



**Investec Trust (Guernsey) Limited et al and Glenalla
Properties Limited et al**
Court of Appeal
19th April 2016

**JUDGMENT
15/2016**

Costs at first instance and costs on appeal

**IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division)**

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

Before: James Walker McNeill QC, President
Robert Logan Martin QC
Deemster David Doyle

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

-and-

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

-and-

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

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

Judgment handed down 19th April 2016

JUDGMENT OF THE COURT

McNeill JA

Introduction

1. This is a judgment in respect of costs issues arising out of a long running litigation. The judgment at first instance was handed down on 6 December 2013 (judgment 39/2013).
2. The appellate process involved a number of appeals and Respondents' Notices. For procedural reasons, the hearing of various issues was separated and the substantive judgments of this court are those dated 27 June 2014 (judgment 28/2014), 29 October 2014 (judgment 41/2014), 21 January 2015 (judgment 4/2015), 17 February 2015 (judgment 8/2015) and 10 August 2015 (judgment 32/2015).
3. As part of the management of these appeals it was agreed that all matters in relation to costs, both relating to proceedings below and regarding the appeals, would be dealt with at the end of our determinations on the substantive points put before us. A hearing was duly convened for 9 February 2016 when we heard final oral presentations following the detailed written submissions filed by each party in accordance with our directions. For present purposes it is not necessary to rehearse in detail the complex background circumstances. Put shortly, they are as follows.
4. The plaintiffs and appellants (who are referred to throughout our judgments as the "former trustees") were formerly the trustees of a Jersey trust, known as the Tchenguiz Discretionary Trust ("the TDT"). The objects of the TDT were and are the members of a discretionary class comprised, inter alios, of Mr. Robert Tchenguiz and his children and remoter issue. 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.
5. During 2007 certain transfers, transactions and arrangements were made in respect of property which had become trust assets. Included within those assets were the share capital in British Virgin Islands companies including the first to fourth defendants.
6. In August 2009 the first two defendants were placed in liquidation and in April 2010 the joint liquidators wrote demanding payment of outstanding loans said to be due from the former trustees who, at that stage, were still trustees of the TDT. In February 2010 Oscatello Investments Limited ("Oscatello"), the fourth defendant, was placed in liquidation and a BVI winding up order was made for Eliza Limited ("Eliza"). In April 2010 the joint liquidators wrote to the former trustees demanding payment of outstanding loans said to be due to those companies.
7. In July 2010 the former trustees were replaced as trustees of the TDT by the fifth defendant (referred to in these proceedings as "the present trustee").
8. Prior to that date, in March 2010, the proceedings leading to the determination below had been commenced. The former trustees sought determination of questions as to whether or not they had become liable – and, if so, on what terms – for monies said to be due to the first to fourth defendants (referred to in these proceedings as the "BVI Companies"). The former trustees also sought declarations against the BVI Companies that they had no personal liability in respect of monies said to be due, and that any claims by the BVI Companies extended only to trust property of the TDT held by them. As against the the present trustee, the former trustees sought a declaration that they had a right to indemnity against trust assets of the TDT, whether or not currently vested in the former trustees, so that they might retain those assets until final determination of liability, realise the assets in order to meet any liability they may be found to have, and obtain exoneration.

9. By counterclaim, the BVI Companies sought declarations that the monies claimed by them were due under binding loan agreements and sought judgments in specified sums or, in the alternative, an accounting of all sums due to them by the former trustees.
10. By counterclaim at the instance of the present trustee, declarations were sought that the BVI Companies had no valid claims to the monies which they contended were due, and that the former trustees were not entitled to indemnity or right of lien or exoneration in respect of the TDT assets. The present trustee also sought an order requiring the former trustees to take all steps necessary to vest title to the assets of the TDT in the present trustee and an accounting against the former trustees on the basis of wilful default. By a third party claim the present trustee sought similar declarations as against the BVI Companies.
11. In response to the determination at first instance, numerous points of appeal were made. Although expressed in a focused manner, some, potentially, had wide ranging consequences. Included within the points of appeal were some which sought the review by this court of the determination, or lack of determination, of costs below. This judgment, therefore, deals with all matters in relation to costs arising as part of the appeal process.

The Appeals

12. It seems to us appropriate to deal, firstly, with those parts of the appeals which seek to review the determination, or lack of determination, of costs below.
13. The order below dealing with costs and handed down after the hearing on 6 December 2013, insofar as relevant to this judgment was in the following terms recorded in the transcript of the hearing in the following terms:

“The plaintiffs and the present trustee are to be jointly and severally liable to pay to the BVI Companies their costs of and incidental to the amendment application and the BVI Companies' counterclaim on that application, provided that:

One: The plaintiffs are to pay to the BVI companies 40 percent of their costs of the amended application and counter claim incurred prior to 5 October 2011, and 10 percent of their costs of the amended application and counter claim incurred after that date.

Two: The fifth defendant, the present trustee, is to pay to the BVI companies 60 percent of their costs of the amended application and counter claim incurred prior to 5 October 2011, and 90 percent of their costs incurred after that date. The fifth defendant, the former trustee, is to pay to the BVI companies their costs of the third party claim and the counter claim to the third party claim.”

Appeals on Costs as at first instance

The costs of the former trustees arising out of the counterclaim by the present trustee.

14. The present trustee had brought a counterclaim against the former trustees for breach of trust. It was not in dispute below that the present trustee had been unsuccessful in its counterclaim. During the hearing below at which costs were addressed the Lt. Bailiff had acknowledged that the counterclaim had been comfortably responsible for the majority of the costs incurred at trial. In these circumstances the former trustees had submitted that costs should follow the event and, in response, the present trustee did not dispute the application of that principle.
15. Notwithstanding the foregoing circumstances, the learned Lt. Bailiff had failed to order the present trustee to pay the former trustees' costs in relation to the counterclaim. As with all costs decisions below, the orders, or failure to order, were made without separate written reasoning being given; separate, that is, from such indications as were made during oral argument and which can be identified in the transcript.

16. The submission for the former trustees before us, therefore, was that the position adopted by the learned Lt. Bailiff was perverse and that an appropriate order should now be made awarding the former trustees their costs in respect of the counterclaim by the present trustee. The claim by the present trustee for breach of trust had been dismissed both at first instance and, now, on appeal and there was no principled basis for departing from the usual rule that costs should follow the event.
17. Before us, the present trustee made no submissions on this point.
18. On behalf of the BVI Companies the submission was that the BVI Companies remained neutral on this particular ground with the caveat that the Lt. Bailiff's orders for joint and several liability should be upheld. They then submitted that if those orders for joint and several liability were to be set aside the BVI Companies would support the Lt. Bailiff's decision on the basis that the decision not to order costs was one that went to the apportionment of costs liability. It was within the scope of his discretion and should not be disturbed.
19. In our view it is appropriate that this matter be considered as a separate issue on appeal. It was addressed as a separate issue below and, given the importance of the matter having regard to the amount of time taken at trial, there is every reason that this matter, as with others below, be taken separately.
20. We can discern no rational basis for failing to award to the former trustees their costs of and arising out of the counterclaim by the present trustee. In particular, we are not persuaded by the submission for the BVI Companies that some form of linking of issues, with consequent apportionment, was being carried out. There is no reasoning below to support such a suggestion.
21. It is very well known that appellate courts are extremely reluctant to interfere with decisions on costs at first instance, primarily because of the greater understanding which the first instance judge will usually have had of the proceedings before her or him. Here, however, the position is stark. There was a separate issue, it had been separately addressed before the learned Lt. Bailiff, there was no decision pronounced and no reasons given. In our judgment there was no principled basis upon which to fail to award costs in favour of the former trustees. We shall allow this part of the appeals and award costs in favour of the former trustees.

The order below that the former trustees be jointly and severally liable with the present trustee for the costs of the BVI Companies of and incidental to the third party claim by the present trustee

22. The present trustee had brought a third party claim against the BVI Companies, the substance of which was to attempt to lock the BVI Companies into an acceptance – were the present trustee to be successful in its counterclaim against the former trustees – that the former trustees had been in breach of trust. It can therefore be seen that the interests of the former trustees and the BVI Companies, through, separately, the counterclaim and the third party claim, were broadly similar on this matter. There was no suggestion that the third party claim made by the present trustee was brought with some encouragement from or in concert with the former trustees.
23. Notwithstanding these circumstances, the learned Lt. Bailiff ordered the former trustees to pay the costs of the BVI Companies of and incidental to the third party claim by the present trustee on a joint and several basis with the present trustee. The former trustees, accordingly, sought to appeal this determination before us.
24. As the former trustees pointed out, the effect of the order was to make a non-party costs order against a party who had supported the case for the party seeking costs. The order had been entirely of the Lt. Bailiff's own motion as the BVI Companies had not contended for such an order either before or during the hearing, far less made a formal application for it. The position adopted by the learned Lt. Bailiff was also contrary to comments made by him during the hearing in question to the effect that the costs of the third party proceedings against the BVI Companies really mirrored the counterclaim against the former trustees and that there was considerable force in the submission that the former trustees had nothing to do with the third party proceedings. In these circumstances, the former trustees submitted that something had gone seriously wrong with the order made by the Lt. Bailiff and, again, no written reasons for the order had been given.
25. Before us the present trustee agreed with the former trustees that the Lt. Bailiff should not have ordered that the present and former trustees should be jointly and severally liable for the BVI Companies' costs of the third

party claim. In its submission, the present trustee and the former trustees should be separately liable in the proportions apportioned by the Lt. Bailiff.

26. On behalf of the BVI Companies it was contended that neither the absence of a formal application for such an order nor the fact that the former trustees had not been formally joined to the third party claim were relevant considerations. The procedure for determination of costs was a summary procedure and not necessarily subject to all the rules that would apply in an action.
27. In the submission of the BVI Companies, the former trustees could not credibly contend that they had no close connection with the third party claim. It mirrored the counterclaim and accordingly it was open to the judge to make the order notwithstanding the absence of formal application and formal joinder. Further, at the hearing below, the BVI Companies had contended that they were entitled to 100 per cent of their costs and that it was only a question of the percentage which fell between the other parties. The Lt. Bailiff's order on the third party claim was simply part of an apportionment exercise and should be read alongside the other costs orders. This court should only disturb the orders below as to costs if the former trustees could satisfy this court that there was no obvious explanation for the order.
28. In our judgment the appeal by the former trustees on this point is well founded. Numerous separate elements of the proceedings below were being treated separately for the purposes of costs. It is clear that, in respect of breach of trust, there were two separate claims, the counterclaim and the third party claim, each with its individual respondent. Even were the third party claim and the counterclaim to be viewed in some sense as two parts of a composite whole, we cannot envisage any logic which would lead to the former trustees to some extent being liable to the BVI Companies for their costs. The former trustees were in no sense prosecuting or supporting the claim by the present trustee and it is the present trustee which should bear the costs incurred by the other parties. It was the former trustees and the BVI Companies which had common interest to defeat the counterclaim and third party claim, and they did so.
29. For the same reasons as set out in paragraph 21 above, we consider that it is proper for this court to interfere with the determination below. We therefore allow the appeal by the former trustees and will order that the costs of the BVI Companies of and incidental to the third party claim be awarded in their favour against the present trustee.

Costs in respect of the former trustees' Amended Application and the Counterclaim by the BVI Companies

30. The costs in relation to these matters relate to arguments on the existence of liabilities under what had been referred to in these proceedings as the Arrangements, and in respect of the personal liability of the former trustees. The Lt. Bailiff ordered that the former trustees pay the BVI Companies' costs of and incidental to the Amended Application and the Counterclaim to the extent of (i) 40 per cent of those costs up until 5 October 2011 and (ii) 10 per cent of those costs from 5 October 2011. In the submission of the former trustees, the reduction after the specified date reflected the fact that the dispute on the existence of the liabilities thereafter was only between the BVI Companies and the present trustee, with the only issue between the former trustees and the BVI Companies then being whether the former trustees were personally liable under the Arrangements. The apportionment of 10 per cent of those costs had been the result of the Lt. Bailiff's conclusion in the Trial Judgment that the former trustees were personally liable under the Arrangements. In the earlier proceedings in this Court the former trustees' appeal on personal liability was allowed: see the judgment of this court dated 27 June 2014.
31. In the submission for the former trustees, it followed from our judgment dated 27 June 2014 that this court was entitled to, and should, revisit the determination of the learned Lt. Bailiff on costs as between the parties on the Amended Application and the BVI Companies' counterclaim.
32. In their submission, the issues under the BVI Companies' counterclaim and the former trustees' Amended Application covered all issues identified in the trial judgment except the issues in respect of breach of trust with which we have dealt above. The order that the former trustees be jointly and severally liable with the present trustee for the BVI Companies' costs of and incidental to the Amended Application and the Counterclaim should be set aside. The liability of the former trustees for a proportion of the BVI Companies' costs at first instance on the issue of the existence of the liabilities to Glenalla Properties Limited ("Glenalla") and Thorson Investments Limited ("Thorson") under the Arrangements, in relation to the period up to 5

October 2011, should be set off against the costs incurred by the former trustees on the issue of their personal liability (on which they have now succeeded). Such an approach was preferable to an issue-based costs order due to the practical complications in assessment which typically arise under such orders. Whilst the application of Article 32 of the Trusts (Jersey) Law 1984 (the "TJL") was not argued at trial, the question of the construction of the loan arrangements was disputed and both the evidence and submissions of the former trustees and the BVI Companies went to that issue.

33. In the alternative, the imposition of joint and several liability on the former trustees was not justified and should be set aside and replaced with separate costs orders against each of the former trustees and the present trustee (on the same basis of apportionment).
34. The court had power to deprive a successful party of its costs in respect of an issue on which it has been unsuccessful on appeal, or order that party to pay another party's costs on that issue. Such an order would be appropriate where the particular issue was discrete and significant.
35. There could be no doubt but that the issue of the former trustees' personal liability was a significant issue and a discrete one. It had been separately pleaded, there was separate evidence and it was argued at trial as a discrete issue.
36. The present was not a situation in which one could simply stand back and look at the matter globally notwithstanding the outcome on a particular issue. The litigation had involved several parties seeking different orders and reliefs. Following the judgments of this court, it could be said that the BVI Companies had been successful on the issues in dispute between them and the present trustee at trial, but were ultimately unsuccessful on those separate issues against the former trustees. That should be reflected in costs. There was, again, absence of any reasoned judgment.
37. Although the position of the former trustees was, principally, that the order should be set aside, their alternative position was that the order for costs should be set aside to the extent that it imposed joint and several liability on the former trustees with the present trustee.
38. There was no good reason for imposing a joint and several liability in the present circumstances. To do so was contrary to the authorities.
39. For the present trustee it was agreed that the learned Lt. Bailiff should not have ordered the present trustee and the former trustees to be jointly and severally liable for the costs of the BVI Companies. They submitted that the appropriate order was for the present trustee and the former trustees to be separately liable for the BVI Companies' costs in the proportions apportioned by the Lt. Bailiff. Apportionment was an exercise of discretion that was highly dependent on all facts and circumstances of the case. As the case management and trial judge, the Lt. Bailiff was best placed to determine the fairest and most appropriate apportionment of the costs between the parties. This court should not interfere with his apportionment.
40. On behalf of the BVI Companies it was contended that, leaving aside the issue as to joint and several liability, the suggestion by the former trustees that, given the judgment of this court on personal liability dated 27 June 2014, this court was entitled to set aside the costs order below entirely, was a new ground of appeal.
41. Upon the assumption that this court determined that it had jurisdiction to set aside the Lt. Bailiff's costs order on the grounds contended for by the former trustees, this court should not do so.
42. It was not clear how any principle of "set off" would apply in the present circumstances and it was simpler and more straightforward that the orders dealing with costs below and on appeal stand separately.
43. There was no sensible rationale for trying to set off the former trustees' cost liability following trial with the costs they incurred on appeal. At this stage it was impossible for this court to know whether the costs orders on appeal and below were comparable.
44. The suggestion of set off was wholly inappropriate.

45. As to joint and several liability, the BVI Companies contended that they had a right to make submissions and to seek to uphold the judge's reasoning for the reasons which he gave (both expressly and impliedly).
46. The BVI Companies emphasised the need for caution for an appellate court deciding that it would interfere with the wide discretion given to a first instance judge on costs. Reference was made to *Factortame Limited v Secretary of State for the Environment* [2002] 1 WLR 2438 at [6].
47. There had been no error of principle such as contended for by the former trustees to the effect that co-defendants should only be made liable for costs on a joint and several basis where they had been pursuing litigation in a coordinated manner. The case of *Stumm v Dickson & Co* (1889) 22 QBD 529 was not authority for that proposition. That case had required to address a situation where a co-defendant had run a separate defence for its own benefit alone. Here, on the other hand, the former trustees and the present trustee had run the same defence up until 5 October 2011. After that date the present trustee had maintained the defence and, plainly, in maintaining it, it would enure to the benefit of itself and of the former trustees. Other authorities such as *Bairstow v Queen's Moat Houses plc* [2001] CP Rep 59 and *Merchant Bridge v Safron General Partner 1* [2012] BCLC 291 indicated the width of general discretion available to the court of first instance.
48. In the submission of the BVI Companies, it was plainly open to the Lt. Bailiff to find that the position adopted by the former trustees and the present trustee throughout the proceedings was sufficiently similar to justify imposing joint and several liability. Even after 5 October 2011 each of those parties had resisted the BVI Companies' claim until at least the start of trial.
49. Whilst it was accepted that there was an absence of express reasoning, this court should only disturb the orders of the learned Lt. Bailiff if it can be shown that there was no obvious explanation for the order.
50. As we have already observed, this Court will always be astute to accept that the ability to interfere with orders for costs at first instance is extremely limited. The issue under this ground of appeal is complex because, as regards this remaining element of the trial, the former trustees have been successful on appeal in relation to the issue of personal liability.
51. We have noted that, below, the parties were not contending for an issues-based determination; and it is clear from the transcript of the hearing on 6 December 2013 that the learned Lt. Bailiff was of the same mind. That said, it is also clear from the transcript of that hearing, at pages 30 and 40, that the grant of costs against the former trustees after 5 October 2011 was in respect of their failure at trial to persuade the learned Lt. Bailiff as to their position on personal liability.
52. Given that the former trustees have succeeded before this court in relation to the issue of personal liability, we sustain this ground of appeal on that point on the basis that this can be done without disturbing the remainder of the determination of the learned Lt. Bailiff. In the circumstances as we have described them, this can be done quite simply by removing the liability of the former trustees for any costs from and after 5 October 2011. Looking at the transcript at pages 40 and 41 it seems to us that the 10 per cent allocation to the former trustees must have been in respect of a point or points which they lost and that must relate to the issue of personal liability.
53. Having said that, we see no rationale in the suggestion on behalf of the former trustees that a form of set off between costs on appeal and costs below should be entertained. As was submitted on behalf of the BVI Companies, neither is there a general rationale for that approach nor do we have any indication as to comparative levels of costs expended. In our judgment the issue can be dealt with as a discrete one in the way that we have suggested and the remainder of the position as between the former trustees and the BVI Companies left upon the percentage basis identified by the learned Lt. Bailiff, but with the liability after 5 October 2011 being 100 per cent.
54. As to the issue of joint and several liability as between the former trustees and the present trustee, we are of the view that we should not interfere with the determination below. Albeit the issue as presented to us is agreed as between the former trustees and the present trustee, the pronouncing of such an order is, almost invariably, for providing a form of benefit to the party in whose favour the order for costs is being made. Prior to 5 October 2011, the former trustees and the present trustee may not have been conducting a completely coordinated defence, but the result for which they contended on this matter was the same prior to

that date. Whilst it is unfortunate that there is no reasoning for us to consider, the factor which we have identified seems to us to provide an adequate basis to entitle the learned Lt. Bailiff to make the type of order which he did.

55. Accordingly, in respect of this ground of appeal, we shall find no costs due by the former trustees to the BVI Companies in relation to the Amended Application and the BVI Companies' Counterclaim as regards the period following 5 October 2011; this means that for the period thereafter the present trustee will be liable to the BVI Companies for the whole of the costs of the latter.

Costs appeal by the present trustee

56. It is convenient at this stage to deal with the appeal made by the present trustee in respect of the costs order made against it at first instance.
57. The point made by the present trustee is that the existing costs order is silent as to the capacity in which the present trustee was ordered to pay costs. The order did not purport to be an order made against the present trustee personally, as opposed to in its capacity as trustee of the TDT. The present trustee submitted that, particularly having regard to the determination of this court on the construction of Article 32 TJL, any potential ambiguity should be beyond doubt and that the order below should be varied to make it clear that it was against the present trustee only in its capacity as trustee of the TDT.
58. In support of this ground, the present trustee submitted that it was clear that the present trustee's participation in the litigation had been in its capacity as trustee of the TDT and in an effort to preserve trust assets. There was no sense in which there was any vindication of any personal interest.
59. As trustee of the TDT, the present trustee had a fiduciary duty to protect trust assets against third party claimants. Reference was made to Article 21(1) and Article 21(3) of the TJL.
60. The proceedings had been commenced by the former trustees and concerned questions of liabilities incurred by the former trustees in relation to the TDT. The present trustee was appointed trustee of the TDT on 2 July 2010 and was joined to the proceedings in July 2011. As the current trustee of the TDT, the present trustee was an obvious defendant for such applications for declarations.
61. Before joining the proceedings, the present trustee had received an order from the Lt. Bailiff Talbot in Guernsey on an application for *Beddoe* relief. On 2 July 2012 the present trustee received a further order of *Beddoe* relief.
62. Throughout the litigation the present trustee had pursued its position in its capacity as trustee of the TDT. It had done so with the objective of preserving the trust assets.
63. The capacity of the present trustee should, therefore, be viewed as solely as trustee and not in respect of any personal capacity. Moreover, it was submitted, given the ruling of this court in relation to Article 32 TJL, the present trustee was not personally liable for costs because it had acted in its capacity as trustee and its liability was limited to trust assets in its hands. To make the present trustee personally liable for inter-partes costs would be equivalent to making a non-party costs order against the present trustee. There was no basis for such an order.
64. It was submitted, further, that the reliance of the BVI Companies on English case law and commentaries did not reflect the position under Jersey law. Nor was English law in any way similar to Guernsey law, where the same reasoning as applied to Article 32 TJL should be applied to Section 42 of the Trusts (Guernsey) Law 2007 (the "TGL"). In addition to these points it was also argued on behalf of the present trustee, albeit not with the same strength and depth as the preceding argument, that this court should order that the present trustee is entitled to an indemnity out of the assets of the TDT in respect of its liability for costs.
65. On behalf of the former trustees it was argued that Article 32 had no application to adverse costs orders made against a trustee in litigation. The jurisdiction to make costs orders was a statutory one, entirely within the discretion of the court. This would include the extent of a party's liability and the way in which it was to be satisfied. Orders for payments of costs "out of the estate" or "out of the trust fund" were well established and

dictated that the paying trustee was not personally liable. In the absence of such wording, the paying party was personally liable as in any other litigation. There was nothing in the statutory provisions which supported the submission that Article 32 was intended to fetter the general discretion of the court to make such orders as to costs as it thought fit.

66. Further, there must, on any view, be at least some circumstances where Article 32 did not apply in relation to costs orders against a trustee for example where the litigation was between trustee and beneficiaries. Beneficiaries are not third parties and dealings with them plainly did not fall within the scope of Article 32.
67. In addition, the practical effect of the arguments for the present trustee would be to prevent a third party from seeking security for costs from a trustee and would, in practical terms, remove the incentive or need for a trustee to seek a *Beddoe* order whenever it could take the costs directly from its trust fund.
68. Turning to the question of entitlement to indemnity out of the assets of the TDT, the former trustees submitted, in the first place, that the present forum was not appropriate for determining whether the present trustee (or indeed the former trustees) were entitled to reimbursement out of the trust fund in respect of the costs of these proceedings. However, if this court was minded to deal with questions of trustee indemnity at the present stage, the former trustees should be granted an indemnity as they had been successful in the proceedings.
69. Upon the principal line of argument, a trustee's right of indemnity in respect of costs and expenses (such as the costs of litigation for third parties) was a matter internal to the trust and to be decided between the trustee and the beneficiaries separately from questions of costs in third party proceedings. It was neither necessary for the court dealing with third party proceedings to determine whether the trustee was entitled to an indemnity nor appropriate for it to do so where the beneficiaries had not been convened to those proceedings. In any event, there was a very real question, in the present circumstances, as to who constituted the beneficiaries for the purpose of considering an application for indemnity arising out of these legal proceedings. Even if it was assumed that the relevant beneficiaries were those entitled to the trust assets upon its final administration, that was a matter over which a question mark still hung.
70. The arguments for the BVI Companies were substantially to the same effect as those for the former trustees.
71. There was nothing in the wording of Article 32 to suggest that it applied to costs orders and the proposed construction on behalf of the present trustee undermined the entire rationale behind the court's costs jurisdiction, including the threat of adverse costs orders to ensure that parties behaved reasonably and proportionately in the conduct of the litigation.
72. If the present trustee were correct, this would mean that every trustee had the benefit of a prospective costs order in every case and the successful third party creditor would always be required to fund the entire costs of litigation where the trust assets were exhausted by the third party claim.
73. Even if the present trustee were correct in its interpretation of Article 32, it was submitted that the court still had jurisdiction to make a costs order against the present trustee personally as a non-party (upon the arguments put forward for the present trustee): *Jefcoate v Spread Trustee* (unreported, Judgment 11/2013). A non-party costs order could be made where a party not merely funded proceedings but substantially controlled them and there was no doubt, here, that the present trustee had plainly had control of its own conduct of the proceedings.
74. As to potential indemnity, there was no basis upon which the present trustee was entitled to an indemnity. The two *Beddoe* orders did not assist and should be ignored. There was a real concern that the *Beddoe* orders had not been properly obtained as the BVI Companies, being a potential claimant to the trust fund, had not been given the opportunity to be heard on the application. In the absence of material evidence as to what occurred at the *Beddoe* hearings neither the BVI Companies nor this court could be satisfied that the appropriate legal or factual considerations were drawn to the attention of the relevant judge.
75. In the absence of being able to rely on the *Beddoe* orders, the present trustee was in an identical position to the former trustees. The present trustee was not entitled to an indemnity, principally because it commenced

litigation which it had comprehensively lost. It had not litigated for the benefit of the TDT generally but had preferred the interests of one class of persons claiming an interest in the fund.

76. Where, as here, a creditor asserted a claim that would exhaust the whole trust fund, the dispute was, in reality, hostile litigation between that creditor and the beneficiaries as to the ownership of the fund. Reference was made to *Alsop Wilkinson (a Firm) v Neary* [1996] 1 WLR 1220. In trust disputes where trustees had incurred expenditure and liabilities in an unsuccessful effort to prefer one class of beneficiaries over another and had acted unreasonably and otherwise than for the benefit of the trust estate, those trustees, ordinarily, would not be entitled to any indemnity: see page 1225.

Discussion

77. We deal first with the application of Article 32 TJL. It seems helpful here to repeat the terms of Article 32 and, indeed, the terms of Section 42 of the TGL.

78. So far as relevant, Article 32 provides as follows:

"32 Trustee's liability to third parties

- (1) Where a trustee is a party to any transaction or matter affecting the trust –
- (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
- (b) ..."

79. Section 42 of the TGL, so far as relevant, provides:

"Dealings by trustees with third parties

- 42 (1) Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.
- (2) ..."

80. It will be seen, therefore, that notwithstanding differences in phraseology, the substance and effect of the respective provisions are the same.

81. In our judgment dated 27 June 2014 we held that, as a matter of private international law, the courts of this jurisdiction should recognise the applicability of Article 32 in the determination of the present disputes between the parties. As we indicated, given the terms of Section 42 of the TGL, there was no issue as to public policy in Guernsey being offended by such a result: paragraph 106. In the whole circumstances we considered that, in the present proceedings, the provisions of Article 32 of the TJL fell to be applied in considering the liability of the trustees of the TDT: paragraph 116.

82. Further, we reached the view that, upon a proper interpretation of Article 32, its provisions were substantive: paragraph 105.

83. Those various views were expressed against the background that the issues before the court were, firstly, as to whether a contractual obligation in a particular sum was binding upon a particular person and, secondly, whether the liability of the obligant was restricted by virtue of the status of the obligant under domestic law: paragraph 93.

84. The issue now before us in respect of the appeal by the present trustee is as to whether, upon a proper interpretation, the terms of Article 32 TJL encompass subjects such as the award of costs in court proceedings.

85. Before embarking upon the issue of interpretation of Article 32, we should observe that each of the TJJ and TGL make specific provisions for payment of costs. As before, Article 53 of the former and Section 71 of the latter are in almost identical terms and certainly to the same effect. Article 53 provides:

"53 Payment of costs

The court may order the costs and expenses of and incidental to an application to the court under this Law to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit."

86. It seems to us that these provisions are not applicable to the present circumstances, in that the proceedings before this court are not applications to the court under either Law. Having regard to the other provisions of the respective laws, we conceive the words "an application to the court under this Law" to relate to more standard trust litigation such as applications seeking that trustees distribute or do not distribute the trust property or seeking other similar orders; applications for the appointment of trustees; and applications for the approval – on behalf of minors and those unborn – of arrangements varying or revoking the terms of a trust or enlarging or modifying powers of management or administration.
87. We therefore turn to Article 32. As has been seen, these statutory provisions relate to transactions or matters affecting a trust, which involve a third party and which may give rise to a claim by the third party in respect of the transaction or matter. The concept of transaction is tolerably easy to identify. It may be a contract (where the legal requirements of that juristic relationship are established), or it may be some item of business falling short of a formal contract. In common parlance it may be a "deal". Certainly, in ordinary legal taxonomy it would be taken to be a bilateral or multilateral arrangement which gave rise to the creation of rights and obligations as between the two, or as between some of a larger number of the participants. Examples might be a contract for employment, a construction contract, a lease, a loan or some form of informal exchange of property where no co-relative rights and obligations were expressed.
88. With such a wide range of possibilities, it may be wondered what the concept of a "matter" might add, especially where the scenario is that there is another party to the matter and that the matter is capable of giving rise to a claim by the other party.
89. Given the extensiveness of the general concept of "transaction" we do not consider that there is scope for application of the *sui generis* rule whereby a word of a general nature in a statute will be given a more restrictive interpretation by reason of the nature of the preceding provisions. It seems to us that the concept of "matter", in the mind of the draftsman, was of something distinct from a "transaction".
90. Upon that basis we see no reason in principle why the concept of "matter" may not embrace litigation. Indeed, as a matter of practice, many litigations are styled "in the matter of ...", particularly in respect of trusts. The result is that Article 32(1) of the TJJ is engaged where a trustee has been involved in a contract or other business deal with a third party and where a trustee has been involved in litigation with a third party, and in each case where the third party has been aware that the involvement of the trustee is as a trustee.
91. Nor do we see such a view as having unacceptable consequences. For example, it does not entirely elide the discretion of the court as to an award of costs. The court may still determine whether a successful litigant is to be awarded only partial costs or whether an unsuccessful litigant may be allowed some costs.
92. On the contrary, it seems to us that this interpretation of Article 32 puts parties to litigation on the same footing as parties to other forms of engagement such as transactions. Under the provisions of Article 32, where, for example, a builder enters into a building contract with another party and is aware that the other party is acting as a trustee, the builder is immediately aware that any claim in respect of the transaction extends only to the extent of the trust property. If the builder then litigates upon a claim arising out of that contract there seems no rationale to conceive of an award of costs being enforceable to a greater extent than the trust funds, that is, to the personal liability of the trustees.
93. If such be the case where the transaction and litigation are in respect of a trust and there is knowledge that the other party is acting as trustee, there seems no logical basis in interpreting the statutory provision as permitting a non-transaction third party to raise or respond to litigation on a matter affecting a trust where it is made perfectly clear that the other party is acting as trustee, to seek an award of costs enforceable against the

trustee personally where the trustee has no personal interest in the litigation. It may be, of course, that in very particular circumstances, the court might be prepared to make an award of costs against the trustee personally, as we would see those circumstances as being outwith the statutory ambit of a "matter affecting the trust".

94. Whilst that determination is sufficient for the issue before us, we consider it appropriate to make some reference to the decision of Lightman J in *Alsop Wilkinson (a Firm) v Neary and Others* [1996] 1 WLR 1220.
95. In that litigation, the plaintiffs, a firm of solicitors, brought an action against a former partner in the firm and the trustees of settlements which the former partner had made, seeking declarations that transfers to the trustees were void as against the firm by reason of the Insolvency Act 1986. On application by the trustees for directions as to whether to defend the plaintiffs' action the court held that it was not the law that trustees had a duty to defend actions challenging the validity of settlements and that, in disputes between rival claimants to a beneficial interest the trustees should in normal circumstances remain neutral.
96. The circumstances of the case were, accordingly, somewhat stark. However, in considering the applicable law, the learned judge suggested that trustees might be involved in three kinds of dispute. The first, which he referred to as a "trust dispute", was a dispute as to the trusts on which the subject matter of the settlement was held. This might be "friendly litigation" involving the true construction of the trust instrument or a matter of administration or it might be "hostile" for example a challenge in whole or in part to the validity of the settlement. As the learned judge noted (at page 1224) the line between friendly and hostile litigation, which was relevant as to the incidence of costs, was not always easy to draw. The judge's second kind of dispute (which he called a "beneficiaries' dispute") was a dispute with one or more of the beneficiaries as to the propriety of any action or inaction on the part of the trustees, usually, an action for breach of trust. The third kind of dispute (which he called a "third party dispute") was a dispute with persons otherwise than in the capacity of beneficiaries in respect of rights and liabilities external to the trust, for example a contract or tort. In relation to a third party dispute", trustees were entitled to an indemnity against all costs properly incurred in representing the trust for the purpose of protecting and preserving the trust estate. In such cases, of course, trustees often sought authorisation before suing or defending. On the other hand, in the view of the judge, a "beneficiaries' dispute" was regarded as ordinary hostile litigation in which costs followed the event. As far as a "trust dispute" was concerned, trustees should remain neutral as between rival claimants to a beneficial interest in the trust estate and, if they engaged in an unsuccessful effort to prefer one class of beneficiaries over another, and were found to have acted unreasonably and otherwise than for the benefit of the trust estate, they, ordinarily, would not be entitled to indemnity.
97. For the reasons which we have given, we do not consider that it is necessary for us to embark upon this form of analysis. Had it been necessary to do so, we could not have characterised the present litigation, and the participation of the present trustee, as an ordinary dispute between competing classes of beneficiaries. The proceedings were commenced by the former trustees in an attempt to protect their position, and the present trustee, as current guardian of the interests of the potential beneficiaries, was an obvious defendant with neither a personal capacity in respect of that issue, nor with a requirement to consider whether to prefer the interests of one class of beneficiaries over another. The issues raised by the former trustees were important ones in respect of the earlier administration of the trust and it was incumbent upon the present trustee to consider those issues and not merely to remain neutral. That having been the reason for the commencement of the litigation by the former trustees, it was not surprising that the present trustee decided to make its own claim in respect of breach of trust. Such a procedure, by a present trustee against a former trustee is singular, if not unknown, and does not fit easily into the categorisation by Lightman J. If anything, it falls into the second category (that is a "beneficiaries' dispute"), albeit at the instance of the present trustee against former trustees as opposed to by present beneficiaries against a present trustee. It seems to us that this is an instance of the trustee being obliged to take appropriate steps to preserve the trust estate. Their own position is not impugned by current beneficiaries and there is no dispute as between different classes of current beneficiaries. When everyone is aware that the trustees' only interest is to preserve the trust estate, there seems no logical reason to presume that the present trustee should be personally liable by reason of its participation in the litigation.
98. This leaves the participation of the BVI Companies to be considered. Again, this part of the proceedings does not fit easily within the categorisation set out by Lightman J. It is not an internal trust dispute. It does not immediately appear to be the sort of "beneficiaries' dispute" which Lightman J envisaged. But it might be a form of "third party dispute" in respect of contractual or tortious acts or omissions by trustees in the course of

administration and affecting persons in a capacity other than that of beneficiaries. Even so, the eventual situation in which the present trustee found itself was hardly similar to that of preferring the beneficiaries specified in the trust instrument over, for example, ordinary creditors, their trustees in bankruptcy or liquidators. The BVI Companies may be separate legal persons from the TDT and its beneficiaries, and may now have joint liquidators looking after the assets of the BVI Companies for creditors, but, given the byzantine nature of the interlocking relationships between those Companies and the TDT, it is by no means clear that the ultimate creditors of the BVI Companies are unconnected with the various potential beneficiaries under the TDT. Certainly, the matters here could not properly be characterised as ordinary contractual responsibilities assumed by trustees as such in the course of administration of the trust. We would therefore have considered that there was much to be said for the view that, in participating in this part of the litigation, the present trustee was neither seeking to defend its own contractual arrangements nor seeking to prefer one class of beneficiaries over another.

99. On all these matters, therefore, leaving aside the application of Article 32, we would not have been prepared to countenance an order that the present trustee be personally liable in costs to other parties to this litigation. As it is, our view in respect of Article 32 means that we do not require to reach a concluded view on other scenarios. Subject to one exception which is referred to below, we have therefore made an appropriate declaration that the liability of the present trustee for costs is as a trustee and extends only to the assets of the TDT. In doing so, we have referred to both Article 32 of the TJJ and section 42 of the TGL. This is to ensure that because, although the TDT is a Jersey trust, the present proceedings have taken place in Guernsey, in the case of its liability for costs the present trustee may rely upon either or both of these provisions depending upon the particular jurisdictional considerations which might arise when the assessment of costs is being carried out and costs are being accounted for. In addition, and given that the Lieutenant Bailiff made an order for costs against the former trustees, we have introduced a similar declaration to clarify the extent of their liability in that respect. Although no party asked for such a declaration before us, it appears to the Court to be the logical consequence of what we have decided.

Costs of the Appeals

100. For the former trustees it was submitted that the principal order in their favour should be that the BVI Companies pay 95 per cent of their costs and the present trustee pay 5 per cent of those costs. In addition, the former trustees were entitled to their costs as against the present trustee on the appeal of the latter.
101. In their submission such an award would take into account the following factors:
- (i) The former trustees had succeeded in their appeal, opposed by the BVI Companies, as to the applicability of Article 32 TJJ and as to the construction of the Arrangements. Reference was made to the judgment of this court dated 27 June 2014;
 - (ii) The former trustees had also succeeded on the only issue in dispute between them and the BVI Companies concerning their liability under the Oscanello arrangement, namely, whether there was any liability in unjust enrichment; and
 - (iii) The former trustees had been successful as against the present trustee in relation to the specific issue raised by the latter concerning the relevance of the state of account between the trustee and the beneficiary for the purposes of Article 32(1)(a).
102. The former trustees submitted, in addition, that as the Lt. Bailiff had made no finding in respect of the Article 32 TJJ arguments, the former trustees should be entitled to costs incurred at first instance in that respect.
103. The BVI Companies, dealing with the former trustees' appeal, submitted that there should be an issues-based award. They accepted that they had lost the argument as to the applicability of Article 32 TJJ and were obliged to pay the former trustees' costs on appeal on the recoverable basis.
104. They submitted, however, that, as the former trustees had argued and lost their ground of appeal that the BVI Companies were barred by an election from arguing on appeal the applicability of Article 32, the former trustees should pay the BVI Companies' costs on that issue.

105. As regards the former trustees' ground of appeal that, Article 32 aside, the loan documents, properly construed, excluded personal liability, this court had expressly reserved its position: see the judgment dated 10 August 2015 at [17]. The appropriate order in respect of that issue was that there be no order as to costs.
106. Turning to the position of the present trustee and its Respondent's Notice, the BVI Companies stressed that the issue raised there as to the true construction of Article 32 in the event (which happened) that this court allowed the first ground of the former trustees' appeal had necessitated a hearing on 14 October 2014 and considerable preparation and argument by all parties. The judgment of this court dated 29 October 2014 rejected the present trustee's construction and the present trustee should pay the costs of the BVI Companies and the former trustees on this issue on the recoverable basis.
107. For the present trustee it was submitted that an issue-based costs order was appropriate. On appeal:
- (i) The BVI Companies had lost on the Oscatello-restitution and Article 32 points.
 - (ii) The former trustees had won on gross negligence, restitution and Article 32; and
 - (iii) The present trustee had won on the Oscatello-restitution argument and lost the application to amend its notice of appeal.
108. Accordingly, on an issue based approach, the present trustee had succeeded in relation to the Oscatello claim and the only parties succeeding in relation to Article 32 were the former trustees. That said, in order to avoid unnecessary and protracted issues on taxation, the court was invited to award costs on a percentage basis. An appropriate award of costs as between the present trustee and the BVI Companies would be an award that the present trustee pay 60 per cent of the BVI Companies' costs of the appeal. The basis of this calculation was that the Oscatello claim, at £39 million, represented 21 per cent of the overall value of the claim. Further, the Oscatello claim had occupied 32 out of the 133 substantive paragraphs of the Court of Appeal's judgment of 10 August 2015, being 24 per cent of that judgment. Finally, it was preferable to order the present trustee to pay 60 per cent of the BVI Companies' costs than to order it to pay 80 per cent of those costs and have the BVI Companies pay 20 per cent of the present trustee's costs.
109. In reply, the former trustees resisted the submission by the BVI Companies that there should be an issues-based costs order in respect of the former trustees' appeal. Not only did the weight of authority show a strong reluctance to make issues-based costs orders, it was apparent that the former trustees had succeeded on all of the issues in dispute between them and the BVI Companies in the appeal of the former trustees. These were (a) personal liability and (b) Oscatello restitution. Reference was made to the judgments of 27 June 2014 and 10 August 2015.
110. As regards the submission by the BVI Companies that the former trustees should pay the costs of the BVI Companies in respect of the arguments on election, the reality was that those arguments were part of an issue on which the former trustees unquestionably succeeded. The fact that the court rejected one argument in reaching that conclusion should not have any bearing on the general rule that the unsuccessful party should pay the successful party's costs. The specific arguments on election did not add significantly to the length of the appeal and there was no suggestion that the former trustees were unreasonable in pursuing those arguments.
111. In their reply, and on matters not already set out above, the BVI Companies noted that the former trustees had not appealed the finding of the learned Lt. Bailiff that the former trustees were liable to Oscatello in restitution, their appeal referring only to the finding that there was no liability to Oscatello in contract.
112. As to the costs order proposed by the present trustee, the BVI Companies suggested that the percentages identified by the present trustee were wholly arbitrary. There was no justification for calculating matters by reference to a percentage of a judgment as there was no necessary connection between the extent of the sections of a judgment and the amount of work involved by parties. The vast majority of the work done by the parties on the appeal by the present trustee related to gross negligence and related issues, all of which the present trustee lost.

Costs relating to Interlocutory Applications

113. The former trustees made applications in respect of costs of the interlocutory applications made by the present trustee comprising (a) the preliminary issue of whether leave to amend was required, as determined in our judgment dated 21 January 2015 and (b) the various applications themselves, as determined by our judgment dated 17 February 2015. The former trustees submitted that, given the way in which these matters were prosecuted, costs should be payable on an indemnity basis.
114. The former trustees submitted that the conduct of the present trustee had been manifestly unreasonable. The applications were made less than a month before the hearing date, despite the appeals having been brought more than a year earlier. The present trustee had been shown to have delayed raising the points in question: see the judgment of this court dated 21 February 2015 at paragraphs [10] – [14]. The applications were a tactical attempt to derail the preparation by the other parties for the substantive appeals: witness the timing of the applications and the amount of material lodged which ran to over 1500 pages. In essence the applications invited the court further to adjourn the appeal hearing at the last minute.
115. Finally, the conduct of the present trustee could be described as scandalous and vexatious in bringing the applications on the basis of baseless allegations that the former trustees had put forward a false case at first instance.
116. The BVI Companies also made submissions on the individual applications made by the present trustee, which they characterised as abusive.
117. In the submission of the BVI Companies, the present trustee and Mr. Robert Tchenguiz had, throughout the whole proceedings, pursued a deliberate strategy of seeking to delay proceedings and prevent the hearing and determination of the appeals. They had needlessly delayed the handing down of judgment at first instance through their application to obtain additional disclosure and adduce further evidence, the appeal on which was dismissed by this court on 29 November 2013.
118. Thereafter the present trustee had in January 2014 appealed against the decision of the learned Lt. Bailiff dated 6 December 2013 and a procedural timetable had been agreed by consent in February 2014 to the effect that all of the appeals would be heard in the week commencing 23 June 2014. That hearing had been derailed by the application by Mr. Tchenguiz to intervene in the proceedings and by the present trustee joining with Mr. Tchenguiz by attempting to adduce further evidence. In addition, there were numerous applications in England for permission to use disclosure documents, including a full appeal to the English Court of Appeal.
119. Turning to the individual applications in question, the BVI Companies noted that the present trustee had purported to file a supplementary notice of appeal on 15 January 2015 without applying for permission to do so. This approach had been clearly rejected by the decision of this court on 21 January 2015 when the court made it clear that, having regard to the disruption already in the proceedings, the application pursuant to Rule 6 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, be lodged no later than 12 noon on 27 January 2015. In that decision and in a separate decision handed down on the same day in respect of the costs of Mr. Tchenguiz's failed intervention application, this court had emphasised that the date of the adjourned hearing, 16 February 2015, had been settled on 3 November 2014.
120. Immediately following those judgments the present trustee had served a notice dated 22 January 2015 for disclosure and interrogatories against the former trustees. Then, by three separate notices dated 27 January 2015 the present trustee had applied for leave to amend its notice of appeal, to adduce further evidence and to have the BVI Companies ordained to give specific disclosure.
121. Five separate skeleton arguments had been served by the present trustee, amounting in total to some 114 pages, but with final submissions only being served on 6 February 2015 in a 71 page document. Further, there were five affidavits which, with exhibits, ran to some 1700 pages, the last affidavit only arriving on the morning of 16 February, minutes before the hearing of the appeals was due to commence.
122. Indeed, just one working day prior to the hearing of the appeal, the present trustee attempted to raise, in an affidavit, allegations of potential breaches of the rights of the present trustee under Articles 6 and 8 ECHR, notwithstanding the provisions of paragraph 3 of the Practice Direction No. 1 of 2006.

123. In all, the conduct of the present trustee leading up to the hearing in the week of 16 February 2015 had severely disrupted the preparations for the appeal on behalf of the BVI Companies. Not only that, much of the relief sought by the present trustee had already been sought and refused, and in some cases on more than one occasion. The *Ladd v Marshall* application was the third attempt to adduce the Gunnarsson statement and the fourth attempt to adduce the draft Clifford statement. The Reports Application was the second attempt by the present trustee to obtain disclosure of documents that were the subject of that application in these proceedings.
124. Further again, the present trustee had sought to indicate that its delay had arisen because of the need to obtain permission to use documentation disclosed in England. But no such permission had been given. Notwithstanding that, the draft supplemental notice of appeal was apparently prepared without any reference to that documentation. The determination by the Court of Appeal in England having been made on 31 October 2014, there could be no excuse for the delay by the present trustee in drafting relevant documents until just a month before the final hearing. The only proper inference to be drawn is that the timing of the applications by the present trustee were part of a strategy aimed at derailing the appeal.
125. This was a clear case for ordering costs to be paid on the indemnity basis. Each of the present trustee's applications had been dismissed by this court in its judgment dated 17 February 2015. The grounds were that, on the evidence of the present trustee itself, the proposed amendments could have been raised even before the trial at first instance and the existence and implications of the SFO investigation could have been raised before the learned Lt. Bailiff. It was therefore obvious to the present trustee that the amendment application and ancillary applications would fail for that reason alone.

Abortive costs

126. In addition to the foregoing submissions, the present trustee also made an abortive costs application for costs to be paid by Carey Olsen, the advocates for the BVI Companies, or by the BVI Companies, in respect of thrown away costs of the hearing on 23 to 25 June 2014.
127. Notwithstanding that the Respondents' notice for the BVI Companies had contained various contentions in relation to the proper construction of Article 32, at the appeal hearing on 23 to 25 June 2014 Advocate Greenfield, for those defendants, noted for the first time that their written materials did not include all their intended submissions on the proper construction of Article 32 and that a further opportunity was required in order for the BVI Companies to prepare and file that material. This was notwithstanding that all other parties had filed all of their written material on the issue in accordance with the agreed timetable. As a consequence, the appeal in respect of that matter was then adjourned to allow the BVI Companies to file further written materials.
128. Because of the BVI Companies' failure, or because of the failure of their advocates, to file a skeleton argument comprehensively outlining their submissions on the Article 32 appeal, the present trustee was not called upon to make submissions at the appeal hearing and the costs of the attendance of its legal team at and preparing for the appeal hearing were wasted. The present trustee submitted that it should be presumed that the failure to include a full, consistent and adequate outline of submissions on the issue of the true construction of Article 32 was attributable to a failure on the part of Carey Olsen and, accordingly, it was appropriate that Carey Olsen bear the burden of paying those costs. In the submissions for the present trustee it was contended that, had it been known that the Article 32 appeal would not be heard during 23 to 25 June, there would have been no need for the present trustee to be represented at that hearing.
129. In response to that application the BVI Companies submitted that there had been no need for the present trustee to have remained at the hearing while this court dealt with the issues which arose on the former trustees' appeal in respect of which the present trustee had indicated that it was neutral. The present trustee ought to have asked the court to be allowed to remove from the hearing. It was the fault of the present trustee that it had incurred costs of attendance throughout that week.
130. In any event, as this court had recognised at paragraph 3 of its judgment dated 11 September 2014, the inability of the court to deal with appeals other than that of the former trustees in the period 23 to 25 June arose from the disruptive and forlorn applications by Mr. Tchenguiz, Heather Bird and the present trustee. Blame for any disruption during the hearing cannot credibly be cast on the BVI Companies.

Costs in respect of the consequential relief application by the BVI Companies

131. The former trustees also sought from the BVI Companies their costs in respect of the application by the latter made on 4 September 2015 seeking consequential relief in the form of (a) the discharge of the Joint Receivers, (b) the handing over of the TDT assets to the Joint Liquidators and (c) the provision of information concerning the trust assets by the former trustees and the present trustee. That application had been dismissed by this court in its judgment dated 22 December 2015 and the former trustees should be entitled to their costs.

Consequential Applications

132. As part of these proceedings before us the former trustees raised certain consequential applications in the event that the court made costs orders in accordance with their principal submissions. They sought an uplift on the recoverable rate for the Guernsey advocates for the former trustees. They sought an order that payment of the costs of external/foreign lawyers retained by the former trustees might be charged at the same maximum recoverable rate. Thirdly they sought an interim payment on account of costs otherwise ordered.
133. As a matter of notice, the former trustees also indicated that, in the event of costs being awarded in their favour against the present trustee, in respect of the present trustee's appeal, the former trustees would make an application to have Mr. Robert Tchenguiz joined to these proceedings for the purpose of seeking an order that he be jointly and severally liable with the present trustee to pay such a costs order.
134. At an early stage the former trustees recognised that the consequential applications were premature and did not insist on them at this stage.

Discussion on the costs of the appeals

135. At the outset, the court is satisfied that it should adopt an issue based approach to determining the costs of the appeals. This is consistent with how we determined the appeals themselves: see items 1 to 7 of the Order, and paragraphs 6 to 9 of the court's judgment, each dated 18 December 2015. This approach will allow for the allocation of costs to be carried out by reference to the determination of the issues which were the subject of the appeals.
136. As regards matters between the former trustees and the BVI Companies, we deal first with the issue as to the applicability of Article 32 TJL, where parties are agreed that the former trustees were successful. In our judgment the former trustees should be allowed their costs as against the BVI Companies, the present trustee having been neutral. Although the former trustees suggested an alternative to an issues-based approach, this particular issue seems to us to be a clear example of an issue which can properly be treated as a separate part of the appeal proceedings. Whilst the issue had been argued below, it had been treated differently by the learned Lt. Bailiff at the end of a hearing where he had considered the majority of the time to have been taken by the breach of trust case. We therefore do not propose to interfere, on this matter, with the costs determination below.
137. The issue as to the BVI Companies being barred by an election from arguing on appeal the applicability of Article 32, whilst separately argued, we regard both as an incidental part of the Article 32 application issue and one where, having regard to paragraphs 45-51 of our judgment dated 27 June 2014, there should be no costs due to or by these parties. Further, having reserved our position in respect of the construction of the loan documents, again we make no order of costs either way.
138. In respect of the issue as to whether there was any liability on the part of the former trustees in unjust enrichment, the former trustees succeeded on this, the only other issue in dispute between them and the BVI Companies, and should have their costs on the recoverable basis.
139. The net effect of the foregoing may appear on one view to be that the former trustees are entitled, as against the BVI Companies, to their costs of the appeal; but as there were numerous other issues which took

separate amounts of time, and as we have already explained, we prefer to express matters in respect of individual issues.

140. Turning now to matters involving the present trustee, we again consider that the clearest way of approaching these matters is by way of individual issues. We are not persuaded by the present trustee's suggestion that a percentage-based approach can be appraised with any reasonable degree of accuracy.
141. It seems to us that the present trustee was successful as against the BVI Companies in respect of the Oscatello restitution issue and should be entitled to costs. On the other hand the present trustee lost on gross negligence and will be liable to the other parties for their costs. The issue between the present trustee and the former trustees as to the relevance of the state of account between the trustee and the beneficiary for the purposes of Article 32(1)(a) we do not consider of such importance to justify an award.
142. Turning to the issue raised by the present trustee under its Respondent's Notice, we rejected the present trustee's construction of Article 32 TJJ and it follows that the present trustee should pay the costs of the BVI Companies and the former trustees on this issue on the recoverable basis.

Discussion on costs relating to Interlocutory Applications

143. In paragraph 97 above we indicated that, looking at the participation of the present trustees in certain parts of the litigation, there was probably much to be said for the view that, there, the present trustee was neither seeking to defend its own contractual arrangements nor seeking to prefer one class of beneficiaries over another. However, when one looks at the Interlocutory Applications with which the court was faced we consider, essentially for the reasoning of the other parties, which we have set out above, that the behaviour of the present trustee cannot be justified by reference to surrounding circumstances and can only properly be characterised as a determined attempt to derail the appeal process. What occurred during this stage of proceedings was far removed from the ordinary conduct of even strenuously adversarial litigation and cannot be condoned. In our judgment the other parties are entitled to their costs on this issue on the indemnity basis. As the awarding of indemnity costs is a mark of the Court's displeasure at the conduct of a party in the litigation, we do not in this instance restrict the liability of the present trustee to the assets of the TDT. Accordingly, we find that the present trustee is to be liable personally for the costs awarded in this respect, and in doing so we consider that this is justified as an example of very particular circumstances such as are referred to in paragraph 93 above.

Discussion on the abortive costs application

144. We have considered the parties' submissions on this matter particularly carefully and the two present members who were also sitting in June 2014 have been able to remind themselves of that hearing and the somewhat unusual turns of events which occurred leading up to it. On balance, and whilst the approach taken by the BVI Companies was hardly an indication of the proper level of preparation to be expected in any appeal case, whether of the arguable magnitude of this case or otherwise, we have decided to make no order of costs. It seems to us that there is force in the point made by the BVI Companies that the hearing had been disrupted by others. Once the effect of the disruption had been identified it seems to us that it was entirely a matter of choice for the present trustee to seek leave to withdraw or, given the singular nature of this entire litigation, to decide to remain against the event that, even on a matter in which they were neutral, something might be said which bore on their interests. That decision was for them and we do not consider that an award of costs would be justified.

Discussion on the consequential relief application by the BVI Companies

145. Whilst these applications were dismissed by this court in its judgment dated 22 December 2015 we do not consider the matters to have been of such substance that the former trustees should be entitled to their costs of preparation and argument.

Consequential applications by the former trustees

146. As the former trustees do not insist on these at this stage we do not require to discuss or determine them.