The Tchenguiz Discretionary Trust ("the TDT")
Royal Court
27th November 2015

JUDGMENT 54/2015

Costs hearing

Civil 1505/2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN RE THE TCHENGUIZ DISCRETIONARY TRUST ("the TDT")

JUDGMENT ON COSTS

Before Patrick John Talbot QC, Lieutenant Bailiff – sitting alone

Dates of hearing: 4th – 6th February 2015

Judgment handed down in open Court: Friday 27th November 2015

Advocate Jessica Roland for the Former Trustees of the TDT, Investec Trust (Guernsey) Limited and Bayeux Trust Limited
Advocate Nick Robison for the Current Trustee of the TDT, Rawlinson & Hunter Trustees S.A.
Advocate Elaine Gray for the Joint Liquidators of four BVI companies, creditors of the TDT
Advocate Paul Richardson for the Protector, Robert Tchenguiz, an adult beneficiary under the TDT
Advocate Christian Hay is the appointed representative of the minor, unascertained and unborn beneficiaries under the TDT, including the two minor children of Robert Tchenguiz

1. By Declaration of Trust dated 26 March 2007, ("the Trust Deed"), the Tchenguiz Discretionary Trust ("the TDT") was created. Investec Trust (Guernsey) Limited was the original trustee and the original protector was an Israeli resident, Uri Moellem. Amongst the beneficiaries under the TDT were Mr Robert Tchenguiz ("RT") and his children and remoter issue. Early in these proceedings ("Guernsey 2") Advocate Christian Hay was appointed to represent the minor, unascertained and unborn beneficiaries under the TDT, including the two minor children of RT.

2. Guernsey 2 are trustees' directions hearings and over a period of more than five and a half years since about May 2010, when Guernsey 2 commenced, many applications have been heard in private in which the jurisdiction of the Royal Court to give directions to trustees (i) for the administration and supervision of trusts, subject to the Trusts (Guernsey) Law, 2007,

("the 2007 Law"), and (ii) relating to the preservation of the assets of the TDT pending judgment in the proceedings heard in open court in the Royal Court of Guernsey, ("the Royal Court"), ("Guernsey 1"), has been invoked either by Investec Trust (Guernsey) Limited and Bayeux Trust Limited, ("the Former Trustees"), and Rawlinson & Hunter Trustees S.A., ("the Current Trustee"), which replaced the Former Trustees as the sole trustee of the TDT on about 2 July 2010, *i.e.* very soon after Guernsey 2 was commenced.

3. The TDT was established under the laws of Jersey and at all material times the proper law of TDT has been Jersey Law – see clause 3.1 of the Trust Deed. But because one of the trustees of the TDT was a Guernsey trust corporation at the time Guernsey 2 commenced, the 2007 Law applied in some circumstances, to the TDT – see section 4. Accordingly, applications for directions made in Guernsey 2 either by the Former Trustees or by the Current Trustee have been heard in the Royal Court since June 2010. Every such application in Guernsey 2 from a date in July 2010 has been heard before me in private, as is customary in most applications brought in the Royal Court for directions in trusts matters either for administrative directions or for so-called *Beddoe's* relief for the reasons helpfully explained by the Royal Court of Jersey (Sir Michael Birt B. presiding) in *A v Rozel Trustees (Channel Islands) Ltd: Re the M and other trusts* [2012] JRC 127, [2012] (2) JLR 51, at paragraphs 14-21.

4. This judgment concerns the costs of the many applications heard in Guernsey 2. Over the length of Guernsey 2 an extremely large number of applications have been issued and, in many cases, have led to a decision from me delivered in private. Since there has been such a high number of applications, it is not surprising to me that a very large total amount of costs has been incurred by the parties to Guernsey 2, *i.e.* the Former Trustees, the Current Trustee, RT and Advocate Hay, and also by the Joint Liquidators.

5. I shall deliver a separate judgment relating to claims for remuneration, properly so called, made by either the Former Trustees, or the Current Trustee or RT, as Protector under the TDT.

6. There is no doubt that under Jersey law trustees are entitled to be reimbursed for their costs and expenses and, furthermore, that this right to reimbursement arises under a trustee's right to be indemnified out of trust property in respect of administration costs and expenses. Furthermore, the learned editors of *Lewin on Trusts*, 19th edition, deal at paragraph 27-158 with directions like many of those sought in this case, *i.e.* directions for the guidance or proper protection of a trustee on administration questions.

7. It is also put in this way in *Lewin* at paragraph 21 – 003:

> "***The General Principle***
> *The trustee is, subject to the terms of the trust, entitled to be indemnified out of the trust property in respect of liabilities, costs and expenses properly incurred by him in connection with the performance of his duties and the exercise of his powers and discretions as trustee:*
>
> > *"Persons who take on the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred … the general rule is quite plain; they are entitled to be paid back all that they have paid out."*
> >
> > (Danckwerts J in *In re Grimthorpe* [1958] Ch 615, at p. 623)

8. Article 26(2) of the Trusts (Jersey) Law 1984 provides that a trustee may reimburse himself out of the trust for, or pay out of the trust, all expenses and liabilities reasonably incurred in connection with the trust. Accordingly, there is no material difference between the position under the Trust Deed and that under Article 26(2).

9. The position under Jersey law was made clear both in the judgment of Judge of Appeal Vos QC in *Alhamrani v J. P. Morgan Trust Company (Jersey) Limited* [2007] JLR 527, at paragraphs 7 and 27, and in the judgment of Nugee J.A. in *des Pallières v JP Morgan Chase & Co.* [2013] JCA 146**, [2013] (2) JLR 239,** where at paragraphs 19 – 22 Judge of Appeal Nugee QC said:

> *"19. First, the starting point is the principles applicable to costs incurred by trustees. These were considered by this Court in Alhamrani: as the Commissioner said, a trustee has a right of indemnity which arises under statute (Article 26 of the Trusts Law), contract and the inherent jurisdiction. As appears from Alhamrani, this is prima facie a complete indemnity so that the trustee is not left to bear any part of the costs out of his own pocket, although it is always possible for a beneficiary to challenge costs as being unreasonably incurred or of an unreasonable amount.*
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> *20. The trustee's right to a complete indemnity can of course be lost if the trustee is guilty of misconduct. Article 26(2) only entitles the trustee to reimburse himself for expenses "**reasonably incurred in connection with the Trust"** and a trustee who has been found guilty of a breach of trust is likely to find that he has to bear personally the cost of unsuccessfully defending himself – although even then it does not automatically follow from a finding that a trustee has committed a breach of trust, however minor, that he will have to bear the costs …"*
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> *This remains good law in England, and the same principles are applicable in Jersey: see In Re Esteem Settlement [2000] JLR Notes 67A (Bailhache B.) where the note of the judgment includes the following:*
>
> > "*A trustee's contractual right to costs, including the costs of litigation, is only lost by misconduct, and not if he has fulfilled his duties or if he has committed an innocent breach of trust."*
>
> *It is not necessary for the purposes of this appeal to explore this particular point further or to seek to define any more closely the circumstances in which a trustee might lose his right to an indemnity.*
>
> *21. For present purposes what is significant is that a trustee's right to an indemnity may be lost through misconduct; **but it is not lost through allegations of misconduct**…* (highlighted by me)
>
> *22. It should not be overlooked that this question of the trustee's indemnity is quite distinct from the question of what [order for] costs should be made inter partes."*

10. Further in his judgment, Nugee J.A. dealt with what he called "the principles in Buckton", referring to the judgment of Kekewich J in *In Re Buckton* [1907] 2 Ch. 406, at pp 413 – 417.

11. In paragraph 31 of his judgment Nugee J.A. also said:

> *"In my judgment there is nothing in Buckton which affects the principle by which trustees are entitled (by statute, contract and under the inherent jurisdiction of Court) to an indemnity for costs reasonably incurred, which can only be lost by misconduct being established …".*

12. The further comments of Nugee J.A. in paragraph 42 of his judgment also assist:

> *"Where I think the question of benefit to the trust is potentially relevant is in deciding what order should be made in respect of the beneficiary's liability for costs. Where a trustee brings a claim (a Buckton category (1) case) it is usually because the trustee is facing some difficulty of construction or administration which needs resolution. The trustee may need to know on what trusts he holds the fund, or what the scope of his powers or duties is, or whether some proposed action is a proper course to take, or require some other guidance from the Court. In all such cases, the reason that the proceedings are regarded as for the benefit of the trust (and hence "**the costs of all parties as necessarily incurred for the benefit of the estate"** as Kekewich J. says) is that there is a question which needs to be resolved in order for the trust to be properly administered…. [Wh]ere trustees initiate proceedings, almost inevitably on advice, the Court is very ready to accept that they have only done so because they considered that there was a point which needed resolution: see Kekewich J's remarks about extending the fullest possible protection to trustees. This remains the practice in my experience, and rightly so. It is in general better if there is a real doubt arising in the course of the administration of a trust that it is put before the Court than that decisions of doubtful validity are taken which might have to be argued over later; and the Court therefore encourages trustees faced with difficulties to apply for directions rather than proceed on a basis which might turn out to be mistaken."*

The Royal Court of Jersey (Sir Michael Birt B. presiding) further clarified the position of a trustee's indemnity in respect of legal costs in paragraphs 23 – 27 of the judgment in *Landau v Anburn Trustees Limited* [2007] JRC 084:

> *"23. Until May 2006, there had been a certain amount of inconsistency in both thought and practice in relation to a trustee's costs. Orders were being made for the trustee to recover its legal costs out of the trust fund on an indemnity basis and sometimes (but not always) the court ordered these to be taxed if not agreed. The Greffier would then exercise his power of taxation under R.12 of the Royal Court Rules 2004 and would apply the scales laid down in connection with that process for [factor A and factor B]. This meant that, in many cases, the amount which the trustee could recover out of the trust fund following taxation was noticeably less than the sum which had been charged by its lawyers. It followed that either the trustee had to make up the difference out of its own assets or the lawyers had to forego some of their fee, which meant that lawyers would act for trustees at a lesser rate than they would act for ordinary litigants.*
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> *24. In an important judgment Alhamrani [2006] JLR 176 Bailhache, Bailiff, sought to clarify the position. He reiterated that, both under customary law and by virtue of Art. 26 (2) of the 1984 Law, a trustee is entitled to be indemnified out of the trust fund in respect of all expenses reasonably incurred. This includes legal fees. A trustee is not expected to fund expenses incurred in connection with the administration of a trust (including legal fees) out of its own pocket. It followed, he held, that in cases of non-adversarial litigation questions of taxation under r.12 did not arise…*

25. *The effect of the Bailiff's judgment was helpfully summarised by Page Commissioner in Alhamrani:*

> *"(1) The general principle is that "a trustee, acting reasonably and in the exercise of its duties, powers and discretions, is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred."*
> *"(2) Strictly speaking, that principle is one that arises as a matter of basic trust law and an express order to such effect is unnecessary.*
> *(3) In such circumstances, no question of taxation arises – even if such an order (that is, an order for an indemnity from trust funds) is made in express terms.*
> *(4) It is to be emphasized that this general principle only applies where a trustee is acting reasonably.*
> *(5) This general rule can be displaced or overridden by the court but only by specific order to that effect.*
> *(6) A beneficiary who thinks that a trustee has acted unreasonably and ought not to be entitled to recover his costs in full (or, perhaps, at all) has the same remedies as those available for any alleged breach of trust or fiduciary duty, or for other misconduct: to say that without the automatic operation of taxation there is no mechanism for preventing the "plundering of the trust fund" by an unscrupulous trustee is therefore incorrect. "Nothing which I have stated above should be taken as indicating a carte blanche to use the trust fund for the payment of legal or professional fees in an improper, immoderate or disproportionate way. A beneficiary or other interested party who wishes to complain of such misconduct has a right of recourse to the court, which would not hesitate to use its supervisory jurisdiction to impose appropriate orders or penalties…".*

26. *As Page, Commissioner said in Alhamrani, "the court may choose to exercise its general supervisory jurisdiction in this respect in a number of different ways. One method might be for the court to consider the reasonableness of the remuneration or legal fees sought to be paid out of the trust fund on an application by the beneficiaries …*"

13. In a recent case in the Court of Appeal in England, *Davies v Watkins* [2013] WTLR 221, Lloyd LJ, at paragraph 26, stated the longstanding position under English law:

> *"As regards the costs of the application for directions, the normal rule is that, absent improper conduct, the costs of the trustee and of the beneficiary defendants will be paid out of the trust fund."*

Lord Justice Lloyd also referred to the general position in paragraph 52 of his judgment:

> *"52. This was not a question of exercising the court's general discretion as to costs in ordinary litigation. The court had to start from the special position of an application for directions by a trustee, with the special rules and practice that apply to such proceedings…"*

14. I shall, therefore, apply in the Royal Court the established law of Jersey, and of England, by following the practice and procedure as to costs of trust proceedings heard in private before the Court as described fully in *Lewin* and in the quoted extracts from judgments which I have set out in paragraphs 6 to 13 above. In doing so I believe that I am also following the practice which is consistently used in trustees' directions hearings heard in the Royal Court where the supervisory jurisdiction of the Royal Court is invoked by trustees. If it be necessary for me so to find, I find that this practice also arises under the customary laws of both Guernsey and Jersey.

15. By way of a short summary, the many applications made for directions in Guernsey 2 since 2010, whether made on behalf of the Former Trustees or on behalf of the Current Trustee and RT, primarily related to the preservation of the assets of the TDT, the management of the TDT, and the maintenance of the net value of the investments in the TDT, including, especially, its shareholding in an Isle of Man company, Iver Resources Limited, ("Iver"), which holds as its primary, and perhaps only, asset the long leasehold interest in an extremely valuable residential property, The Royal College of Organists in Kensington, London, ("the RCO"). Some others of the applications have related to the payment of UK corporation tax for which two companies known as the Farnborough Companies were liable, and to the sources of payment of such taxes.

16. These applications were, therefore, applications relating to the administration of the TDT where trustees or, in the case of the Former Trustees, previous trustees claiming a lien over the TDT assets for alleged arrears of remuneration and fees sought the guidance of the Royal Court, and their consequential protection, claiming such directions under the supervisory jurisdiction relating to trusts, to which the 2007 Law and the inherent jurisdiction of the Royal Court applies. Further, a limited number of applications related to the defence in England of proceedings brought against the Former Trustees, as trustees of the TDT, by individual claimants. The directions given on those applications were, in my view, typical *Beddoe's* directions.

17. With a few exceptions, to which I shall revert later in this judgment, no objection was raised by either RT or Advocate Hay or the Joint Liquidators, as liquidators of the four BVI companies, which have the benefit of a very large judgment in Guernsey 1, (as partly confirmed by the Court of Appeal in their favour,) to the application of the ordinary rule in trust administration proceedings that the costs of such parties as trustees and beneficiaries and protector should, in the ordinary course of events, be raised and paid out of the trust fund without those parties needing to have recourse to the Royal Court for an order to that effect, and without any form of taxation of those costs.

18. Since the Former Trustees retain the assets of the TDT pending a resolution of their claim to an effective lien over the assets, they are obliged to take any appropriate steps to preserve such assets and to maintain their net value. Their role in doing so is likely, therefore, to be considerably more active than the role of the Current Trustee, which was appointed on about 2 July 2010 but has yet to have the assets of the TDT vested in it.

19. The Former Trustees contend that they have retained fiduciary obligations in relation to the trust assets of the TDT since their removal as trustees since they have retained the assets of the TDT. It seems to me that their functions in relation to the assets are fiduciary functions and that they are, therefore, acting in a fiduciary capacity at the same time as acting so as to preserve the assets so as to enable them to enforce their lien. The Former Trustees argue that, even though they have not been the trustees of the TDT since their removal, they have remained as parties exercising fiduciary powers in relation to the assets of the TDT and that, as such parties, they are entitled to an implied equitable indemnity in relation to their costs and expenses of so acting in discharge of their functions. Whether they still remain trustees for the purposes of the 2007 Law or not, they rely, in support of their argument that this is

the position under Jersey Law, upon the decision of the Jersey Court of Appeal in *des Pallières v JP Morgan Chase & Co* (supra), at paragraph 23, of the judgment of Nugee J.A. where he said:

> *"… although JPM is not a trustee, it is a person with functions in relation to the Trust which are fiduciary. I agree with the Commissioner ...: that such a person is entitled to an implied equitable indemnity in respect of costs reasonably incurred by it in the discharge of such functions: see Lewin on Trusts (18th edition 2008) paragraphs 21 – 31.… [T]he Commissioner said:*
>
> > *"The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent of finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets. The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation under rule 12 – 3 of the Royal Court Rules 1984."*
>
> *I entirely agree, and since there is no dispute as to the principle, it is unnecessary to say more."*

20. It seems, therefore, that Jersey law is settled on this matter and that the Former Trustees, as fiduciaries, are entitled to a full indemnity for all their costs and expenses in Guernsey 2 out of the assets of the Trust Fund without any need for taxation by the Royal Court, unless, of course, it were held that they had misconducted themselves as trustees or such fiduciaries and subject to what I say later in this judgment about specific applications.

21. There can, in my judgment, be no tenable argument that the Former Trustees are not, as a general rule, entitled to be reimbursed on a basis of indemnity for the costs and expenses incurred by them both in the preservation of the assets of TDT and in seeking directions from the Royal Court in Guernsey 2 relating to the TDT. No party contended that there was, even on the highly unusual facts of this case, any real argument on this question and I did not understand Advocate Gray on behalf of the Joint Liquidators to be contending otherwise.

22. Accordingly, including in relation to a number of applications made in Guernsey 2 where the question of costs had either been reserved or not addressed specifically, and save in relation to a limited number of applications to which I refer specifically below, the general principle of indemnity applies in relation the costs and expenses of the Former Trustees.

23. The same also applies, in my judgment, in relation to the costs and expenses of the Current Trustee and of Advocate Hay who are, therefore, entitled, as a general rule, to claim their costs out of the TDT on the basis of indemnity without the need for any taxation in the Royal Court.

24. I now turn back to the Trust Deed to deal with the position of RT as Protector under the TDT. Under clause 14.7 of the Trust Deed, it was provided as follows:

> *"Every Protector shall be entitled (both during and after the time he is in office) to reimbursement of his reasonable expenses (including the costs of any legal adviser, accountant or other professional retained by him in connection with the Protector's personal position as Protector or in connection with any matter relating to this Trust) and where the Protector is a person engaged in a business to be paid his usual*

> *professional or other charges for all work done, time spent and services rendered by him (or if an individual by his firm) in connection with this Trust."*

Clause 14.8 provided, so far as is material, as follows:

> *"No Protector shall be liable for any loss to the Trust Fund … Without prejudice to clause 14.7 any person who is appointed the Protector hereunder shall be entitled to be indemnified (both during and after the time he is in office) out of the Trust Fund and the income thereof in respect of all actions, costs, claims, damages, demands, expenses and liabilities whatsoever howsoever arising by virtue or in consequence of such person being appointed a Protector hereunder or anything done or omitted to be done by such person in the course of that appointment other than by his own fraud, wilful misconduct or gross negligence."*

Clause 14.11 provided as follows:

> *"The powers hereby conferred upon the Protector are fiduciary and (without prejudice to the generality of the foregoing) shall not be capable of exercise so as to confer upon him directly or indirectly any benefit of any nature whatsoever other than as expressly provided herein."*

The Trust Deed, therefore, expressly provides that the powers of RT, as the Protector under the TDT, are fiduciary powers. More crucially perhaps, it also provides expressly that he is entitled to reimbursement of his costs and expenses and the true construction of the provisions which I have just quoted is, in my judgment, clearly that RT, as the Protector, is entitled to be reimbursed his costs and expenses, including his legal costs incurred in and about Guernsey 2, on the indemnity principle without the need for an order for taxation of any such costs in the Royal Court, unless I were to be satisfied, on the application of another party or of the Joint Liquidators, that some part of his costs and expenses has been incurred unreasonably or improperly – see also *In the matter of the HHH Trust* [2013] JRC 023 where Clyde-Smith, Commissioner, sitting in the Royal Court of Jersey held:

> *"20. The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets. The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation…"*.

25. It follows, in my judgment, that the Former Trustees, the Current Trustee, RT and Advocate Hay are entitled to their costs of all applications made in Guernsey 2 and their expenses from the inception of the proceedings in about May 2010 on the indemnity principle out of the assets of the TDT, subject only to the costs of a limited number of applications to which I shall revert later, where different principles apply, without any need for a taxation of those costs in the Royal Court.

26. Since the Joint Liquidators are not beneficiaries under the TDT and have played their part in many applications in Guernsey 2 with a view to protecting the value of the assets of the TDT as a source from which to satisfy their judgment in Guernsey 1, the same position does not apply in relation to their costs. They did not, therefore, seek their costs out of the TDT, although they have sought an order that their costs of a limited number of applications should be paid by some of the other parties, and I shall deal with this point later in this judgment.

27. Since it is very likely that the TDT is an insolvent trust, questions of priority as between, for instance, (a) those entitled to exercise their right to indemnity out of the trust fund to reimburse themselves for the costs and expenses incurred in Guernsey 2 and (b) the judgment

creditors in Guernsey 1, *i.e.* the companies of which the Joint Liquidators are liquidators, might prove important. But those questions do not, in my judgment, arise in Guernsey 2. It will be for Lieutenant Bailiff Sir John Chadwick, or for any other judge appointed in Guernsey 1, or for the Court of Appeal should they decide to deal with such matters, to determine such priorities if the parties, including the judgment creditors in Guernsey 1, are unable to agree such questions without a court order. I stress, therefore, that nothing in this judgment, (or indeed in my future judgment as to the remuneration of the Current Trustee, of the Former Trustees and of the Protector), is to be regarded as providing any support for the enforcement of their rights of indemnity as to costs and expenses in priority to the claims of the judgment creditors in Guernsey 1.

28. At paragraph 27 – 113 of *Lewin on Trusts*, 19th edition, the issue of misconduct committed by a trustee is addressed as follows:

> *"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increase costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law."*

This statement of the law applies, in my judgment, as much in the Royal Court, as in England. If an order, which provides that there should be no order for costs, is made either by consent or by the presiding judge, there is, as I see it, no reason to depart from that provision and to allow parties to exercise a right of indemnity out of the trust assets for their costs of the specific application or applications where no order for costs has been made. The Court of Appeal in England decided in *In re Hodgkinson* [1895] 2 Ch. 190, that a declaration that there should be no order as to costs is a judicial decision that the parties to whom such decision applied, including trustees, are not entitled to their costs of the application or applications in question. It followed, the Court of Appeal decided, that, where a provision had been made that there should be no order as to costs, the trustee had no right to retain his costs of such application or applications out of the trust estate. I respectfully agree with the way in which it is put at p. 194 of the judgment of Lord Justice Lindley.

> *"The effect is that each party must pay his own costs. If so, how is that consistent with the retainer by the trustee of his costs out of the estate? I cannot think that it is …[I]f the judge says, "I make no order as to costs," that negatives the prima facie right of the trustee to take his costs out of the estate".*

A similar position was taken by both Lord Justice Lopes and by Lord Justice Kay. In my judgment, the Royal Court should follow the reasoned approach of the Court of Appeal in *In re Hodgkinson*. Accordingly, where any order made in Guernsey 2 expressly provides that there should be no order as to costs, and does not distinguish as between one party and another, the costs of the parties, with the exception of the costs of Advocate Hay, are not to come out of the assets of the TDT, but are to be borne by those parties personally.

29. I am satisfied that I should make separate provision for the costs of Advocate Hay incurred on applications where, whether by consent or otherwise, no order for costs was made. He was joined as a representative of the minor, unborn and unascertained beneficiaries under

the TDT and was joined by the Royal Court itself so as to ensure, in particular, that the minor children of RT were separately represented. This is, I believe, standard practice on applications like Guernsey 2 and the position was made clear by me from the start that Advocate Hay would be entitled to be reimbursed for his costs and expenses out of the TDT Trust Fund on an indemnity basis. In those circumstances, I am satisfied that I should make an exception for the costs of Advocate Hay of any such application where no order as to costs has been made and I direct that his costs of such applications should be reimbursed on the indemnity principle from the assets of the TDT, without the need of a taxation in the Royal Court.

Misconduct by the Former Trustees or the Current Trustee

30. I repeat paragraph 27–113 of *Lewin on Trusts*, where it is stated:

> *"A trustee may be deprived of costs, or ordered to pay costs, not only by reason of his conduct which occasioned the proceedings, but also by reason of his unreasonable conduct in bringing unnecessary trust proceedings, or his conduct in the proceedings themselves, for example by taking procedural steps which needlessly increased costs, by acting in a partisan manner to some beneficiaries against others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, by adopting an excessive role in trust proceedings by contesting claims which ought to be contested by others, not the trustees, or which ought not to be contested at all. If the court, upon the question of costs being drawn to its attention, makes an order that the judge does not think fit to make any order as to costs, that is an order depriving the trustee of costs and disentitling him from indemnity, and so preventing him from claiming a right of indemnity under the general law."*

31. As is made clear in both *Alhamrani* and *des Pallières*, this statement of the law applies as much in Jersey, as it does in England, and, in my judgment, the law applies equally in Guernsey. I have carefully considered each of the applications where either the Current Trustee or RT or the Joint Liquidators or the Former Trustees have contended that the costs of another party or parties should not be met out of the TDT on the basis of the principle set out in *Lewin*. Subject to what I have decided above on the Orders where a provision was expressly concluded that there should be no Order as to costs, there is, in my judgment, only one application where the general principle that the costs of the trust parties should be met out of the TDT should not apply. I would emphasise, in particular, that, in my judgment, the general principle applies to each of the many applications within Guernsey 2 when issues arose about the RCO and proposals for either the sale out of the TDT of the shares in Iver or the refinancing of the RCO. Although I decided on some of those applications that no such sale should take place and although certain proposals for such refinancing did not proceed, I did not consider that either the opposing parties or the Joint Liquidators, who presented detailed arguments in their further skeleton argument dated 10 June 2014, had proved or established to my satisfaction that I would be justified in concluding that the challenged party had by its or their or his conduct acted in such a way as to disentitle it or them or him from claiming costs out of the TDT.

32. The exception to my general conclusion in the previous paragraph was an application brought by the Current Trustee on 12 August 2013. That application was a hostile application in Guernsey 2 brought against the Former Trustees claiming declaratory relief that the Former Trustees and the Joint Liquidators had acted unreasonably in their respective roles as lien-holder in possession of the TDT assets and contingent creditors of the TDT in allegedly delaying a refinancing of the RCO. Details of the claim were set out, primarily, in the 2nd affidavit of Andrew McCullum, a director of the Current Trustee, sworn on 12 August 2013. It was clear to me almost from the outset that this application was a contentious claim between trustees and not a claim for the exercise of the Court's supervisory and administrative jurisdiction over trusts. Accordingly, the Current Trustee should have issued its claims as new proceedings in open Court, and definitely not by way of application in Guernsey 2. After a relatively short while this application was either abandoned or

withdrawn by the Current Trustee. In these circumstances it is clear, in my view, that the Current Trustee should pay the costs of the Former Trustees and of Advocate Hay and also of the Joint Liquidators on the indemnity basis. In my judgment, the application was brought in the wrong proceedings and on a procedurally unacceptable basis. The circumstances relating to the application were, in my judgment, exceptional circumstances and the other parties, and, in this instance, the Joint Liquidators, should not be out of pocket for defending the application or for making submissions on it. I also direct, in the exercise of my powers as to costs, that the Current Trustee should bear all of its own costs of this application and is not entitled to recover any of its costs of the application out of the TDT. If it should be the case that RT supported the application, then he should also bear his own cost of the application and not be entitled to recover any of his costs of the application out of the TDT.

Costs Reserved

33. In case it is not otherwise made completely clear in this judgment, I direct that wherever in any Order made on any application in Guernsey 2, whether or not such an Order was made by consent, costs have been expressly stated to be reserved, the general principle shall apply and each of the Former Trustees, the Current Trustee, RT and Advocate Hay will be entitled to claim their costs on the basis of indemnity out of the TDT without the need for any taxation by the Royal Court.

Foreign Lawyers' Costs

34. With the exception, I think, of Advocate Hay, each of the parties and the Joint Liquidators have retained English lawyers during parts of Guernsey 2. Some of them have retained solicitors and Counsel with specialist experience in trusts. It follows, in my view, that unless it can be established by a party that the use of English lawyers by other parties was unreasonable or that the costs and expenses claimed for using English lawyers were, in part, unreasonable, each of the Former Trustees, the Current Trustee, RT and (in relation only to the application referred to in paragraph 32 above,) the Joint Liquidators is or are entitled to claim the cost to them of their English lawyers within Guernsey 2 on an indemnity basis and without taxation by the Royal Court, (save in the case of the application mentioned in paragraph 32 where, unless agreed between the Current Trustee and the Joint Liquidators, a Court taxation may be required). Further, in my judgment, although the Guernsey authorities relating to the taxation in the Royal Court of English and other foreign lawyers' costs *may* be relevant on any future challenge to such costs on the basis that they were unreasonable, they do not operate at this stage. Subject to the following paragraph, I did not understand any of the parties or the Joint Liquidators to suggest the contrary.

35. It appears that in about April 2012 the Current Trustee ceased using English lawyers on the basis that it was no longer necessary or proportionate for them to do so. Furthermore, the Current Trustee contends that no other party should be entitled to recover from the TDT any part of their costs which represent the cost to them of using English lawyers since that date. Advocate Robison did not satisfy me that there was a sustainable case that the other parties who had continued to use English lawyers after April 2012 had acted unreasonably or improperly in doing so. That does not, however, mean that the Current Trustee would be debarred from raising an argument at a later stage that some of the costs incurred by the other parties, which I think would mostly mean the Former Trustees, in retaining English lawyers were unreasonable in amount or nature.

The procedure to be used to establish any 'misconduct' by either the Former Trustees or the Current Trustee or the Protector

36. I agree with the procedure suggested by Advocate Wessels in paragraph 20 of the Former Trustees' skeleton argument of 31 March 2014 that the parties who wish to press their claims to be indemnified out of the TDT for their costs incurred in the TDT, *i.e.* the Former Trustees, the Current Trustee, RT and Advocate Hay, should calculate the financial extent of such claims, giving appropriate detail including dates of costs being incurred and a detailed summary of the work done, to enable the other parties and the Joint Liquidators to decide

whether or not they would wish to challenge the nature of the costs claimed or the amount of the costs claimed on the basis that either the nature or the amount was unreasonable. In my view, this procedure would best meet the arguments of the Joint Liquidators, to which I am sympathetic, that they are, in some circumstances, at present inadequately informed so as to be able to put reasoned argument to the Royal Court about the costs claimed by the parties to Guernsey 2. This procedure would, as I presently see it, best enable me to exercise, if appropriate, the supervisory jurisdiction of the Royal Court over trusts – see also Page QC, Commissioner, at paragraph 26 in his judgment in the Royal Court of Jersey in *Alhamrani* (*supra*). I shall, however, after delivering this judgment, invite submissions from Counsel on the appropriate procedure for any such challenges to be determined by me.

PATRICK TALBOT QC
Lieutenant Bailiff

27 November 2015