant Bailiff was entitled to reach his decision having regard to his view that there was an urgent need to have the framework agreement in place and an unacceptable impact of any delay. [paragraph 107 below]
c. In the application of point c in paragraph xi above to the period after the creation of the Oscatello Arrangement and the creation of the 2008 Entries and Transaction, the Lieutenant Bailiff was entitled to reach the view that, in light of all the uncertainties surrounding both the proper objective for the trustees and the financial world in general, any failure was not of an appropriate level of culpability. [paragraph 112 below]
d. When the decision below was properly understood, there was nothing of merit in the complaints as to failure to recollect the evidence of a witness or the impact of a piece of evidence. [paragraphs 113 to 117 below]
e. We do not consider that the approach of the Lieutenant Bailiff failed adequately to identify the proper test for identifying gross negligence. [paragraphs 118 to 119 below]
f. In respect of point d in paragraph xi above we discern no other matters of sufficient weight to entitle us to disturb the determination of the Lieutenant Bailiff on this section of the Appeals. [paragraphs 120 to 121 below]

Preliminary considerations

52. The fundamental contention in the argument before us on behalf of the present trustee was that the approach taken by the Lieutenant Bailiff had placed undue emphasis on the pleadings of the parties, failed to address the arguments for the present trustee and failed to deal properly with its witnesses. It was said, for example, that, as to Glenalla and Thorson, the Lieutenant Bailiff should not have held that the former trustees did not act improperly in accepting the novation of liabilities as there was no reason why the assets and liabilities could not have been transferred to a company wholly owned by the former trustees as trustees of the TDT, thereby ensuring that the TDT trustees were not themselves incurring any liabilities. As far as Oscatello was concerned, the complaint, on various bases, was that the Lieutenant Bailiff should have found that it was unreasonable and improper for the former trustees to incur a liability to Oscatello in debt or under the general law. The answer of the former trustees to these and similar points is that they were not in issue at the trial: the Lieutenant Bailiff had dealt properly with the case of the present trustee as it was pleaded, put to the witnesses and expounded in submissions, and the case being advanced on appeal is a new case not put forward at trial.

53. In these circumstances it is necessary to identify the case which was advanced by the present trustee relating to those and other related matters. In doing so, it is important to bear in mind that the contention that the former trustees had acted in breach of trust in a manner that could properly be categorised as grossly negligent is self-evidently a very serious allegation, requiring to be pleaded with specificity. It is not enough to say that the loss represented by the liabilities to Glenalla, Thorson and Oscatello should have been avoided: the present trustee had to go further and assert that there were steps that should and could have been taken that would have avoided the loss. Nor is it enough to say that the former trustees behaved in a manner amounting to gross negligence, unless the present trustee can demonstrate that that behaviour was a cause of the loss.

54. We would go further. The former trustees were entitled to know with precision what the present trustee said was the extent of the duty owed by the former trustees, how that duty had been broken (involving a comparison of what the former trustees did and what the present trustee said they should have done instead), why the breach was said to be a grossly negligent breach, and how the breach had given rise to the loss claimed (in other words, that the loss would have been avoided if the former trustees had done what the present trustee says they should have done). The former trustees were entitled to expect that the case they had to meet in those respects would be set out in the pleadings; and they were entitled to expect that the Lieutenant

Bailiff would determine the issues identified in the pleadings. Although it may be the case that courts are less inclined to hold parties to their pleadings than was the case in the past, pleadings still have an essential role in the identification of the issues in dispute and in enabling the parties to prepare their arguments and deal with evidential matters on a common footing. Too much of a departure from the pleaded cases may give rise to injustice by causing a party to be taken by surprise. Pleadings may, of course, be amended; and, in the present case, the current trustee was permitted to amend its pleading at the end of the trial to reflect an aspect of the case that it had put in closing submissions. As amended, however, the pleadings provide the basic framework for identification of the issues to be determined at trial: on which, in the whole circumstances, the Lieutenant Bailiff was quite correct to concentrate.

55. We also pause to reflect on what is stated, in paragraph 7.1 of its Notice of Appeal, by the present trustee:

> "As a basic and fundamental point, after a trial R&H [the present trustee] was entitled to have its case considered on the totality of the evidence and submission, and not simply or primarily on the basis of its pleaded case".

On this point we start by recognising that it is not, of course, the function of pleadings to identify all points of law: an advocate is entitled, ordinarily, to make any points of law open to him on the facts as they have emerged at trial. It is also accepted that unpleaded factual points can emerge in the course of a trial; and they are not always formalised by amendment of the pleadings. If a trial proceeds on the basis that unpleaded points are nevertheless in issue, we accept that a judge cannot then ignore them and deal with the matter solely by reference to the pleaded issues. But these observations do not detract from the primary point that the purpose of the pleadings is to define the issues: it is for an appellant to make good the assertion that the issues went wider than those emerging from the pleadings.

The pleadings: general

56. Unless we state otherwise, we refer to the pleadings in their final amended form. On examination they disclose that, as regards breach of duty as trustees, and as matters now stand in this appeal, the case for the present trustee before the Lieutenant Bailiff (and where in pleadings and other documents the present trustee is referred to also as "R&H") was that the former trustees breached their obligations in three broad areas. First, in creating and accepting accounting entries purporting to show that there were multiple obligations when in fact there were not. Secondly, in failing to extinguish any such liability on or after the creation of the Oscatello structure. Third, in failing to render valid the July 2008 Entries, the October 2008 Entries or the March 2009 Transaction.

57. It may be important to understand that, at the outset of the trial, a significant part of the case for the present trustee was that there had been no loans due by the former trustees to Glenalla or Thorson. The proceedings had commenced with the former trustees' Application which explained much of the salient background. In particular they asserted that when, in the interests of the TFT, funds were transferred between entities ultimately controlled by the first named plaintiff (otherwise ITGL) as the trustee of the TFT, it was the general practice to account for the transfers as a series of informal loan arrangements. The former trustees expressly made no admission as to whether those arrangements constituted or gave rise to loan agreements binding in law. Paragraph 13 of the Application described the process in the following terms:

> "The said arrangements were recorded by means of accounting entries in the books of account of each relevant company as being made from the transferor 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. Thereafter, loans were recorded as made by ITGL as trustee of the TFT to an immediate subsidiary, and then from that company to its subsidiary, and so on to the transferee. Loans were not recorded as made to or from ITGL as trustee of the TFT where the transferor and transferee were owned by same ultimate parent company. Where ITGL was a counterparty to such

> arrangements, it was a party only in its capacity as the trustee of TFT and at all times the arrangements were recorded within a separate ledger from ITGL's own corporate books of account."

This system became known as "upstreaming and downstreaming". The former trustees' pleadings referred to the informal arrangements as "the Arrangements"; the present trustee, focusing instead on the entries that reflected them, referred to them as "the Accounting Entries".

58. It is also important to understand the original thrust of the present trustee's Defence and Counterclaim. This was concerned to establish two main propositions: first, that the BVI companies had no valid claim against the former trustees; secondly, that if there was a valid claim against the former trustees, neither the BVI companies nor the former trustees were entitled to look to the assets of the TDT to satisfy that claim. It was in these circumstances that it first set out what it asserted was the effect of the Accounting Entries.

59. In paragraph 11 the present trustee therefore pleaded that "the Accounting Entries did not represent or evidence any real transaction or real transfer of funds between a company and its parent or subsidiary company and do not evidence any legally binding loan agreements. They were simply book entries without any matching underlying transaction between a company and its parent or subsidiary company and no monies were or are repayable under them. The monies which are repayable are repayable by the company which received the funds direct to the company which transferred the funds".

60. Paragraphs 15 and 16 then pleaded that, because the Accounting Entries neither created nor evidenced any legally binding loan agreements, there were no liabilities capable of being novated to the former trustees, and that the Glenalla and Thorson Deeds of Novation did not create binding loan arrangements where previously there had been none. In paragraph 18, it was pleaded that, if the former trustees did continue to treat the accounting entries as constituting binding loan agreements, they were simply wrong to do so.

61. As to the Oscatello restructuring, paragraph 21 pleaded that it was intended by Kaupthing and the former Trustees that Kaupthing's proposed loans to Oscatello and Eliza were to be non-recourse to the assets of the TDT held outside Oscatello and its subsidiaries, so that Kaupthing was intended to have recourse only to the assets of Oscatello and its subsidiaries for repayment of loans it made to Oscatello.

62. Paragraphs 25 and 26 referred to the warranty given by the former Trustees in the framework agreement of the accuracy of the list of assets and liabilities of the companies transferred into the Oscatello structure, and paragraph 27 pleaded that the former Trustees could not resile from the position shown by the warranted statements of assets and liabilities, which omitted any loans equivalent to the accounting entries.

63. Then, as an alternative to its primary case that the Accounting Entries did not represent legally binding loan arrangements, the present trustee relied upon the entries made in the books of account of the TDT and its subsidiaries in July 2008 and October 2008, and upon a March 2009 transaction (respectively the "July 2008 Entries", the "October 2008 Entries" and the "March 2009 Transaction"), as having given effect to the mutual intention of Kaupthing and the former Trustees that recourse should only be to assets within the Oscatello structure and as having discharged any liability that the former Trustees might have been under.

64. In summary, therefore, the present trustee's primary case was in relation to the existence of the loans and was that they had never existed as obligations of the former Trustees; but, if they had, those obligations had been extinguished in July or October 2008 or March 2009.

65. By the end of the trial, the present trustee had accepted that the Accounting Entries relating to the Glenalla loans reflected movements of funds directly from Glenalla to the former trustees; and the Lieutenant Bailiff held (in paragraph 231 of his judgment) that the same applied to the

entries relating to the Thorson loans. Thus a significant part of the present trustee's original case – that there had been no loans due to Glenalla or Thorson – was either abandoned by them or was rejected by the Lieutenant Bailiff, and there is no appeal against that part of his decision. It was in these circumstances that a major part of the determination below had to deal with an issue no longer live and that matters now concentrate on unreasonableness and breach of duty.

The pleadings: identification of the case on breach presented for the present trustee

66. We turn therefore to consider the pleadings relating to the now remaining complaints against the former trustees. These are set out in the Amended Defence and Counterclaim for the present trustee at paragraphs 67 to 76. They are directed primarily to asserting that the former trustees had acted unreasonably in incurring the loans, or in failing to transfer the liability for them, with the claimed result that the former trustees were not entitled to indemnity from the TDT against the claims made by the BVI companies. As we have already observed, substantially the same matters as are relied on in the claim that the former trustees acted unreasonably are also relied on as founding a claim that the former trustees acted in breach of trust in a manner that amounted to gross negligence.

67. Before identifying what appears to be set out in those parts of the pleading, it is important to be aware that the former trustees sought further and better particulars of some of the allegations set out in those paragraphs. Answers were initially given by the present trustee in November 2011 ("the November 2011 replies"). The former trustees were not satisfied with the answers, and obtained an order from the Lieutenant Bailiff for the provision of further information. The present trustee provided information pursuant to that order on 30 December 2011 ("the December 2011 replies"). Again, the former trustees were dissatisfied with the answers provided and the present trustee provided yet further information by letter dated 21 February 2012 ("the February 2012 replies"). As it may be helpful for those reading this judgment to have access to the relevant parts of the pleading in full, we have set out our analysis of the relevant paragraphs, the related questions and ensuing answers in Appendix 1 below.

68. The essence of the case for the present trustee is found in Paragraph 67 which asserted that the former trustees (a) were obliged to act with due diligence as would a prudent person and to the best of their ability and skills; (b) had to preserve the value of the trust property and enhance its value; and (c) had to exercise their powers only in the interests of the beneficiaries and in accordance with the terms of the trust. Paragraph 68 asserted that, as paid professional trustees, the former trustees owed a higher standard of care than an unpaid individual. Breaches of these obligations are pleaded under three headings: "creation and acceptance of the accounting entries"; "failing to extinguish any liability on or shortly after the creation of the Oscatello structure"; and "failure to render valid the July 2008 entries, October 2008 entries or the March 2009 transaction".

69. The citations from the pleadings, as set out in Appendix 1, show that the pleaded case on negligence for the present trustee at trial commenced with the submission that ITGL in its capacity as trustee of the TFT should not have undertaken obligations to Thorson and Glenalla or made entries that appeared to record such obligations. In closing submissions this allegation was accepted by the present trustee to be a matter that was merely background to the complaints that were the subject of the trial: transcript day 10, p.77, lines 18-22. That left as the main part of the pleaded case the assertion that the former trustees as trustees of the TDT should have done one of the following:

    a. They should have taken steps after August 2007 to ensure that any valid loans were owed by the company that received the funds to the company that transferred them: paragraph 72. The nature of the steps was a matter for the former trustees, but could for example have involved the passage of resolutions or the correction of books and records: December 2011 replies, answer 35.
    b. Had that not been done, they should have extinguished any existing liability of the former trustees as trustees of the TDT or transferred the liabilities into the Oscatello structure: paragraphs 73 and 74(f). This should have been done either:

i. by obtaining loan repayments from debtor companies that had been contributed by the TDT to the Oscatello structure (February 2012 replies, answer 5) and using the payments to discharge the Glenalla, Thorson, Oscatello and/or Eliza loans (December 2011 replies, answer 37(a). This should have been done on or shortly after the creation of the Oscatello structure (February 2012 replies, answers 4 and 6.3). or

ii. by procuring releases, mutual in the sense that each company would release its claims because other companies would also release their claims (February 2012 replies, answer 11) of liabilities owed by or to the former trustees to or from companies in the Oscatello structure (December 2011 replies, answer 37(b)) or by procuring the novation of the former trustees' liabilities so that they were owed not by the former trustees to Eliza or Oscatello but by Silverville to Eliza and by Eliza to Oscatello, and so that companies within the Oscatello structure were creditors or debtors of Oscatello, not of the former trustees (December 2011 replies, answer 37(c)). This should have been done shortly after the creation of the Oscatello structure (February 2012 replies, answer 9).

c. We note in passing that it was suggested that these steps could have been taken without the directors of Thorson and Glenalla being in breach of fiduciary duty and whether or not those companies were solvent (December 2011 replies, answers 39 and 40; February 2012 replies, answer 15). It is probable also that the present trustee contended that these steps could have been taken without Kaupthing's consent: the answer to that effect in the November 2011 replies (answer 47) strictly related to giving effect to the July and October 2008 Entries and the March 2009 Transaction, but the steps the present trustee contended should have been taken to do that were in substance the same as those it contended should have been taken to transfer the liabilities into the Oscatello structure.

d. They should have effected the July 2008 Entries and the October 2008 Entries and/or the March 2009 Transaction promptly on or after the creation of the Oscatello structure (paragraph 74(j)) or done more to render them valid (paragraph 75) by observing the necessary formalities (paragraph 76(b)). These formalities involved steps substantially the same as those which the present trustee said that the former trustees should have taken so as to transfer the liabilities into the Oscatello structure (compare December 2011 replies, answers 37(c) and 49-51).

70. It may also be important to note also, albeit in parenthesis, the times at which the present trustee contended these various things should have been done: "after August 2007" – which is to say after the transfer of assets into the TDT in the case of possibility (1); "on or shortly after" the creation of the Oscatello structure in the case of possibility (2)(a); "shortly after" the creation of that structure in the case of possibility (2)(b); and either "promptly on or after" the creation of the structure, or at the time of the July and October 2008 Entries and the March 2009 Transaction in the case of possibility (3).

The trial: identification of the case presented in opening for the present trustee

71. The case run by the present trustee in opening was consistent with the pleaded case. Its written Opening Submissions it asserted in paragraph 5.3 (on page 56 of the document) that the former trustees' conduct "in incurring and retaining liabilities" for the inter-company loans was unreasonable; and in paragraphs 5.7 (b) and (c) it raised certain questions. "What did the former trustees do that they should not have done, and what did they not do that they should have done, that amounted to acting unreasonably?" And were there "legitimate constraints" on what the former trustees could do arising from such things as adverse tax consequences, the necessity and availability of Kaupthing's consent and the financial position of the companies? Paragraphs 5.12 and 5.13 deal with the former trustees' duties and powers and the higher standard of care to be expected of a paid professional trustee; and paragraph 5.14 is in the following terms:

> "R&H submits that the most critical failings of the former trustees were failing to raise the issue of the inter-company loans at the time of the Oscatello Restructuring, giving a false warranty to Kaupthing under the Framework Agreement, and failing to correct the position thereafter".

72. Paragraph 5.20 asserts that the former trustees' failure to deal with the inter-company loans, at the time of the Oscatello restructuring when they realised their significance, was unreasonable, a very serious failure to exercise due diligence or best ability, and gross negligence. Paragraph 5.22 complained of the interposition of the trustee in the inter-company loans, it being said that "a transfer of money from company A to company B could simply have been a loan from company A to company B. But instead, it was treated as a loan from company A to the trustee and then from the trustee to company B". Paragraph 5.24 complained of a failure to consider novating the loans on or after the transfer of assets and liabilities from the TFT to the TDT; paragraph 5.26 of a failure to extinguish the loans before the creation of the Oscatello Structure; paragraph 5.27 of a failure to novate the loans or to extinguish them at the time of the creation of the Oscatello structure; and paragraph 5.29 of a failure to pass resolutions to validate the July 2008 Entries and the October 2008 Entries.

73. Paragraphs 5.30 to 5.46 dealt with the possible existence of constraints on the former trustees' freedom of action. Paragraph 6.1 to 6.4 deal with the claim in breach of trust. Paragraph 6.2 is in the following terms:

> "R&H's central point is that once the former trustees realised that the statement of assets and liabilities given to Kaupthing did not mention the inter-company loans, they were under a duty to raise it, and their failure to do anything about it was a very serious failing below the standard of the reasonable trustee. Had they done so, the result would have been that the loans would have been novated into the Oscatello Structure. Therefore, the former trustees' failures were properly "gross negligence" in which they would not be entitled to any exemption from liability".

74. Paragraph 6.3 complains of a "striking failure" to consider the interests of the beneficiaries, and paragraph 6.4 asserts that the loss resulting was the loss of the trust property that would arise if the BVI Companies succeeded in enforcing the inter-company loans.

75. In his opening submissions to the Lieutenant Bailiff, Advocate Swan for the current trustee emphasised that his written Opening Submissions remained his case subject to two issues requiring clarification: transcript day 2, p.71, lines 7-12. The two issues addressed were in respect of the case against the BVI companies' claim and the proper approach to Article 32 of the Trusts (Jersey) Law 1984. Nothing further was added as regards the gross negligence and breach of trust elements of the claim.

The Judgment of the Lieutenant Bailiff

76. For the purpose of understanding the following analysis it is necessary to repeat that the consequence of our previous decisions is that the liability of the former trustees is limited by virtue of the operation of Article 32 to the trust assets, subject only to any separate liability they may be under for breach of trust. Because of the exoneration provision contained in clause 9.1 of the Declaration of Trust dated 26 March 2007, the former trustees will not be liable for any loss resulting from a breach of trust unless that loss arose "by reason of that Trustee's own fraud, wilful misconduct or gross negligence". Upon our analysis, it is not necessary for us to consider whether the liabilities to the BVI companies were unreasonably incurred, or whether the former trustees acted unreasonably in failing to divest themselves of those liabilities. Those issues would have arisen only if the former trustees' right to indemnity had depended upon Article 26 (2) of the Trusts (Jersey) Law, which gives a trustee a right of reimbursement in respect of expenses and liabilities reasonably incurred in connection with the trust.

77. As we explained in our judgment dated 29 October 2014, we consider that it is Article 32 itself that gives a right to indemnity in a transaction entered into by a trustee with a person who

knows that the trustee is acting as such. The Lieutenant Bailiff, however, took a different view of the effect of Article 32, and considered that any indemnity available to the former trustees was derived from Article 26 (2). That led him to consider, principally, the reasonableness of the former trustees' behaviour, and his conclusions on that topic are closely bound up with his conclusions on the question of whether or not the former trustees were liable for breach of trust. It follows that in considering the Lieutenant Bailiff's findings, we apply them in the context of our own determination regarding Article 32.

78. The Lieutenant Bailiff dealt with the salient matters for present purposes as Issues 6 and 7 (between paragraphs 217 and 252 of his judgement). These issues were stated in the following terms.

> "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.
> Issue 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."

79. The pleaded matters considered by the Lieutenant Bailiff to be relevant to these Issues were set out between paragraphs 74 to 77 and in paragraph 84 of his judgment. In our view, those passages, which for ease of reference we have set out in Appendix 2, accurately summarise both the pleadings to which we have just referred and their effect.

80. Although stated primarily in the context of Article 26 unreasonable conduct, the matters identified by the Lieutenant Bailiff in those passages of the pleadings are indeed the issues which arise on the pleadings. We did not understand the present trustee to complain of the Lieutenant Bailiff's analysis in these passages; although, as we have said, complaint is made both of the exclusive nature of his focus on the pleadings and of the way in which he dealt with the issues. It may be appropriate to observe at this point, however, that it does not seem to us that the Lieutenant Bailiff's consideration of the issues was entirely confined to the matters that had been pleaded. This appears most clearly from paragraph 222 of the judgment, where the Lieutenant Bailiff said this:

> "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 the existing liabilities to Kaupthing) or, perhaps, on 24 August 2007 (when they assumed, or undertook, those liabilities by entering into the deed of novation)".

This passage demonstrates that the judge understood there to be a live question about the conduct of the former trustees in undertaking liability to Glenalla and Thorson on 24 August 2007 that went beyond the pleaded case, which was itself confined to a complaint that the former trustees had failed to novate the loan obligations so that they became direct obligations by the company which actually received the funds to the company which actually transferred them.

81. Consistently with the way in which he had formulated the issues, the Lieutenant Bailiff first considered whether there were matters which, if found, were capable in law of establishing that the liabilities incurred by the former trustees were not reasonably incurred; and he identified two such matters. In paragraph 230 he said this:

> "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".

82. The Lieutenant Bailiff's reasoning on these topics was set out in paragraphs 231 and 232. As it may be helpful to be able to refer to them in full they are quoted in Appendix 3. Again the learned Lieutenant Bailiff considers in detail the pleadings and what had been established at trial.

83. The Lieutenant Bailiff dealt with issue 7 – breach of trust amounting to wilful default or gross negligence – in paragraphs 234 to 251 of the judgment. In paragraph 234 he set out clause 9.1 of the TDT Declaration of Trust, and paragraph 83 of the present trustee's defence, noting that fraud was not alleged. In paragraphs 235 and 236 he referred to paragraphs 70 to 72 of the present trustee's Defence, and quoted paragraphs 70 and 71 (the latter of which asserted that the former trustees had acted improperly in accepting that loan obligations had been created by the upstreaming and downstreaming, and in accepting a novation of notional liabilities in August 2007). He then said that he had already rejected the submission that it was unreasonable for the former trustees to act in the manner alleged; and he therefore rejected also the submission that the conduct was in breach of trust and, a fortiori, constituted wilful default or gross negligence.

84. In paragraph 237 the Lieutenant Bailiff quoted paragraph 72 of the present trustee's defence and counterclaim (which asserted that, if the liabilities were actual, not notional, the former trustees acted unreasonably in failing to novate them after the transfer to the TDT so that they became direct loan obligations between the paying and receiving companies); and then he said this:

> "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" transferee and ITGL was the "actual" recipient."

85. In paragraph 238, the Lieutenant Bailiff referred to paragraphs 73 and 74 of the present trustee's defence and counterclaim, dealing with the failure to extinguish the liabilities on or shortly after the creation of the Oscatello structure; and he quoted subparagraphs (f), (g), (h), (i) and (j) of the latter paragraph. In paragraph 239, he referred to paragraphs 75 and 76 of the current trustee's defence and counterclaim, complaining of the failure to render valid the July 2008 book entries, the October 2008 book entries and/or the March 2009 transaction.

86. The Lieutenant Bailiff then, between paragraphs 240 and 252, set out what by now had become his principal findings on the breach of trust claim. As it may be necessary to the understanding of this judgment to be able to refer to these passages in full they are quoted in Appendix 4. In summary, the Lieutenant Bailiff made the following findings:

i. He found it impossible to identify an allegation of breach of trust on the part of the former trustees, as trustees of the TDT, within paragraph 70 (which pleaded only that ITGL, as trustee of the TFT, had acted unreasonably and/or improperly in making the accounting entries.): paragraph 240.
ii. He found that, for breach of trust purposes, no reliance could be placed upon paragraph 71 (which pleaded unreasonableness and impropriety in accepting that multiple loan obligations were created by upstreaming and downstreaming): paragraph 241.
iii. As regards the pleadings in paragraphs 72 and 74 (g) and (i), complaining of the failure to novate loan obligations so that they became direct obligations by the company which actually received the funds to the company which actually transferred them, the Lieutenant Bailiff was of the view that the former trustees would have to have failed to a degree sufficiently culpable to amount to 'wilful default' or 'gross negligence': paragraph 242.
iv. The learned Lieutenant Bailiff then referred to the closing submissions on behalf of the present trustee, where Advocate Swan had indicated that he was not pursing a case of wilful default but had submitted that he could establish a 'serious or flagrant degree of negligence' in four respects, namely, (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 Oscatello framework agreement; and (iv) in failing to deal with the loans problem after entering into the framework agreement: paragraph 243.
v. In the judgment of the learned Lieutenant Bailiff there could not have been negligence – let alone gross negligence – in relation to heads (i) and (ii): paragraphs 244-246.
vi. Turning to the third head (the "loans problem") the Lieutenant Bailiff observed that a failure by the former trustees to recognise the future problem of exposure of assets to claims by Kaupthing might be said to indicate a falling short of anticipated high standards of professional trustees; but in the circumstances which he outlined the failure could, in his view, not be described as a serious or flagrant degree of negligence: paragraph 247.
vii. In respect of the final head, the Lieutenant Bailiff noted the submissions of the former trustees as to the position of the present trustee on the pleadings: paragraph 248. He accepted that it was for the present trustee to state which steps could be taken after the framework agreement had been entered into and noted that the former trustees had requested particulars as to how they could properly and lawfully have extinguished or otherwise dealt with the Arrangements: paragraph 249. As the Lieutenant Bailiff then proceeded to appraise in detail, the response of the present trustee was to identify a number of means by which the loans might be extinguished: paragraph 249. But he was not persuaded that extinction of liabilities could be achieved without third party consent and considered that there was no convincing evidence that such consent would be forthcoming: paragraph 250. Further, he was not satisfied that, in view of the complexities and a deteriorating market in late 2008, any failure could be described as a serious or flagrant degree of negligence: paragraphs 251 and 252.

Grounds of appeal: general

87. The present trustee's complaints about the Lieutenant Bailiff's conclusions are summarised in paragraph 2 of the Notice of Appeal, and elaborated in subsequent paragraphs. So far as relevant to matters presently being addressed, paragraph 2 asserts that the Lieutenant Bailiff erred in fact and law in failing to find that the former trustees had acted unreasonably and/or in grossly negligent breach of trust in incurring liabilities to Glenalla, Thorson and Oscatello and in failing to divest themselves of such obligations: 2.2 and 2.3. Paragraphs 2.5 and 2.6 complain that the Lieutenant Bailiff "committed serious procedural irregularities in failing to consider the evidence of R & H's witnesses and R & H's submissions, and in dealing with large parts of R&H's case simply on the pleadings. This has been compounded by the very lengthy and unexplained delay in handing down judgement. On key aspects of the case, he failed to identify

the evidence that he relied upon; he failed to explain his analysis of the evidence and/or to explain how he reached his decision on the evidence".

88. We have already dealt with delay in handing down. As we have already indicated, whilst these matters fall under two main heads – the substantive dismissal of the breach of trust claim, and procedural irregularity – there is at points some overlap between them.

Grounds of Appeal: Dismissal of the breach of trust claim

89. The detailed grounds of appeal in relation to the breach of trust claim are set out between paragraphs 9 and 13 of the Notice of Appeal. Paragraph 9 is an instance of the overlap to which we have already referred: it complains in general terms that the Lieutenant Bailiff failed to consider the former trustees' relevant duties and powers; that he failed to deal with the standard of skill, care and diligence expected of a highly paid professional trustee; that he failed to apply the correct test to the evidence at trial, instead reaching his conclusions on the basis of the pleadings and/or assertions unsupported by evidence; and that he failed to identify or analyse the evidence that he relied on, and failed to explain his reasoning.

90. Paragraph 10 gives specification in respect of the Lieutenant Bailiff's conclusion that the former trustees were not in grossly negligent breach of trust in accepting the novation of the Glenalla and Thorson loans in August 2007. However the contentions in this paragraph proceed by applying to this conclusion the submissions earlier set out in paragraph 7 of the Notice regarding unreasonableness and impropriety.

91. We therefore turn to paragraph 7:

a. Paragraph 7.2 makes the complaints that through an unduly narrow focus upon pleadings and upon novation between the transferor and transferee companies the Lieutenant Bailiff "ignored R & H's case as put in closing submissions i.e. whether the former trustees acted unreasonably and/or grossly negligently in accepting liabilities to Glenalla and Thorson by novation on 24 August 2007".
b. Paragraphs 7.3 and 7.4 assert that the Lieutenant Bailiff, for various reasons, was wrong to conclude that the transfer of liabilities was part of a package whereby both assets and associated liabilities would be transferred to the former trustees as trustees of the TDT. In particular, the present trustee stated that there was "no reason why, for example, the assets and liabilities could not have been transferred to a <u>company</u> wholly owned by the former trustees as trustees of the TDT, thereby ensuring that the TDT trustees were not <u>themselves</u> incurring any liabilities." (original emphasis)
c. Paragraphs 7.5 and 7.6 say that the Lieutenant Bailiff failed to consider whether, as a matter of law it was reasonable, proper, prudent or necessary for safeguarding the assets of the TDT that the former trustees become directly liable to Glenalla or Thorson for millions of pounds, or whether there was any evidence to that effect; and, it is said, if he had considered it he must have concluded that it was not.
d. Finally, paragraph 7.7 refers to a number of matters from the evidence of Mr Clifford and Mrs Bleasdale which it is said support the proposition that it was not reasonable, proper, prudent or necessary for the former trustees to accept the liabilities, which evidence the Lieutenant Bailiff is said to have failed to consider.

92. We commence by returning to paragraph 10, and noting that in that paragraph and in submissions before us, the present trustee pointed to an alleged difficulty in the judgment in identifying the appropriate cross-references left unspecified by the Lieutenant Bailiff. Advocate Swan referred to paragraph 236 as a possibility. But paragraph 236 concerned paragraph 71 of the defence and counterclaim, which dealt with pre transfer issues which, as we have said in paragraph 69, are no longer live.

93. It seems to us that there is no merit in this point as, in paragraph 245 itself, the Lieutenant Bailiff specifies the reason for his determination, namely, that "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". As it happens these are the same reasons as are stated in paragraph 231 regarding unreasonable conduct.

94. It is then said in paragraphs 10.4 and 10.5 that there was no evidential foundation for that finding; and it is also said to be wrong as a matter of law, since there was no legal requirement for the former trustees to accept liabilities as well as assets.

95. Paragraph 10.6 asserts that the former trustees owed duties to safeguard the trust assets in the interests of the beneficiaries, for which they were paid generous remuneration. They were obliged to consider critically whether they should accept liabilities, and there was no evidence that they even considered that duty or sought to comply with it. "There was therefore a clear breach of trust in failing to safeguard the assets of the TDT which was, in all the circumstances, grossly negligent."

96. Paragraph 10.7 is to similar effect: it complains that the Lieutenant Bailiff failed to consider whether it was a proper exercise of the former trustees' administrative powers, or a proper discharge of their duty to protect the trust fund for the benefit of the beneficiaries, to accept the liabilities; and, had he done so, he would have concluded that accepting liabilities in the circumstances of this case was a grossly negligent exercise of their powers or a grossly negligent breach of duty.

The reasoning of this Court

97. We have set out at some length our consideration of the issues which were presented to us under this head of the appeal of the present trustee. In part we have done this in response to the exhortations on behalf of the present trustee that only a detailed understanding of the case and the judgment would show the deficiencies in the process of the judgment and lead to the conclusion that only a re-trial would suffice. In part also we have done so because the issues were so widely canvassed before us. For our own part, and on a proper characterisation of the issues as a matter of law, we find the essential issues presented to us to be amenable to a much more succinct analysis.

98. For the reasons which we shall now express, it is our judgment that the criticisms of the Lieutenant Bailiff's conclusions, as adumbrated in paragraph 10 of the Notice for the present trustee, have not been made out to s sufficient degree to permit us to interfere with the decision below.

Novation in August 2007

99. What the present trustee seeks to do in this appeal, as was clear to us from the submissions to us from Advocate Swan, is to substitute for its pleaded case one which is somewhat imprecisely expressed in the grounds of appeal as "R&H's case as put in closing submissions i.e. whether the former trustees acted unreasonably and/or grossly negligently in accepting liabilities to Glenalla and Thorson by novation on 24 August 2007." This leads, ineluctably, to the specific suggestions in paragraphs 7.2 – 7.3 and 10.5 of the Notice of Appeal that there was "no reason why, for example, the assets and liabilities could not have been transferred to a <u>company</u> wholly owned by the former trustees as trustees of the TDT, thereby ensuring that the TDT trustees were not <u>themselves</u> incurring any liabilities" (again, original emphasis).

100. So far as we can discern, the only point in the trial at which anything remotely close to such a suggested action was canvassed was when Advocate Swan had said, rather in passing, during his submissions to the learned Lieutenant Bailiff, (transcript B9, p102, lines 10-17):

> "Had he [Mr Clifford] thought for a moment, given that his own view was that there was no rationale to this policy, why would the TDT trustee be accepting these massive liabilities? What he ought to have done was say, well, why do we need to do this? Those

liabilities could very easily have been novated to a company underlying the trust. There was no reason why the TDT trustee had to take those liabilities on personally."

101. That remark by Advocate Swan, and the similar proposal put in the grounds of appeal, is not a case which was put in any real, substantial or systematically considered sense in the present trustee's closing submissions at trial. Nor had it been a case introduced by amendment after the evidence. Most importantly, it was not a case put to the former trustees' witnesses in cross-examination. On its face, it raises at least the question of what was to be achieved by putting liabilities – or assets and liabilities – into a subsidiary company: because the Glenalla and Thorson loans would have been enforceable against the assets held by that company to the same extent as they are enforceable against the assets held directly by the former trustees.

102. On this whole issue, therefore, the learned Lieutenant Bailiff, in our judgment, did not concentrate unduly on the parties' pleadings at the expense of the remainder of the case for the present trustee as put before him in pleadings or closing submissions: rather he concentrated quite properly on the case before him. As is clear from many sections of the pleadings for the present trustee, the action which was suggested and put to the former trustees was non-acceptance by them of transfer of liabilities or extinction of such liability as was transferred to them: see paragraphs 7, 8, 9 and 11 of Appendix 1. Taking positive action in some way to put the assets – or assets and liabilities – into the hands of another, whether a wholly-owned subsidiary or some alternative structure, was not a live suggestion during the trial.

103. Looking at matters from a different perspective, it seems to us clearly impermissible for the present trustee to raise on appeal a case that was not pleaded or properly identified at any point in the course of the trial: whether that set out in paragraphs 7.3 or 10.5, or that mentioned in submission before the Lieutenant Bailiff or before us.

104. Further, in approaching matters as he did the learned Lieutenant Bailiff, in our judgment, was well entitled to come to the view, expressed in paragraphs 231 and 245, that it was not unreasonable, in the whole circumstances, for the former trustees to accept the package without seeking to unpick it in advance of the transfer. As will be remembered the present trustee submitted, as it was put in paragraphs 10.4 and 10.5 of the grounds of appeal, both that there was no evidential foundation for the finding and that it was wrong as a matter of law, since there was no legal requirement for the former trustees to accept liabilities as well as assets. In our view, if such a finding needed a particular evidential basis, it could be found in the very fact that at the heart of these events was the desire of Mr Victor Tchenguiz to divide the existing trust structure into two in order to separate the interests of his two sons and their families. That existing trust structure was a single entity whereby the whole trust patrimony of assets and liabilities was held by one set of trustees. It is true that, on occasion, it may be possible for a natural or legal person to attempt to separate assets and liabilities, but to be able to do so may depend upon the views of creditors. The point here, however, is that in August 2007 the former trustees were merely being asked to accept a simple division of the single trust patrimony. Manifestly the liabilities associated with Robert's share could not be left with that of Vincent. Assets and liabilities not having been held separately in the TFT, it seems to us an inevitable inference from the fact that trust assets were being bestowed upon the first plaintiffs through the decisions of others that it was not unreasonable, in those circumstances, for the former trustees to accept the package of assets and liabilities.

105. We should add that when it came to Advocate Swan's oral submissions to us it was manifest that a particular concern was that the present family home of Robert Tchenguiz was likely to be lost: a result which, it was said, would have been avoided if the house had been transferred to the former trustees and the remaining assets and liabilities to a subsidiary company. However, leaving aside the point that there is no question that the family home of Robert Tchenguiz (and which was the former premises of the Royal College of Organists) was to any extent an ancestral home of the Tchenguiz family, this point is again different from the contention in paragraphs 7.3 and 10.5 that the assets and liabilities could have been transferred to a company wholly owned by the former trustees as trustees of the TDT. The suggestion put to us would

have involved a process of selection, and, unlike acceptance of the existing association of assets and liabilities, that process was something which needed to be explored in evidence.

Failure to recognise future exposure at the creation of the Oscatello framework agreement

106. Turning to Advocate Swan's third head the Lieutenant Bailiff, in our judgment, was entitled to reach the view that a failure by the former trustees to recognise the future problem of exposure of assets to claims could not be described as a serious or flagrant degree of negligence in December 2007. At one remove, that view might be thought entirely consistent with that expressed in respect of the novations in August 2007; but the issue as at December 2007, as the learned Lieutenant Bailiff indicated in paragraph 247, was that of cross-contamination of assets held by the former trustees outside the Oscatello structure arising from the former trustees remaining indebted to companies within the structure.

107. The Lieutenant Bailiff based his view upon the urgent need to have the framework agreement in place and the unacceptable impact of any delay through the former trustees trying to deal with the "loans problem". As Advocate Swan pointed out in his submissions to us, the Lieutenant Bailiff does not explain the basis for his understanding of that urgency and related impact. In our view, however, there was evidence before the Royal Court which could have led to that characterisation of events. In his Witness Statement dated 30 March 2012 (particularly at paragraph 41) Mr Robert Tchenguiz had indicated that late 2007 had been a period of market volatility and that, as a result of that volatility, the TDT was in default of its financing arrangements. Given the high sums of money involved and the commercial nature of the structure, a degree of urgency seems highly likely.

108. This indicates that, contrary to Advocate Swan's suggestion that the views of the Lieutenant Bailiff were mere assertion unsupported by evidence, there was a potential evidential basis for the views expressed by the Lieutenant Bailiff. It is well recognised that, generally, an appellate court will not interfere with a finding in fact by a court of first instance where there has been an evidential basis which, if accepted, could have founded the determination of fact in question. Advocate Swan directed us to certain other considerations, as presaged in paragraphs 11.3- 11.9 of the grounds of appeal, which might suggest that there was no real urgency. So far as we have been able to identify from the evidence before the Royal Court, and through the submissions made to us, there was no contrary evidence before the Royal Court of such weight that the view of the learned Lieutenant Bailiff on this point can properly be viewed as mere unsupported assertion.

Failure to deal with future exposure after the creation of the framework agreement

109. In respect of the final head set out by Advocate Swan in his submissions to the Lieutenant Bailiff, the Lieutenant Bailiff, at paragraphs 248 to 252, was not persuaded that extinction of liabilities could be achieved without third party consent, was satisfied that there was no convincing evidence that such consent would be forthcoming, and was not satisfied that, in view of the complexities and a deteriorating market in late 2008, any failure could be described as a serious or flagrant degree of negligence.

110. Before us Advocate Swan, in no small detail and as set out in grounds of appeal 12 and 13, took us through what appeared to the present trustee to be the salient evidence and other considerations which had been before the Lieutenant Bailiff, seeking to show not only that there was an insufficient evidential basis for the views of the learned Lieutenant Bailiff that extinction of liabilities could be achieved without third party consent but also that sorting out the loans would not have been problematic and would have been to the advantage of Kaupthing.

111. Sufficiency of evidence, almost invariably, is a matter for the court of first instance. It is manifest also that the view of a first instance court as to the evidence before that particular court on complex factual background will be entitled to considerable respect because of the ability of representatives, on appeal, to express those matters with finer nuances than might

have been done earlier. However it is to be remembered that the eventual conclusion of the Lieutenant Bailiff on this point, as set out in paragraph 251 of the judgment, was that, even if extinguishment of liabilities could have been achieved with or without consent, the likely complexity and length of the process during a period of deteriorating market conditions meant that any failure to achieve the objective could not be described as a serious or flagrant degree of negligence.

112. On this particular point we accept that the determination of the Lieutenant Bailiff is expressed in somewhat telegraphic terms. In our view however, properly understood, the approach of the Lieutenant Bailiff was to indicate that there were such a number of uncertainties, surrounding both the individual objective and the financial world in general, that any failure was not of an appropriate level of culpability. In other words, had there been a clear and simple objective, failure to achieve which might have damaging consequences, a failure to take any steps to achieve the objective might equate to gross negligence, all other things being equal. But, where the surrounding circumstances are of significant level of complexity, a failure to act occurs in a less clear-cut factual matrix and suggestions that the failure ought to be found to have amounted to gross negligence may require a particular degree of cogency in order to be sustained. In the whole circumstances we are not persuaded that any of the individual pieces of evidence at first instance put before us discloses that the learned Lieutenant Bailiff was not entitled to reach the views which he expressed on this issue.

113. There are two further particular criticisms of the judgment of the Lieutenant Bailiff, related to this issue, which were relied upon by the present trustee. They were in respect of the manner in which he had addressed the evidence in the following passage of his judgment:

> "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."

114. As we understood it, Advocate Swan had two main complaints here. The first was that the Lieutenant Bailiff had failed even to mention the evidence of a witness, Mr Brown, who, along with Robert Tchenguiz, had spoken to the obtaining of consent from Kaupthing. The second was that he had misunderstood the effect of including the loans as warranted (wrongly believing them to be a disadvantage to Kaupthing).

115. As to the first, having considered all the material before this court it seems to us that the reference in paragraph 250 to the evidence of Mr Smalley should be a reference to Mr Brown. Mr Smalley's evidence did not cover these matters: Mr Brown's did so. In our view, even if misrecollecting a name, the learned Lieutenant Bailiff was entitled to reach the view which he did on the specific section of the evidence which was in his mind. All that Robert Tchenguiz and Mr Brown could say was that they believed Kaupthing would have consented. Their belief is irrelevant unless based on material that leads to an inference to the same effect. We are satisfied that this was the point which the Lieutenant Bailiff was making in paragraph 250 of the judgment, and it was a point which he was entitled to make. Despite his error in misstating the name of one of the two relevant witnesses, he correctly identified the nature and effect of the evidence which had been led before him at trial.

116. As to the second, which does appear to be the case, the fact that including the loans would arguably have been advantageous to Kaupthing is only part of the picture, the rest involving an assessment of the solvency of the various group companies and the willingness of Kaupthing to provide any latitude in a deteriorating situation. In reality, the present trustee needed direct evidence from Kaupthing, and they did not have any. Thus any misunderstanding on the part of the Lieutenant Bailiff which may be suggested is not material. In the absence of actual evidence of the position which would have been adopted by Kaupthing, it could not be known by anyone, including Mr Tchenguiz and Mr Brown, what Kaupthing would have done. It appears to us that this was what the Lieutenant Bailiff was conveying in paragraph 250, namely that such evidence was not sufficient to establish the point which the present trustee was seeking to make.

117. Having acknowledged the confusion of Brown with Smalley, and the misunderstanding of the effect of including the loans as warranted, we have to consider applying the approach already discussed, that is, whether these matters indicate that the Lieutenant Bailiff had so misremembered things over the long delay as to make his whole judgment unsatisfactory. In our view they do not. The points which lead us to this opinion are the isolated nature of the mistakes, the relative unimportance of the errors in the face of the evidence which the Lieutenant Bailiff undoubtedly had and the availability and observable use by him at various points in the judgment of the transcripts which he had. In our judgment, the errors which he did make are not sufficient to permit this Court to interfere with his decision. That being so, the fact that these errors may have been the result of the delay in giving the judgment does not provide a reason for us to interfere when that would not otherwise be justified, Having said that, we have no reason to consider that the errors made by the Lieutenant Bailiff in the context of paragraph 250 of the judgment were in fact the result of the delay in giving judgment rather than simply minor inaccuracies in what was a long and complex judgment which dealt with a range of legal and factual issues.

Ancillary matters on gross negligence and unreasonableness

118. Before dealing with individual heads of complaint we deal with the complaint, for the present trustee, as to failure of the Lieutenant Bailiff to identify what he understood as gross negligence. We commence by noting that, in paragraph 243, the learned Lieutenant Bailiff recorded the submissions before him on this point for the present trustee: namely that gross negligence meant a serious or flagrant degree of negligence, not equating to reckless or intentional fault or the like. Thereafter there is no suggestion of a competing attempt to define gross negligence for the purposes of this litigation nor of a differing view in the mind of the court. It seems to us that in the ensuing paragraphs (244 – 249) the analysis of the learned Lieutenant Bailiff follows that fairly general and practical approach.

119. That approach, we might add, seems to us consistent with the approach of Mance J (as he then was) in *Red Sea Tankers Ltd v Papachristidis (the Hellespont Ardent)* 1997 2 Lloyd's Rep 547, 586 col 2, where he said:

> "If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. "Gross" negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence is capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk."

120. In this context, we do not discern any merit in the points made in paragraphs 7.5, 7.6, 7.7, 10.6, 10.7, 11.1 and 11.2 of the Notice of Appeal. These, in brief, raise the issue of failure to consider whether, as a matter of law it was reasonable, proper, prudent or necessary for safeguarding the assets of the TDT that the former trustees become directly liable to Glenalla or Thorson. However it is not enough, in this appeal, to establish a complaint that there was a failure to consider a matter which there was a duty to consider unless it can be established that there was,

in the whole circumstances, a grossly negligent breach of trust with an associated loss. Such is clear on the present trustee's own pleading in paragraph 83. It seems to us that the points made in these paragraphs, and before us, are merely ancillary to those made in the earlier paragraphs with which we have just dealt. Without an associated case, which ought to have been established, that something else ought to have been done which would have prevented the loss they avail the present trustee nothing.

121. Having considered all of these aspects, we are satisfied that the appeal for the present trustee does not succeed.

The remainder of the Plaintiffs' Appeal

122. The plaintiffs' appeal for the former trustees embraced the following issues:

a. Whether Article 32 of the Jersey Law was applicable;
b. Whether liability of the plaintiffs in relation to the Oscatello Arrangement was by virtue of contract;
c. If it was common ground between the parties at trial that Article 32 excluded personal liability, whether the plaintiffs should have been found personally liable;
d. Whether, on entering into the Glenalla and Thorson loans and Oscatello Arrangement, the plaintiffs had assumed personal liability; and
e. Whether there had been errors in findings on costs.

123. The Respondent's Notice for the present trustee raised, among other matters:

a. Whether Article 32 could be construed to create a form of statutory direct right of recourse to trust assets; and
b. Contentions as to the proper approach to orders for costs.

124. In our judgment dated 27 June 2014 we determined that, in the present proceedings, Article 32 fell to be applied in considering the Glenalla and Thorson loans and the Oscatello Arrangement. We also found that the circumstances surrounding the loans and Arrangement were such that personal liability was being excluded.

125. In our judgment dated 29 October 2014 we found that where a trustee is a party to a transaction to which Article 32 applies, the trustee has no personal liability, an earlier trustee may recover trust property to satisfy a claim, on satisfying liability the trustee is entitled to discharge on that liability and that allegations of breach of trust do not affect recourse to the trust property.

126. As we have indicated to parties during the course of these proceedings, except insofar as already dealt with, all questions as to costs will be dealt with separately after our substantive determinations have been concluded with this judgment, with the opportunity for such further argument as may be appropriate.

127. It therefore remains for us, in this judgment, to conclude with the further Oscatello issues.

Obligations of the former trustees, or the TDT, to Oscatello after the 21 December 2007 transfers of funds.

128. As indicated by the learned Lieutenant Bailiff in paragraphs 117 and 118 of his judgment, on 21 December 2007, immediately following the putting in place of the Framework Agreement and the Overdraft Loan Agreement, Oscatello instructed Kaupthing to make a number of payments. Those payments included one of £39m to a loan account 5962 maintained by Kaupthing in name of the Former Trustees. It was not disputed before the learned Lieutenant Bailiff that the debt shown on that account represented 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 was it a matter of dispute that that liability was the subject of a personal guarantee given by Robert Tchenguiz at the time that the facility was agreed.

129. Kaupthing acted on that instruction, applied £39m to the credit of loan account 5962, and thereby discharged the debt owed by the former trustees under the August 2007 Kaupthing loan facility agreement. This had the effect of releasing Robert Tchenguiz from his liability as guarantor. The monies used to make the payment came either from monies borrowed by Oscatello from Kaupthing or from monies made available to Oscatello by its immediate parent, Eliza, out of the proceeds of the profit participation loans: see paragraph 119 of the judgment of the Royal Court.

130. An issue for the Royal Court was what, as between the former trustees, Eliza, Oscatello and Kaupthing, were the obligations which arose from the discharge. It appears that, below, there was common ground between the first to fourth defendants and the former trustees that there had been a loan agreement between the former trustees and Oscatello. The former trustees accordingly accepted that they had a liability to Oscatello, and that it arose by way of a contract of loan. However, by virtue of an amendment made by the first to fourth defendants to their pleadings during the trial, an alternative basis of claim was set out, namely, that the discharge of the debt had been made "at the request and/or with the consent and agreement of ITGL and Bayeux …" This somewhat cursory statement of an alternative head of claim has been treated as an adequate assertion of a claim in restitution: see paragraph 124 of the judgment below. As the former trustees accepted liability through a loan agreement, this alternative head of claim was of limited interest to them. The point was of importance, however, to the present trustee, who denied that any liability existed.

131. Before this court, the former trustees, in their appeal, contended that the learned Lieutenant Bailiff had erred in concluding that there was no liability to Oscatello in contract. They also contended that the Lieutenant Bailiff had erred in finding that there was a liability to Oscatello in restitution. The present trustee agreed with the former trustees that the learned Lieutenant Bailiff had erred on the restitution point, but submitted that the Lieutenant Bailiff had correctly decided that there was no liability in contract. The first to fourth defendants, before us, supported the decisions of the learned Lieutenant Bailiff both as regards there being no contract of loan and as regards the existence of a liability in restitution.

132. We deal first with the issue as to contract.

Obligation in contract: The reasoning of the Lieutenant Bailiff

133. The learned Lieutenant Bailiff observed that the payments to be made by Kaupthing, on the Oscatello instruction, were to be funded both from profit participation loans (the proceeds of which were made available to Oscatello by Eliza) and through an overdraft facility available to Oscatello under the loan agreement of 19 December 2007. That overdraft loan agreement had provided, among other matters, that "the purpose of the loan was to refinance current debt as listed in Schedule 1"; and Schedule 1 included an amount of £39m due from the former trustees as borrower under loan account 5962: see paragraph 118 of the judgment below.

134. Before the Royal Court there was no documentary evidence showing consideration by Oscatello, by the Former Trustees or by Eliza in relation to the use of the funds available to Oscatello to repay the former trustees' indebtedness to Kaupthing (see paragraph 121 of the judgment below). Mrs. Bleasdale, however, had instructed the Tchenguiz bookkeepers that Oscatello had made an interest free loan of £39m to the TDT (see paragraph 120). She understood that the payment by Oscatello had to be accounted for in an appropriate way and it seemed to her that an interest free loan was the proper treatment (paragraph 123). Mrs. Bleasdale was not cross examined on these matters (paragraph 123).

135. The learned Lieutenant Bailiff found force in the submission that there was 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, the terms of an agreement of loan in respect of this payment. Nor did he find any evidence to suggest that a loan agreement was approved by the respective directors of the former trustees or by the board of directors of

Oscatello. Accordingly he was not persuaded that it had been established that the sum was paid by Oscatello to the former trustees under the terms of a loan agreement (paragraph 129).

Obligation in contract: Parties' submissions

136. The BVI Companies relied upon the determination by the learned Lieutenant Bailiff.

137. For the former trustees, Advocate Wessels contended that the conclusions reached by the learned Lieutenant Bailiff were based on an incorrect and incomplete view of the evidence before the Royal Court. It was clear that Mrs. Bleasdale had authority. Whilst she lacked authority to act on behalf of the former trustees personally, her authority to act on behalf of them as trustees of the TDT was clear from her status as an "Authorised Signatory" for ITGL and for the corporate directors of Bayeux. She was similarly authorised in respect of Oscatello and had signed the Framework Agreement and related agreements on behalf of both the former trustees and Oscatello.

138. It was clear that the Former Trustees and Oscatello had approved the agreements. The Framework Agreement and related agreements had been executed on their behalf: agreements which enabled the movement of funds giving rise to the Oscatello Arrangement. The former trustees and Oscatello subsequently approved the Funds Flow, which specifically provided for the transfer of a sum of £39m. Further, the former trustees and Oscatello knew that it was the established practice for the flow of funds in the TDT Structure to be accounted for as loans. The learned Lieutenant Bailiff had not rejected the evidence of either Mrs. Bleasdale or Mr. Clifford as to that practice. The corporate directors were also corporate directors for many other companies in the TDT structure and were, therefore, fully aware of the practice. The absence of a written loan agreement or specific resolutions were therefore irrelevant.

139. For the present trustee, Advocate Swan submitted that the learned Lieutenant Bailiff had correctly found that no loan had been agreed between Oscatello and the former trustees. As regards money used by Oscatello to discharge the debts of other companies, loan agreements had been entered into. There was no evidence that a loan agreement had been approved by the former trustees (acting by their directors) or by the directors of Oscatello. There were no resolutions by Oscatello or the former trustees confirming the establishment of any loans. There was no evidence that Mrs. Bleasdale had authority to agree a loan.

Contract: The reasoning of this Court

140. It seems to us that this point can be dealt with tolerably succinctly, and without this court exceeding its usual ambit of inquiry by embarking upon a reconsideration of the evidence before the Royal Court.

141. No party suggests that there was any documentary evidence indicating consideration by Oscatello or by the former trustees in relation to the December 2007 instruction to discharge.

142. The learned Lieutenant Bailiff rejected the submissions, on behalf of the present trustee, that the application of the £39m was part of the consideration for the transfer of assets to Oscatello under the Framework Agreement, was to be treated as an officious act unsolicited by the former trustees or was intended by Oscatello, or seen by the former trustees, as a gratuitous benefit (see paragraph 128 of the judgment below). It appears that these rejections were based upon the combination of the participation of the former trustees in the Framework Agreement, the fact that the Framework Agreement specifically envisaged the emergence of the Overdraft Loan Agreement (albeit the former trustees were not party to it) and the fact that the latter included a specific purpose of repayment of loan account 5962 (see paragraph 128).

143. However, the learned Lieutenant Bailiff found nothing in the evidence to show that Mrs. Bleasdale had authority to agree, either on behalf of the former trustees or on behalf of Oscatello, the terms of an agreement of loan in respect of this payment. That finding in fact was

open to the learned Lieutenant Bailiff and there is no contrary evidence which would permit this court to interfere with it.

144. Accordingly, whilst on one view, it might seem to follow that the juristic act of Oscatello in instructing Kaupthing to use the funds should have been capable of and intended to have a different legal effect from those which were rejected, the Lieutenant Bailiff was entitled to find that there was no evidence to support the creation of the type of relationship pled, namely, that of loan. Looking at the matter from the standpoint of contract, therefore, whilst on the submissions made it might be suggested that Oscatello might not have intended to carry out an act which had no bilateral consequences with the former trustees, it was not proved that Oscatello had created new rights and obligations between itself and the former trustees.

145. We turn now to restitution.

Restitution: General

146. When this issue came to be addressed before us, we expressed our concern that, on a point of law on which there has been much judicial and academic comment in numerous jurisdictions, the parties' submissions before this court might properly be categorised as somewhat slim: an unusual circumstance in this litigation. It was as a result of those concerns that the supplementary notes of argument were lodged.

147. Our concerns remain. In any future cause where a claim is advanced in this jurisdiction based on principles of restitution, unjustified enrichment, *quasi contract* or *quantum meruit* this Court expects that the parties will address the Royal Court fully on the ambit of the remedy available to litigants in this jurisdiction by reference to the local jurisprudence, customary law and such judicial or academic writings from other jurisdictions as appear not inconsistent with the law of Guernsey. See, for example, the discussions in *Benedetti v Sawiris* [2014] AC 938, 2013 UKSC 1427, and the symposium on unjustified enrichment, unjust factors and failure of purpose reasons reported in the Edinburgh Law Review, Volume 18, at pages 414-451.

148. We note that in Jersey the Royal Court has been equally cautious in dealing with applications based on unjust enrichment: see *In re Esteem Settlement* 2002 JLR 53, at paragraphs 156-157 (Birt, DB) and *Flynn v Reid* 2012(1) JLR 370 at paragraphs 93-108 (Wm Bailhache, DB).

Restitution: The reasoning of the Lieutenant Bailiff

149. As the learned Lieutenant Bailiff understood the case put before him, it was that, in the absence of a loan agreement, 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. He understood reliance to be placed on certain observations of the Court of Appeal in England in *Falcke v Scottish Imperial Insurance* (1886) 34 Ch D234.

150. The learned Lieutenant Bailiff observed that it had been submitted that there could be no doubt as to the former trustees' request or consent as to the discharge of the debit balance as the entire refinancing transaction had been recommended to the Former Trustees by R20 and implemented for the purpose of discharging the liabilities under the August 2007 Kaupthing loan facility agreement. As noted by the learned Lieutenant Bailiff, the submission for the present trustee, on the other hand, was that there was no basis for a restitutionary claim as there had been no enrichment. (Paragraph 127). On the analysis of Advocate Swan, the TDT trustees had owned Oscatello, and had owed £39m to Kaupthing. Upon Oscatello paying £39m to Kaupthing, the TDT no longer had a liability to Kaupthing but its asset, Oscatello, was then worth £39m less. In these circumstances, the TDT was no better off as a result of the transaction.

151. The learned Lieutenant Bailiff expressed his decision in succinct terms. By reference, it appears, to the decision in *Falcke v Scottish Imperial Insurance*, he considered the general law to provide that payment by party A of the debt owed by party B to party C, at the request or

with the consent of party B, gave rise to an obligation on party B to repay to party A an amount equal to the amount so paid: see paragraph 130 of the judgment. Applied to the facts before him, he found that the former trustees, or the TDT, were subject to binding obligations in respect of what had been described as the Oscatello Loan.

Restitution: Parties' submissions

152. For the former trustees, as appellants, Advocate Wessels submitted that liability for restitution in respect of unjust enrichment had to follow the four-stage test in *Banque Financière de la Cité v Parc (Battersea) Limited* [1999] 1 AC 221, 227, where Lord Steyn identified the need for (i) enrichment, (ii) at the expense of the claimant, (iii) unjustness and (iv) there being no defence on the part of the person enriched. The discussion by the learned Lieutenant Bailiff had failed to consider this approach and, in particular, had failed to identify any ground for restitution based upon injustice through issues such as duress, undue influence and necessity. Reference was made to Goff & Jones, The Law of Unjust Enrichment (8th Edn, 2011), at paragraph 1-08.

153. Even if a ground for restitution could, in principle, be identified on the basis of a request, there had been no documentary evidence of any such request or consent. Further, there was no evidence to support a finding that a request was made separate from that which would support a finding of an express loan agreement. If the actings of Mrs. Bleasdale supported the finding of an express loan agreement, that was an end of the matter.

154. Turning to the essential requirement of enrichment, Advocate Wessels submitted that, by drawing down the necessary sums to enable repayment, Oscatello had assumed an equivalent liability to Kaupthing. The assumption of that liability necessarily meant a corresponding reduction in the asset value of Oscatello to the trustees of the TDT and, in consequence, the net wealth of the TDT remained the same. A claim in unjust enrichment could succeed only where the enrichment could be ascribed with some monetary value: see Goff & Jones at paragraph 4-03. No such value was readily apparent nor had it been pleaded. It was noteworthy that, whilst the learned Lieutenant Bailiff had referred to "restitutionary principles" at paragraph 212, he at no point identified what those principles were nor any particular factor rendering the alleged enrichment unjust.

155. Further, the Former Trustees had changed their position in such a way that it would be inequitable to require them to make restitution in full or at all. The Framework Agreement and related documents effected a significant restructuring of the TDT structure. By divesting themselves of assets and entering into transactions which could not be reversed, the Former Trustees had changed their position to their detriment.

156. It was well established that the defence of change of position was available in cases of "anticipatory reliance": *Dextra Bank & Trust Company Limited v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [38]. Change of position did not fall to be determined with reference to any particular document but required the court to assess the overall position: *Lipkin Gorman v Karpnale Limited* [1991] 2 AC 548, 580 E-F. The former trustees had not only transferred a number of companies to Oscatello but also procured Oscatello's granting of a Share Charge and the execution of other new share pledges.

157. In any event, it was a well-established principle that no claim in unjust enrichment could be made with the effect of undermining a contract between the parties: *Taylor v Motability Finance Limited* [2004] EWHC 2619, at [23] and *Pan Ocean Shipping Limited v Creditcorp Limited* [1994] 1 WLR 161, 164. Here, there were two, alternative, contractual arrangements to which the Former Trustees and Oscatello were parties.

158. In the first place there was the Framework Agreement which, implicitly, acknowledged that it was part of a wider transaction. The references to consideration in the Framework Agreement should be construed accordingly and a claim in unjust enrichment thereby excluded. Secondly, the separate loan agreement between the former trustees and Oscatello, if the former trustees

were correct in their early submissions, would lead, ineluctably, to a finding of success for the former trustees on their appeal against the finding of restitutionary liability.

159. In response, for the BVI Companies, Advocate Greenfield relied upon the decision in *Falcke v Scottish Imperial Insurance* as authority for the proposition that where the claimant had conferred a benefit on the defendant at the request, or with consent, of the defendant, that was an "unjust factor" giving rise to restitutionary liability. The decision in *Falcke v Scottish Imperial Insurance* remained good law and had been relied upon in the House of Lords decision in *Foskett v McKeown* [2001] 1 AC 102, where Lord Hope of Craighead (at page 119B) had specifically identified the importance of a request on the part of the defendant.

160. Furthermore, neither the Framework Agreement nor the Overdraft Agreement allocated risk. There was no obligation on Oscatello to draw down any sum or apply it for any particular purpose. Oscatello was not obliged to discharge any liability to the former trustees. There was, therefore, no contract excluding restitution.

161. Turning to change of position, it was contended that performance of a contractual obligation for which a party had received consideration was merely expenditure in the ordinary course of things: see Lord Goff of Chieveley in *Lipkin Gorman* (580F).

162. Obligations undertaken pursuant to the Framework Agreement did not constitute a change of position. The former trustees had received full consideration for each and every obligation undertaken under the terms of the Framework Agreement. Separately, the former trustees' own financial position was unaffected by the obligations.

163. For the present trustee, Advocate Swan submitted that the determination of liability under restitution was wrong. First, claims in restitution, in general, had not been allowed where the parties had entered into a contract to regulate their affairs. Reference was made to *Taylor v Motability Finance Limited* [2004] EWHC 2619 and to *The Olanda* [1919] 2 KB 728n. The court will not imply a contract unless it is necessary to do so: see *Baird Textiles Holdings Limited v Marks & Spencer plc* [2001] 1 All ER (Comm) 737 at [61]. If the court, here, would not imply a contract or a term, it would be wrong to impose a liability in restitution as that would undermine the contractual principles.

164. Further, the critical element of enrichment was missing. The value of the former trustees' assets in their subsidiary Oscatello had been reduced by the same amount as the debt discharged and the former trustees had transferred valuable assets to Oscatello as part of the transaction.

Restitution: The reasoning of this Court

165. For present purposes, we note that in this jurisdiction the Royal Court has been prepared to assume, in respect of an ancillary application dealing with discovery, that a plaintiff might have an arguable case on the ground of unjust enrichment: see *Norman Piette Limited v Hochtief Construction (UK) Limited* 2005-06 GLR 50 at paragraphs 4 to 9 (Hancox, LB).

166. In the discussion which follows, we express our decision in this complex area in terms which are intended to be no wider than absolutely necessary for the present case. Nothing which we say should be taken as suggesting that a remedy would necessarily be available in a situation which might be thought to be analogous.

167. In *Norman Piette Limited* the Royal Court was prepared to envisage an arguable case on the ground of unjust enrichment where a supplier of materials to the building industry supplied goods and materials to a subcontractor for the purpose of constructing ground and ancillary works in connection with the construction of the new airport in Guernsey. Some items were incorporated into the fabric of the building and were not capable of being returned. Other items were said to have remained on site but the main contractor had refused their return. It was said that the main contractor had received payment for the project under its contract with the States of Guernsey, which payment would necessarily have included monies for the items supplied to

the subcontractor by the plaintiffs. This, it was to be argued, would have led the main contractor to have been unjustly enriched through the plaintiff's supply.

168. The principal authority relied upon by the Royal Court in *Norman Piette Limited* appears to have been *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* [1943] AC 32 (particularly at page 61 in the speech of Lord Wright). Whilst the *Fibrosa* case was one of failed consideration in a contractual relationship because of the outbreak of war, the case of *Norman Piette Limited* did not involve any contract between plaintiff and defendant. The decision in *Norman Piette Limited*, therefore, is an indication that, within this jurisdiction, the courts may be prepared to entertain a claim based on unjustified enrichment in circumstances where there was no pre-existing legal relationship between the parties.

169. Assuming, for present purposes, that some manner of claim based on unjustified enrichment is available within this jurisdiction in circumstances other than a failed contract or *quantum meruit* claims for work carried out, we proceed upon the basis that the four-stage test set out in *Banque Financière de la Cité v Parc (Battersea) Limited*, most recently referred to by the Supreme Court in *Benedetti v Sawiris* at paragraph 10, would be an acceptable approach in this jurisdiction. The four stages are: (1) has the defendant been enriched? (2) was the enrichment at the claimant's expense? (3) was the enrichment unjust? and (4) are there any defences available to the defendant?

170. Whilst in *Benedetti v Sawiris* there was no dispute that the defendant had been enriched by the provision of the plaintiff's services, that the enrichment was at the expense of the plaintiff and that the circumstances called for restitution by the defendant since he had accepted the plaintiff's services on the basis that they will not be provided gratuitously, it may be instructive to note one reference given in the reasoning of Lord Reed, and cross-referred to the speech of Lord Wright in *Fibrosa*. Lord Reed, at paragraph 97, referred to the judgment of the Supreme Court of Canada, given by Bastarache J in *Kingstreet Investments Limited v New Brunswick (Finance)* [2007] 1 SCR 3 where, at paragraph 32, the learned judge said:

> "Restitution is a tool of corrective justice. When a transfer or value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions. In *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, McLachlin J (as she then was) neatly encapsulated this normative framework: 'the concept of 'injustice' in the context of the law of restitution harkens back to the Aristotelian notion of correcting a balance or equilibrium that had been disrupted' (p 804)."

171. The decision in *Falcke v Scottish Imperial Insurance* can be seen as an example of one of the types of situation which may fall within the four stage test enunciated in *Banque Financière*. A person has made payment in respect of a property belonging to another or has carried out work on it. If he does so intentionally at the request of the person entitled to the property, he has a right of action against the owner for the money paid or for the work done at his request. On the other hand, if he confers an unsought benefit on the other person he does not, thereby, entitle himself to an equitable right of recoupment as against the other person. That is the rule as expressed by Cotton, LJ in *Falcke* at page 241, and Bowen, LJ at 248-249. The continuing authority of the decision in *Falcke* was confirmed by Scott, LJ in *In re Cleadon Trust Limited* [1939] Ch 286, 313 and by Clauson, LJ at 322. Those passages in *In re Cleadon Trust Limited* were referred to with approval in *Crantrave Limited (in Liquidation) v Lloyds Bank plc* [2000] QB 917 in the judgment of Pill, LJ. Those observations of Cotton, LJ in *Falcke* were most recently referred to with approval by Lord Hope of Craighead in *Foskett v McKeown* [2001] 1 AC 102, 119. It follows that the continuing authority of the decision in *Falcke* for the general proposition to which we have referred is beyond doubt in the law of England and Wales. It fits within the tests put forward in *Banque Financière* in relation to unjust enrichment and it has not been suggested to us that the approach in *Falcke* is inconsistent with general principles of law within this jurisdiction.

172. The decision in *Falcke* fits within the scheme set out by Lord Steyn in *Banque Financière* in respect that the owner of the property will, clearly, have been enriched, that enrichment will have been at the expense of the claimant and that if the payment or work has been carried out with the consent of the owner of the property, or the obligant, the equitable right will emerge, subject to possible defences.

173. What is clear from the decision in *Falcke*, as enunciated by Cotton and Bowen, LJJ, is that work done or money expended by one person to preserve or benefit the property of another does not of itself confer upon the person who has so acted the benefit of a claim in restitution. There is no presumption against donation. As expressed by Bowen LJ, and repeated by Lord Hope of Craighead in *Foskett*, the critical element in the creation of the liability is the request of the person who has benefited.

174. It seems to us, therefore, that the issue in this case, as regards an equitable restitutionary remedy, is whether the evidence supports the assertion for the first to fourth defenders that a request was made by the Former Trustees, or consent was given by them, that Oscatello discharge the loan on their behalf.

175. There is no evidence of a request by the former trustees that Oscatello discharge the debt owed by the TDT to Kaupthing. Nor, in our view, are the circumstances such as might suggest that the participation of the Former Trustees in the events of December 2007 should lead either to such an inference or to the inference that they consented to Oscatello discharging the loan. This is not a case where a debtor, being either unable to meet the demand for payment, or finding it more convenient that, in the interim, the demand be met by a friend or associate, requests that, or consents to, the demand being met by the friend or associate. Rather, the events of December 2007 constituted a restructuring and refinancing of the TFT and its subsidiary companies.

176. Between August and December 2007 the TFT owned the shares in the BVI companies and was debtor to Kaupthing in the sums borrowed by the TFT and thereafter undertaken by the TDT. After the December 2007 arrangements, the BVI companies were owned by Oscatello, whose shareholding was owned by Eliza, whose shareholding the TDT owned. The new debt was owed by Oscatello to Kaupthing, and part of it had been used to pay off the old debt owed by the TDT. It would make no sense that, immediately after the arrangements of December 2007, the assets of the TDT, through the ultimate shareholding in Oscatello, would embrace the liability to Kaupthing whilst, at the same time, the TDT would be immediately liable to Oscatello in restitution for the cost of the discharge.

177. The complexities of this aspect of the present case mean that it does not sit easily within the type of case most readily envisaged under the principle enunciated in *Falcke*. Adopting the approach set out in *Falcke*, however, we do not discern in the present circumstances anything to infer that Oscatello could properly have been acting in the reasonable expectation that it would be entitled to an immediate recoupment from the former trustees.

178. A comparison may be made with the circumstances in August when the TDT took over assets and liabilities from the TFT. As can be seen from clause 2(d) of the Deed of Novation between the two sets of trustees and Kaupthing (set out in paragraph 21 of the judgment below), Kaupthing merely released the TFT from its loan obligations and accepted the TDT in place of the TFT. There was no question of the TFT being liable to the TDT for this undertaking of its liabilities, because the assets and liabilities of the TFT were being divided between the two trusts. In December 2007, Oscatello was a newly created participant in the overall scheme to which assets were given and which was prepared to accept that certain assets should be used to discharge the old debt. This was not a take-over in which a refinancing package involved the payment of the debt of the outgoing owner; rather, the debt was being moved as a direct liability of the old debtor to a newly formed intermediate company which now had control of the assets which could support the debt. The rearrangement could have been carried out in a similar way to that of August 2007, with Kaupthing releasing the TDT and accepting Oscatello as obligant in its place. That was not done, in all probability because the reorganisation of

funding and new monies from Kaupthing made it preferable from the point of view of Kaupthing that a new Loan Agreement should be put in place.

179. The law of restitution, as indicated in the passage from *Kingstreet Investments Limited*, referred to in paragraph 163 above, operates to provide an immediate correction. There is no indication that it can be operated to create a new set of rights and obligations such as a long term loan. Nor was any correction required. The fact that matters proceeded by way of discharge of the old liability and putting in place of a new arrangement with the new debtor did not disturb the fact that Oscatello, a new or dormant company, with no other assets or interests, was being placed into a corporate structure where part of its obligations would be accepting the liabilities and obligations of debtor to Kaupthing, in place of its ultimate beneficial owner the TDT.

180. In these very singular circumstances we consider that the learned Lieutenant Bailiff erred in finding that, immediately after the transfers of funds on 21 December 2007, the former trustees, or the TDT, were subject to binding obligations in restitution to Oscatello.

Conclusions

181. For all the reasons which we have set out above, and to recap, we have reached the following principal determinations:

a. We are satisfied that although an unacceptable delay did occur in this case between the ending of the trial and the giving of judgment, that in itself would not justify our allowing the appeal without having properly considered the evidence, always taking into account the existence of the delay but not regarding it as conclusive or definitive in its own right; see paragraph 46.

b. As to the determination that there had been no culpable breach of trust in respect of the novation as at August 2007, the Lieutenant Bailiff did not concentrate unduly on the parties' pleadings at the expense of the remainder of the case for the present trustee as put before him in pleadings or closing submissions: see paragraph 103.

c. In respect of failure to by the former trustees to recognise future exposure at the creation of the Oscatello Framework Agreement, we are not persuaded that there is a sufficient basis for us to disturb the determination below that such a failure could not be described as a serious or flagrant degree of negligence by reason of the urgent need to have the Framework Agreement in place and the unacceptable impact of any delay: see paragraph 108.

d. We are of the opinion that the Lieutenant Bailiff was entitled to reach the view that any failure to deal with future exposure after the creation of the framework agreement could not be described as a serious or flagrant degree of negligence: see paragraph 112.

e. As regards the Oscatello Arrangement, the Lieutenant Bailiff was entitled to find that there was no evidence to support the creation of a contract of loan: see paragraph 144.

f. The Lieutenant Bailiff erred in finding that, immediately after the transfers of funds on 21 December 2007, the former trustees, or the TDT, were subject to binding obligations in restitution to Oscatello: see paragraph 180.

Orders

182. Given the range of issues which have been the subject of the appeal, we invite parties to consider the terms of this judgment and the terms of the preceding judgements in these appeals on which no orders have yet been made, to liaise with each other and, within fourteen days of the handing down of this judgment, to make submissions to us as to the appropriate potential orders which should follow.

APPENDIX 1: Analysis of Pleadings

1. The first head of complaint in paragraph 67, creation and acceptance of the accounting entries, was dealt with in paragraphs 70 to 72.

2. Paragraph 70 pleaded 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". The words "and/or in creating such obligations if and insofar as they existed" were added to the end of that sentence by amendment at the end of the trial.

3. Paragraph 71 pleaded 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/or in creating such obligations if and in so far as they existed*, and in accepting a novation of such notional *or, if it be the case, real* 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". The italicized words were again added by amendment at the end of the trial.

4. In relation to the allegation in paragraph 71 that "the accounting entries should simply have been replaced by a direct loan obligation", the answers given in the November 2011 replies, and the relevant requests, were as follows:

   Request 28: "Please state the date, or range of dates, when R & H say that the former trustees ought to have replaced the accounting entries in the manner suggested.
   Answer 28: "The replacement should have been carried out by ITGL before the transfer of assets from the TFT to the TDT.
   R29: "Please state whether the allegation of acting unreasonably and/or improperly is one made against the former trustees, or is one made against ITGL (ie, at a time when it was the trustee of the TFT)".
   A29: "Sufficiently pleaded. Without prejudice to this, the allegations are against ITGL as trustee of the TFT under paragraph 70 and the second sentence of paragraph 71, and against the former trustees as trustees of the TDT under the first sentence of paragraph 71 and under paragraph 72".
   R30: "Please explain in sequential form the steps which, on R & H's case, the former trustees ought to have taken in order to carry out the exercise which it is said that they ought to have carried out in order to replace the accounting entries with other direct loan obligations".
   A30: "This is an improper request. Without prejudice to this, ITGL controlled the administration of the companies owned by the TFT and the steps that could have been employed were a matter for it. For example, ITGL could have passed, and could have procured the directors of the companies concerned to pass, appropriate resolutions and/or procured the bookkeepers and/or accountants to correct the books and records of the relevant companies".

5. Paragraph 72 pleaded that, if the accounting entries created or evidenced 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". These allegations plead not only what it is said the former trustees did wrong, but also to some extent what it is said they should have done instead. The words we have underlined in the quotations from each paragraph show that in relation to two of the three allegations the contention is that action should have been taken before the transfer of assets from the TFT to the TDT. This allegation

was rejected by the Lieutenant Bailiff, and there is no appeal against that part of his decision.

6. Of the allegation under paragraph 72 that the former trustees acted unreasonably and/or improperly in failing to novate the loan obligations so that they became direct obligations, the answers given in the November 2011 replies and the relevant requests were as follows:

> R32: "Please state the date, or range of dates, when R & H say that the former trustees ought to have novated the Arrangements in the manner suggested".
> A32: "After 24 August 2007".
>
> R33: "For the avoidance of doubt, please state whether this allegation of breach of trust is predicated upon the Glenalla Deed of Novation and the Thorson Deed of Novation having been properly executed".
> A33: "Sufficiently pleaded".
>
> R35: "Please explain in sequential form the steps which, on R & H's case, the Former Trustees ought to have taken in order to carry out the exercise which it is said that they ought to have carried out in order to novate the Arrangements in the manner suggested".
> A35: "This is an improper request. Without prejudice to this, the Former Trustees controlled the administration of the companies owned by the TDT and the steps that could have been employed were a matter for the Former Trustees. For example, they could have passed, and could have procured the directors of the relevant companies concerned to pass, appropriate resolutions and/or procured the bookkeepers and/or accountants to correct the books and records of the relevant companies".

7. The second head of complaint in paragraph 67 is dealt with in paragraphs 73 and 74. Paragraph 73 contains the essential allegation that the former trustees acted unreasonably and/or improperly in failing to extinguish any existing liability on or shortly after the creation of the Oscatello structure; and paragraph 74 sets out ten matters relied on in support of the allegation. They are as follows:

   (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) further, 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 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 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, 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 2009 Transaction ought to have been carried out promptly on or shortly after the creation of the Oscatello structure.

8. In relation to the allegation under paragraph 73 that the Former Trustees acted unreasonably and/or improperly in failing to extinguish the liabilities on or shortly after the creation of the Oscatello Structure, the present trustee was again asked to provide an explanation in sequential form of the steps which the former trustee ought to have taken in order to carry out the exercise which it is said that they ought to have carried out in order to extinguish the Arrangements in the manner suggested (Request 37). The present trustee's response in the November 2011 replies was to refer to answer 35 (which had said that "the Former Trustees controlled the administration of the companies owned by the TDT and the steps that could have been employed were a matter for the Former Trustees. For example, they could have passed, and could have procured the directors of the relevant companies concerned to pass, appropriate resolutions and/or procured the bookkeepers and/or accountants to correct the books and records of the relevant companies").

9. It was this answer (among others) that the present trustee was ordered to elaborate. In the December 2011 replies, it said this:

> "A37: If the Accounting Entries were legally binding loan agreements, then the Former Trustees ought to have taken the following steps to extinguish their liability under them on or after the Oscatello re-structuring:
>
> (a) They ought to have made demand for payment from those companies within the TDT which owed money to the Trustees under the Accounting entries; procured the passing of resolutions by members of those companies that the companies would pay; procured the companies to pay them as trustees of the TDT; and utilised those sums to repay the alleged loans to Glenalla, Thorson, Oscatello and/or Eliza; alternatively
>
> (b) The former trustees:
>
> a. as shareholders of Silverville and as shareholders of Eliza respectively, ought to have passed resolutions procuring that:
>
> i. Eliza and Silverville enter into an agreement with them as trustees of the TDT whereby all parties to the agreement mutually released each other from any liability under the Accounting Entries;
>
> ii. Eliza procure Oscatello to enter into the said agreement; and
>
> iii. Eliza procure Oscatello to procure all the companies in the Oscatello structure to enter into the said agreement; and
>
> b. ought to have procured GFT and Finistere, as directors of Silverville, Eliza, Oscatello and the companies in the Oscatello Structure to implement the said resolutions and agreement; alternatively
>
> (c) The former trustees:
>
> a. as shareholders of Silverville and as shareholders of Eliza respectively, ought to have passed resolutions procuring that:
>
> i. Eliza and Silverville enter into a novation agreement with the former trustees whereby all liabilities of the former trustees to Eliza (if any)

were discharged and replaced by equivalent liability owed by Silverville to Eliza;

ii. Eliza procure that Oscatello enter into a novation with the former trustees and Eliza whereby all liabilities of the former trustees to Oscatello were discharged and replaced by equivalent liabilities owed to Oscatello by Eliza; and

iii. Eliza procure that Oscatello cause all the companies in the Oscatello structure owned by Oscatello to enter into novation agreements with the former trustees so that any liabilities of the former trustees to those companies were discharged and replaced by equivalent liabilities of Oscatello instead; and any liabilities which those companies owed to the former trustees were discharged and replaced by equivalent liabilities owed to Oscatello;

b. ought to have procured GFT and Finistere, as directors of Silverville, Eliza, Oscatello and the companies in the Oscatello Structure to implement the said resolutions and agreement".

10. Additional particulars of these matters were given in the February 2012 replies. So far as relevant, the requests and answers were in the following terms.

"Request 37 (a).

R4: Is it R&H's case under their first alternative claim under sub-paragraph (a) of the Further Response to Request 37 [i.e. R&H's claim that on or after the Oscatello restructuring" the Former Trustees "ought to have made demand for payment from those companies within the TDT which owed money to the Trustees under the Accounting Entries; procured the passing of resolutions by members of those companies that the companies would pay; procured the companies to pay them as trustees of the TDT; and utilised those sums to repay the alleged loans to Glenalla, Thorson, Oscatello and/or Eliza"] that those steps would have enabled the indebtedness of Thorson, Glenalla, Oscatello and/or Eliza to be discharged in full –

(i) on the creation of the Oscatello Structure; or
(ii) shortly after the creation of the Oscatello Structure?

A4: The response to Request 37 (a) is sufficiently pleaded. Without prejudice to this, R&H's case is that the steps set out in Response 37(a) should have been taken either on or shortly after the creation of the Oscatello structure.

R5: Please indicate whether the reference to "those companies within the TDT which owed money to the Trustees under the Accounting Entries" is intended to be a reference: -

(i) only to those companies then held within the TDT which had been contributed to the Eliza/Oscatello structure on 19 December 2007; or
(ii) to all companies within the TDT structure?

A5: Only to those companies which had been contributed to the Eliza/Oscatello Structure.

R6: If the answer to the last question 5 is in sense (i) [i.e. that R&H is claiming that demands for repayment ought to have been made only from companies which were both (a) debtor companies of the Former Trustees and (b) companies contributed to the Eliza/Oscatello structure on 19 December 2007]:-

6.1 please explain why those debtor companies ought to have been selected to raise the funds to repay the loans;

6.2 please identify which of those debtor companies within the Efiza/Oscatello structure had available cash or could have realised assets or investments for

the purpose of making the repayments referred to, and please identify the investments that should have been so realised; and

6.3 if it is R&H's case that the Former Trustees should have taken steps to realise assets in order to repay the loans due to Glenalla and Thorson, then please identify when the duty to make such realisations arose.

A6.1 For the same reason that the Plaintiffs selected those companies when they carried out the July 2008 Entries and the October 2008 Entries i.e. to eliminate the alleged loans, whether they were loans owing by the former trustees ought to them, from companies that were contributed or to be contributed to the Eliza/Oscatello Structure, and/or to ensure that the former trustees' warranty given pursuant to clause 8.1 of the Framework Agreement was accurate.

A6.2 According to the accounting entries, the following companies owed sums to the TDT trustees as loans:

Brigetta Investments Limited:	£3,236,892.82
Danielle Properties Limited:	£21,929,903.55
Limebrook Limited	£8,296,559.63 or £7,730,081.71
Violet Capital Group:	£53,814,940,99.00

Further, according to the accounting entries, the following companies owed sums to Silverville Limited as loans:

Alzama Properties Limited:	£96,760,023.47
Heatherville Limited:	£48,403,999.00
Roxinda Limited:	£96,706,985.51
Razino Limited:	£330,640.28

R&H does not know how much cash, realisable assets or investments each of these companies had. However, R& H believes that the companies had the following assets although it does not know the quantities held or the terms on which they were held. Further, R & H does not know whether they had other assets in addition to the ones listed below:

Alzama Properties Limited	Shares in Kaupthing, Morrisons, Sainsbury's, Barclays, Aricom, Nexen
Heatherville Limited	Shares in Greene King, Marstons, Morrisons, Sainsburys
Roxinda Limited	Shares or bonds in Blackstone Group plc, General Maritime Corp, Kaupthing Bank; holdings in Gerresheimer, Jazz Pharm; shares held under swaps or contracts for differences in Sainsbury's, Morrisons, Barclays and Mitchells & Butler
Razino Limited	Shares in Sainsburys
Brigetta Investments Limited	Shares in Tazamia which in turn held shares in Kaupthing;
Daniella Properties Limited	Shares in the Laurel Pub Company
Limebrook Limited	Shares in the Laurel Pub Company
Violet Capital Group	Shares in Mitchells and Butlers plc

A6.3 Any duty to make such realisations would have arisen on or shortly after the creation of the Oscatello Structure.

R8: The Oscatello loan came into existence on 21 December 2007. This was after the date of the Framework Agreement. Please identify which assets R & H contends should have been used to repay the loan to Oscatello stop
A8: The same as the assets available used to repay the other loans.
Request 37(b) and (c).

R9: Please confirm that it is R&H's case that the steps set out in sub-paragraphs (b) and (c) of the Further Response to Request 37 ought to have been implemented "*shortly after the creation of the Oscatello Structure*", rather than "*on the creation*" of the structure.
A9: Shortly after the creation of the Oscatello Structure.

R11: In relation to the alternative strategy described in sub-paragraph (b), please explain the intended meaning of the words "*mutually released*". In relation to any two of the companies referred to, one would have been a debtor and the other a creditor under what R&H refers to as "*the Accounting Entries*". Is it R&H's case that each company referred to would simply have waived the right to repayment of all indebtedness? Alternatively, if R&H contends that there should have been some form of set-off, please explain how such set-off could have validly operated.
A11: Each company would release its claims because other companies would also release their claims. Thus, for example, Eliza would release its claims against the Former Trustees because Silverville would release its claims against Eliza at the same time.

11. Also under paragraphs 73 and 74, the present trustee sought information on a number of questions, such as what would be the fiscal consequences of extinguishing the Arrangements; whether the Arrangements could have been unilaterally extinguished by the FTs or, if not, how they could properly have procured the directors of Thorson and Glenalla to extinguish them without being in breach of fiduciary duty; and whether or not it was the present trustee's case that the Arrangements could have been restructured without Kaupthing's consent. As to these, the present trustee's answers were that they made no averment about the UK fiscal consequences, and it was for the former trustees to plead the fiscal consequences if they wished to; that the former trustees could have procured the directors of Glenalla and Thorson to extinguish the liabilities by novating them to Oscatello, and no admission was made

that a breach of fiduciary duty would be involved, it being for the former trustees to make this allegation if they wished to; and that the July 2008 Entries, the October 2008 Entries and the March 2009 Transaction could have been carried out without Kaupthing's consent (November 2011 replies, answer 47). These answers were supplemented in the December 2011 replies, the present trustee saying that the directors of Glenalla and Thorson could have extinguished the liabilities without being in breach of fiduciary duties because it would have been in the interests of those companies, of the other companies within the TDT structure and of the former trustees to have done so (December 2011 replies, answers 39 and 40). The assertion that it would have been in the best interests of Glenalla and Thorson for the arrangements to be extinguished was itself elaborated in the February 2012 replies, where the CT relied on the following matters in support of it:

(a) Repayment of the alleged loans owed to Glenalla and Thorson, whilst not altering the balance sheet of those companies (if the alleged loans were valid), would have extinguished the arrangements and been of benefit to the companies by providing them with liquid assets; and/or
(b) By the novation of the alleged loans to Oscatello, the alleged loans owing to Glenalla and Thorson were not extinguished even if the Former Trustees' liability under them were extinguished, and the balance sheets of Glenalla and Thorson were not altered (if the alleged loans were valid), in the same way that the novation of the alleged loans from the TFT to the TDT in August 2007 extinguished the liability of the TFT trustee but did not alter the balance sheet of the companies (if the alleged loans were valid). The novation to Oscatello was in the interests of those companies because it ensured that the assets of Glenalla and Thorson could thereafter be managed and protected within the Oscatello Structure; and/or
(c) It was in the interests of Glenalla and Thorson for funding provided by Kaupthing pursuant to the Framework Agreement to the companies in the Oscatello Structure to continue and as such extinguishing the arrangement in order to ensure that the warranty given by the Former Trustees pursuant to clause 8.1 of the Framework Agreement was accurate and was in the interests of Glenalla and Thorson; and/or
(d) If and insofar as Glenalla and Thorson were solvent on or shortly after the creation of the Oscatello Structure, they could write off any alleged inter-company loans owing from the Former Trustees as trustees of the TDT".

The present trustee also asserted that the companies' insolvency (if they were insolvent) was not an impediment to carrying out the stated steps (February 2012 replies, answer 15).

12. The third head of complaint in paragraph 67, failure to render valid the July 2008 Entries, October 2008 Entries or the March 2009 Transaction, is pleaded in paragraphs 75 and 76. Paragraph 75 pleads that, if any of the July 2008 Entries and/or the October 2008 Entries and/or the March 2009 transaction or any of them were invalid, then the former trustees acted unreasonably and/or improperly in failing to do more to render them valid. Paragraph 76 sets out three matters relied on in support of that allegation, namely:

(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 deeds of Leon 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.

13. Of this last allegation, that the formalities were not onerous, expensive or difficult to achieve, the former trustees sought an explanation in sequential form of the steps that should have been taken in relation to each of the July 2008 Entries, the July 2008 Entries and the March 2009 Transaction. The answer given in the November 2011 replies was simply to repeat Answer 35. However, in the December 2011 replies the CT contended in relation to the July 2008 that:

"The Former Trustees:

a. as shareholders of Silverville and as shareholders of Eliza respectively, ought to have passed resolutions procuring that:

i. Eliza and Silverville pass resolutions or otherwise confirm that the July 2008 Entries so far as they affected each of them were valid and binding on each of them; and to enter into an agreement with the Former Trustees as trustees of the TDT whereby all parties mutually agreed that the July 2008 Entries were valid and binding on each of them;

ii. Eliza procure that Oscatello pass a resolution or otherwise confirm that the July 2008 Entries, so far as they affected it, were valid and binding on it; and to enter into the said agreement; and

iii. Eliza procure Oscatello to cause all the companies in the Oscatello Structure to pass resolutions or otherwise confirm that the July 2008 Entries so far as they affected each of them were valid and binding on each of them; and to enter into the said agreement;

b. ought to have procured GFT and Finistere, as directors of Silverville, Eliza, Oscatello and the companies in the Oscatello Structure to implement the said resolutions and agreement."

Similar contentions were made in relation to the October 2008 Entries and the March 2009 Transaction (answers 49-51).

14. Paragraph 83 set out the claim for breach of trust. It is in the following terms:
"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."

APPENDIX 2: Judgment (paragraphs 74-77 and 84)

"74. The matters said to constitute unreasonable conduct by the former trustees – so as to dissentitle 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 obligations 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 asset; (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 were 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 novatingthe 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) in the July 2008 book entries, the October 2008 blog entries and all 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 obligations directly between the transferor company and the transferee companies; and c) the formalities were not onerous or otherwise difficult to achieve.

…

84. In paragraph 83 of its Counterclaim the present trustee avers that, by reason of the matters set out in paragraph 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 businessman, 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."

APPENDIX 3: Judgment (paragraphs 231 and 232)

"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."

APPENDIX 4: Judgment (paragraphs 240 to 252)

"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 "rendering] 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 ftmds) 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 [sic] 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."