IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between: **(1) RAWLINSON & HUNTER TRUSTEES S.A.**

(in its capacity as the trustee of the Tchenguiz Discretionary Trust)

Applicant

-v-

(1) ITG LIMITED

(2) BAYEUX LIMITED

Respondents

Hearing dates: **4th and 5th October 2016**

Judgment handed down: **30th January 2017**

Before: **Richard James McMahon, Esq., Deputy Bailiff**

Counsel for the Plaintiffs: **Advocate P Richardson**

Counsel for the Defendants: **Advocate R G Shepherd**

Cases, legislation and materials referred to:

The Trusts (Guernsey) Law, 2007
The Royal Court Civil Rules, 2007
Rawlinson & Hunter Trustees SA v ITG Limited and Bayeux Limited (unreported, 11 November 2015, RCt; 4 October 2016, CA)
Johnson v Gore Wood & Co [2002] 2 AC 1
Stuart v Goldberg Linde [2008] 1 WLR 823
Arthur JS Hall and Co v Simons [2000] 3 WLR 543
Secretary of State for Trade and Industry v Bairstow [2004] Ch 1
Lewin on Trusts (19th ed.)
Ogier Trustee v CI Law Trustees [2006] JRC 158
In the matter of the Bird Charitable Trust and the Bird Purpose Trust 2012 (1) JLR 62
Schmidt v Rosewood [2003] 2 AC 709
Hartigan Nominees Pty Ltd v Rydge 29 NSWLR 405
The Judicial Committee (Appellate Jurisdiction) Rules 2009

Introduction

1. The Applicant, Rawlinson and Hunter Trustees SA, is the current trustee of the Tchenguiz Discretionary Trust ("the TDT"), which is a Jersey trust established by an instrument dated 26 March 2007. The Respondents, ITG Limited and Bayeux Limited, were the previous trustees of the TDT until their removal by the protector of the Trust, Robert Tchenguiz, under powers conferred upon him under the trust instrument by a Notice dated 1 July 2010. I will refer to the Respondents as "the former trustees". There has been a considerable amount of litigation before this Court (and elsewhere) involving these parties and the full background to many of the events that I will touch upon is contained in the various judgments that have been delivered in those proceedings. I intend to repeat only that which is pertinent to the present Application before me.

2. The Application before me is dated 8 January 2016. It is made pursuant to sections 68 and 69 of the Trusts (Guernsey) Law, 2008 (although that must have been meant to be a reference to the 2007 Law), rule 71 of the Royal Court Civil Rules, 2007 and/or the inherent jurisdiction of the Court. The orders sought are pleaded in the alternative:

> "*1. That the Respondents shall:*
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> *a. Forthwith provide to the Applicant, or alternatively permit the Applicant to inspect, all files and documents relating to, connected with or otherwise concerning the Tchenguiz Discretionary Trust ("**TDT**") that are within the Respondent's control (including but not limited to files and documents, whether or not owned by the Respondents or held as trustee, relating to the administration of the TDT and correspondence with third parties and file notes and internal memoranda relating to the TDT) ("**TDT Documents**");*
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> *2. Alternatively, that the Respondents shall:*
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> *a. Forthwith provide to the Applicant, or alternatively permit to inspect, all TDT Documents save for any TDT Documents that the Respondents claim a right or duty to retain ("**Retained Documents**"); and*
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> *b. Within 7 days file and serve a sworn affidavit containing:*
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> *i. a comprehensive list of the Retained Documents; and*
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> *ii. in respect of each Retained Document, the right or duty relied on and full particulars of the grounds on which that right or duty is claimed.*"

3. Advocate Paul Richardson appears on behalf of the Applicant and Advocate Shepherd on behalf of the Respondents. Advocate Richardson acknowledged that there was no basis for bringing the Application pursuant to rule 71 of the 2007 Rules and relied instead on the provisions of the 2007 Law or alternatively the general supervisory jurisdiction exercised by the Court over trusts.

4. The Application is supported by a number of Affidavits from lawyers working for Advocate Richardson. In response, Luis Gonzalez, a director of the First Respondent and a director of the two corporate directors of the Second Respondent, has filed a number of Affidavits. In

chronological order, the evidence begins with the First Affidavit of Ian Davis, which was sworn on 11 January 2016, with his Second Affidavit being sworn on 21 January 2016. Mr Gonzalez swore his First Affidavit on 4 February 2016 and his Second Affidavit on 19 February 2016. Mr Davis swore his Third Affidavit on 18 April 2016. Robert Breckon swore an Affidavit on 13 July 2016. (This Affidavit was really in support of an application dated the same day, by which the Applicant sought an urgent half day hearing in relation to one aspect of the Application, and which was dismissed by me on 18 July 2016.) Mr Gonzalez swore a Third Affidavit on 23 September 2016. Mr Davis swore a Fourth Affidavit on 3 October 2016, to which almost 400 pages of documents were exhibited. This was the day before the hearing commenced.

5. These late Affidavits are, I fear, symptomatic of the desire of these parties to air everything that has been addressed between their Advocates, and sometimes others, in correspondence. Most of the material exhibited had been generated since the close of the exchanges of material previously ordered, but some of it existed when the earlier Affidavits were prepared. If those documents were relevant to the Court's determination of the Application they really should have been thought about when the Application was made and material lodged in accordance with the Court's directions. I have considered all the material placed before me. However, I am not impressed with the way in which substantial amounts of material are introduced so late in the day as if each party had the right to do so without more ado. Given the background to the matters being raised by this Application, all of which should have been very familiar to the parties and their advisers, I simply wish to sound a word of warning that I may not be as amenable as I have been to material arriving so late in the day in future. To do so inevitably means that less consideration can be given to the late material prior to a hearing commencing.

6. There is a further general point I can make about the content of a number of the Affidavits filed in relation to this Application. Too often, what is set out is not evidence but argument. I find it unhelpful to receive a deponent's view of the merits of a case based on their understanding of the law. I much prefer legal argument to be confined to the summaries of principle that should be set out in Skeleton Arguments and then having the benefit of Counsel's oral submissions. There is a real risk that the material relating to an Application becomes unwieldy if I find that I have to consider argument that is interwoven with evidence. Factual witnesses should, in my view, confine themselves to placing before the Court material that they would be permitted to say and produce in evidence from the witness box. I understand the temptation of lawyers to want to articulate arguments that they feel should be deployed but the proper way to do that is to brief the Advocate who will be appearing in the case. In short, I find it far easier to understand a matter when I am able to get a clear picture of the facts from reading the Affidavits and I can then digest the legal submissions made by Advocates based on that material, developing, as necessary, any points made with appropriate brevity in Skeleton Arguments.

7. The parties' Skeleton Arguments started with the Applicant's commendably short summary of the principles it wished to advance dated 20 January 2016. The response on behalf of the former trustees is dated 19 February 2016 and the Applicant's reply dated 15 April 2016. Once again, the Advocates saw fit to engage in another round of Skeleton Arguments in the run-up to the hearing. Advocate Shepherd provided a Further Skeleton Argument dated 30 September 2016, resulting in Advocate Richardson responding with his own Further Skeleton Argument dated 3 October 2016. To the extent that these documents purported to narrow the issues between the parties, they are helpful but, as became apparent at the hearing, the opposition to the Application of the former trustees continued to be mounted on the bases previously articulated.

8. At the risk of over-simplifying matters, the Applicant asserts that it is a well-established principle that a new trustee is entitled to require a former trustee to deliver to the new trustee

all records, books and other papers belonging to the trust. Whilst acknowledging that this is a qualified, rather than an absolute, right, the Applicant contends that there is no reason to depart from this general principle in the present case. In response, the former trustees argue that the Application is an abuse of the process of the Court because there has been an earlier application for delivery up of documentation and it is inappropriate to vex the former trustees again with such a wide-ranging application and, in the alternative, the former trustees submit that the entirety of the dealings between the parties provides good reason for the Court to exercise its discretion not to grant the relief sought by the Application.

The facts

9. Shortly after the change of trustees of the TDT, on 20 August 2010 Macfarlanes LLP, acting on behalf of the former trustees, wrote to Herbert Smith LLP, acting for the Applicant, indicating that they would be in a position to provide a full list of files relating to the TDT structure, including personal working files, but subject to appropriate redactions to remove privileged material and the removal of personal items. This letter shows that the Applicant had already gained access to certain files, that photocopying was underway and that a review was being undertaken of the files in the possession of the former trustees, which was likely to be completed by the end of that month. This letter responded to a request for information made 10 days earlier.

10. Macfarlanes LLP wrote again to Herbert Smith LLP on 3 September 2010. This letter set out the various categories of documents that had been retained or removed from the files relating to the TDT structure. Some of the areas listed related to advice given to the First Respondent personally, for which it had paid from its own funds. The letter added "*In the event that any advice has been inadvertently paid for out of the Trust Fund, the relevant time costs will be identified and an account will be made to the Trust Fund in respect of them*" and "*In carrying out the file review, we have been required to balance our clients' rights to withhold privileged and personal documents against your client's desire to be given immediate access to these files, of which there are many hundreds.*"

11. Further correspondence passed from Macfarlanes LLP to Herbert Smith LLP in April and May 2011, from which it is apparent that access to certain files was being afforded to the Joint Liquidators of some companies within the TDT structure, as well as further access to the Applicant.

12. There was a previous application dated 8 August 2011 for the delivery up of certain documents relating to the TDT (Civil File No. 1627). Lieutenant-Bailiff Sir John Chadwick made an order on 10 October 2011 ("the Delivery-Up Order"). I will address this step in the chronology of events in more detail shortly. Mr Gonzalez states that, by the time this application was made, the Applicant had already been provided with access to approximately 1,300 hard copy files of trust documentation.

13. The Respondents complied with the Delivery-Up Order between December 2011 and January 2012. This resulted in some 400 lever arch files of documents and some 57,000 electronic documents being delivered up to the Applicant. Mr Gonzalez estimates that this exercise cost approximately £1 million.

14. Mr Gonzalez refers to a meeting on 16 February 2012 between representatives of the former trustees and Andrew McCallum of the Applicant to discuss TDT accounting information. Mr McCallum was provided with extensive financial information in relation to companies within the TDT structure.

15. Helen Green is one of the joint receivers appointed by Order of this Court dated 24 January 2014 (also made by Lieutenant-Bailiff Sir John Chadwick). The Schedule to the Order listed

30 companies in which the former trustees had shareholdings, principally as wholly-owned companies although, in a couple of instances, being below 100% of the issued shares, in respect of which the joint receivers were appointed. By a further Order dated 28 April 2015, Lieutenant-Bailiff Sir John Chadwick brought certain loan and debtor balances within the scope of the receivership. Para. 6 of the original Order provides:

> "*Upon written request from the Joint Receivers from time to time the Former Trustees and the Present Trustee shall provide to the Joint Receivers without delay such information and documents in relation to the Assets and the Companies as the Joint Receivers may reasonably require Provided always that:*
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> *(i) the Former Trustees and the Present Trustee shall not be required to disclose any document or information in their respective possession, custody or control in respect of which they are entitled to claim legal professional privilege (which, for the avoidance of doubt does not include documents or information in respect of which of a Company may be entitled to claim);*
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> *(ii) any document or information in their respective possession, custody or control may be provided by the Former Trustees or the Present Trustee on terms (to be stated at the time the document or information is provided) that it is privileged from disclosure to the BVI Companies or is otherwise subject to confidentiality inconsistent with such disclosure; and in any such case, the BVI Companies are to be notified of the fact that documents or information have been provided on those terms and the document or information is not to be provided on them without further order of the Court;*
>
> *(iii) subject to the foregoing, the Receivers may disclose any document or information to the BVI Companies for the purpose of seeking information or advice from the BVI Companies*".

Further, para. 13 of the Order provides that "*The Joint Receivers and the parties shall have liberty to apply to vary this Order or to seek the determination of the Court on any matter arising under it*".

16. Ms Green corresponded with the former trustees in June 2015 in respect of certain loans believed to exist and now be covered by the terms of the receivership. On her behalf, Advocate Clare Tee wrote to the Advocates acting at that time for the Applicant and the former trustees on 28 September 2015 requesting certain information that was being sought and indicating that there would otherwise be an application to the Court. The response from Mourant Ozannes on 5 October 2015 referred to the replies sent by Mr Gonzalez to Ms Green. Advocate Tee's reply on 6 October 2015 welcomed the information that the parties were arranging for the Applicant to have access to the TDT files in Guernsey. Mourant Ozannes reverted on 22 October 2015 providing further information. (The relevant documents were exhibited to the Third Affidavit of Mr Gonzalez.)

17. In the meantime, Mr McCallum made an enquiry on 31 August 2015 of Mr Gonzalez seeking access to documents including those relating to the TDT. The request was pursued by Thomas Neveu and access was requested on 28 September 2015. Two of their colleagues were allowed access to the TDT files at the offices of Mourant Ozannes on 29 September 2015, but were unable to take any copies. Mr Neveu was frustrated that the former trustees were being uncooperative. E-mail correspondence continued into October and November 2015, during which Mr McCallum criticised Mr Gonzalez for seeking to justify the former trustees' reluctance to permit access to the TDT documents variously by reference to the "*extensive Court-approved exercise*" previously undertaken, the purpose of the request being unclear and the lack of resources within the former trustees to enable access to be provided.

This culminated in a detailed response being provided on behalf of the former trustees by their Advocates, Mourant Ozannes, in a letter dated 25 November 2015 sent to Babbé, the firm then instructed by the Applicant. That letter stated: "*As has been made clear in the correspondence to date, our clients are prepared to permit your client access to the TDT documents in their possession, subject to your client providing at least one week's notice of its wish to review the documents, so that our clients can arrange for the documents to be returned from the archives and made available for review at suitable premises.*"

18. A request was sent by Helen Green to Robert Tchenguiz on 15 December 2015 enquiring about an apparent loan made to him from funds of the TDT, with a similar request being made to Mr McCallum the same day.

19. By a letter dated 17 December 2015, Mourant Ozannes informed Babbé that "*Our review of the TDT files is taking longer to complete than we anticipated and unfortunately it is unlikely to be completed before the Christmas vacation. However, we will contact you as soon as the files are available for inspection by your clients.*" In their letter dated 23 December 2015, Babbé expressed concern at the ongoing delay. Mourant Ozannes replied on 6 January 2016, reiterating that:

> "*It remains our clients' position that they are prepared to provide your client with access to the remaining TDT documents which our clients have in their possession.*
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> *However, upon undertaking a review of the TDT documents, it has come to our attention that it is necessary and appropriate to conduct a review of those documents to determine whether any claim for privilege should be made.*
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> *We are conscious that your client wishes to access the remaining TDT documents which are in our clients' possession. We are expediting our privilege review to ensure those documents are made available to your client at the earliest opportunity. We anticipate completing our review by no later than 29 January 2016, following which your client may have immediate access to the remaining TDT documents.*"

20. It was at this stage that the Application was made.

21. Mr McCallum's response to Ms Green on 13 January 2016 referred to his TDT files being incomplete and him needing to get access to all the relevant files, on both sides of the equation, to be able to answer Ms Green's questions. He also stated that he understood that Robert Tchenguiz had informed Ms Green about the efforts made, though to no avail, to obtain access to the TDT files and archives and the decision to file the Application. In his Second Affidavit, Mr Davis referred to this exchange of correspondence as showing that the failure of the former trustees to provide access to the TDT Documents is hindering the effective running of the TDT.

22. In the First Affidavit of Mr Gonzalez, he confirms that the former trustees have retained 14 boxes of trust documentation relating to the TDT and explains that this particular Affidavit intended to deal solely with the documents that had been removed from the TDT files by the former trustees on the grounds of privilege, rather than it being a substantive response. In doing so, he explained that when the former trustees complied with the Delivery-Up Order in respect of the electronic TDT documents, privileged documents were withheld as described in his Fifth Affidavit in that application, which had been sworn on 16 January 2012. He also referred to the disclosure that had been given in proceedings to which the label "Guernsey 1" has been applied (and which I adopt in respect of this Application), in which privilege was similarly claimed in respect of documents listed during that disclosure exercise. In his Third Affidavit, Mr Davis exhibited the disclosure lists provided by the former trustees in that

action, being dated 4 and 28 November 2011, 19 December 2011, 24 and 26 January 2012. Part of the review to which reference had been made in correspondence at the end of 2015 and early 2016 was to identify documents in respect of which privilege had already been claimed and to remove them from the TDT files still retained. The review also identified certain other documents that the former trustees claim to be covered by privilege. As a result, Mr Gonzalez indicated that there were 110 documents in respect of which a claim for privilege had been made when complying with the Delivery-Up Order, 112 documents arising from privilege in the Guernsey 1 action, some documents that had been created after the former trustees had been removed on 2 July 2010, which were not, therefore, TDT Documents and 29 documents that were regarded as personal to the former trustees, although these numbers include some duplicates. He exhibited a 19-page document listing what the former trustees said to be privileged documents. Forewarning of the content of this Affidavit had been given in a letter from Mourant Ozannes to AFR Advocates dated 29 January 2016.

23. Representatives of the Applicant attended at Mourant Ozannes on 1 February 2016, as set out in AFR's letter of 2 February 2016, referring to the primary purpose of the inspection being to verify the information requested by the joint receivers. Advocate Richardson drew attention to the fact that the majority of the files inspected, which were only a fraction of those in the 14 boxes retained, had been stamped "scanned" and enquired as to what this meant. The response from Mourant Ozannes dated 5 February 2016 explains that the documents were ingested into an electronic disclosure platform for litigation purposes. A further response dated 12 February 2016 sets out in detail some of the bases on which the former trustees considered that the Application was abusive. There were further exchanges between the parties' Advocates in February 2016, but those exchanges do not appear to add anything of substance. Mr Gonzalez also refers to his e-mail response to Mr Neveu on 6 April 2016 in which he provides further explanation about the scanning process that had been undertaken.

24. The Third Affidavit of Mr Gonzalez offers the reason why it was being filed as being "*that there appears to be confusion as to the subject matter of the Application and the nature of the relief sought*". (There had not been any confusion, though, of which I was aware, so any confusion can only have been in the mind of Mr Gonzalez or someone advising him.) He exhibits further correspondence between the Advocates. By a letter dated 19 July 2016, Mourant Ozannes referred to documents in respect of which privilege is claimed but also commented at the end that they would be writing further as a result of the hearing the previous day. (That was the hearing when I dismissed the application for an urgent half-day appointment.) They did so on 26 July 2016, in which they mentioned the confusion existing as to the scope of the Application. Mourant Ozannes clarified the categories of documents in addition to the formal TDT files comprising the 14 boxes of retained material that continued to be held by the former trustees. These comprise formal records of companies in the TDT structure, which were split into those companies that had gone into liquidation, and so fell under the control of the joint liquidators, but had never been requested by them, records of companies under the control of the joint receivers, but never requested by them, and companies that had held yachts, which had since sold to third parties, and which companies therefore had no functions as their assets had been sold. Mourant Ozannes indicated that the joint liquidators and/or the joint receivers may wish to be heard in respect of the Application. A chaser was sent by Mourant Ozannes on 31 August 2016. No reply had been received, so Mr Gonzalez took it upon himself to comment further.

25. Mr Gonzalez acknowledges "*that there have been a very small number of inconsistencies in the way in which privilege has been asserted over trust documentation*" (para. 23). He then explains how those inconsistencies have been resolved through correspondence. He repeats what had largely been explained by him previously concerning the underlying reasons behind the Application and refers to what had been said in judgments in Guernsey 1 as supporting his assertion that the Application is redundant and should be dismissed.

26. In his Fourth Affidavit, Mr Davis exhibits yet further correspondence, including a letter dated 30 September 2016 from Advocate Richardson in which the Applicant re-iterates its suggestion that an independent third party could review all the documents that relate to the TDT to which access to the Applicant is being denied with a view to determining which documents should continue to be withheld from inspection on the basis of alleged privilege. Mr Davis also exhibits witness statements of Richard Hillier and Nicole Martin dated 22 and 23 September 2016 respectively in respect of a claim before the court in England and Wales in which the Applicant is the second claimant (Claim No: CL-2015-000610). He also exhibits a witness statement of Raymond Emson dated 9 July 2014 and the claimant's Further Particulars of Fact in a different claim in England and Wales by *inter alia* the Applicant in its capacities as trustee of other trusts, ie, not the TDT, against the Director of the Serious Fraud Office (2013 Folio 1450 and 1451). These substantial documents were put into evidence in support of the assertion from Mr Davis that the Applicant believes that the documents it holds do not amount to a complete set of documents that ought to have been delivered up and/or disclosed in Guernsey 1 and, because leave to appeal has been given, the Applicant is hampered in relation to that appeal until it has a full set of documents.

Abuse of process

27. Although Advocate Shepherd did not pursue the former trustees' argument that the Application should be dismissed as an abuse of process strenuously, he also did not abandon it. Accordingly, because logically it is the first matter I should consider, on the basis that it affords the former trustees a full answer to the Application, I will address those arguments now. In doing so, it is necessary to provide a little more detail about the Delivery-Up Order itself.

28. The Delivery-Up Order fell into three parts. The first paragraph related to the former trustees carrying out a search of their entire database of trust documentation in accordance with a list of search terms in respect of listed personnel from 1 January 2007 to the date of the order. There were 17 people listed and they exactly matched those referred to in the application. (I note that the name of Mr Gonzalez appears, albeit with a slightly different spelling, but do not imagine that the incorrect spelling was then carried through into the searching process.) The key words listed ran to 162 entries and also matched the terms of the application (although a rogue comma appearing at the end of "Tchenguiz" was removed in the Appendix to the Order). The Order also required the former trustees to provide to the Applicant a database of all documentation produced by the search excluding documentation that is not trust documentation. The former trustees were ordered to give the Applicant a list of all documents that they removed from the database together with a sworn affidavit from a senior employee of the former trustees confirming that the documents removed do not comprise trust documentation and/or that privilege was being asserted and specifying the basis of that assertion. The second paragraph of the Order related to the files of Quinn Emanuel Urquhart & Sullivan LLP in respect of litigation involving the so-called Somerfield claims. The third paragraph related to the files of Ozannes (and by then Mourant Ozannes) relating to advice given to the former trustees as trustees of the TDT.

29. The evidence in support of that application was contained in two Affidavits of Rodney Hodges. As well as providing background information about the position of the Applicant and the former trustees, in his First Affidavit, which was sworn on 8 August 2011, Mr Hodges explained (at para. 21) that:

> "*... practical arrangements were made for R&H to access TDT's hardcopy documentation but subject to strict controls imposed by Investec. In particular, R&H staff and lawyers attended Investec's offices in Guernsey for a two-week period in August 2010 to gain an overview of TDT's hard copy documentation and search for*

documentation on specific issues. Although two weeks may sound like a long period of time, given the extent of TDT's hard-copy documentation (1300) files, R&H was only able to obtain an overview of the files during this period."

He added (at para. 35)

"*I should also point out that, even though the parameters for the search (as set out in the Appendix) are intended to be broad, to try to capture all of TDT's documents, electronic searches are blunt tools and it is inevitable that some of the trust's documentation will not be picked up in this search. Therefore, whilst requesting this search be carried out, on behalf of R&H I reserve the right to request that Investec carry out further electronic searches in the future should it become apparent that the initial search has not captured part of TDT's documentation.*"

30. The evidence on behalf of the former trustees was contained in an Affidavit of Mr Gonzalez sworn on 14 September 2011. He joined issue as to the extent of the relief being sought, the purpose underlying that application and the cost implications of having to comply with any such order. In passing he explained that the former trustees had been uploading documents to a document management system because of the way the dispute between the parties and the others involved in Guernsey 1 was developing. However, Mr Gonzalez explained that the process had not reached the stage at which it could be said there was an "entire electronic database" populated through this process. He also explained that the e-mails of a list of persons held in back-up tapes were in the process of being uploaded into that system. The list covers all but one of those who were then listed in the Delivery-Up Order. In respect of Robert Clifford, Mr Gonzalez stated that this was being done "*to a limited extent*". There were several employees of the former trustees referred to by Mr Gonzalez who were not specified in the Delivery-Up Order. In respect of the comment from Mr Hodges reserving the right to request further searches be carried out, Mr Gonzalez commented (at para. 50):

"*Conducting these future searches will require the search and review processes set out above to be repeated in their entirety increasing the already disproportionate costs associated with this request.*"

31. In the Second Affidavit of Mr Hodges, apparently sworn on the day of the hearing at which the Delivery-Up Order was made, being 10 October 2011, he sought to emphasise the need for the Applicant to have access to all the documentation because it is property of the TDT, and not of the former trustees, and it was part and parcel of enabling the Applicant to administer the TDT. He understood that the number of electronic documents potentially involved had been reduced from the estimate previously given by Mr Gonzalez, but that it was still a considerable exercise likely to cost a significant amount of money.

32. In the Skeleton Argument of the Applicant, its position was put as follows (para. 18):

"*The Order sought by R&H mentions key words that should be searched, but the order for delivery up of the trust documents is not intended to be limited to the documents produced from these searches. R&H does not know whether the key words are exhaustive. The Former Trustees have a duty in making <u>all</u> relevant documents available promptly (per <u>Ogier Trustees</u> above) and the Order sought is not intended to cut down the ambit of that duty.*"

33. I have referred to this evidence in order to put the terms of the Delivery-Up Order actually made into better context. The Order itself was quite specific as to the obligations of the former trustees. The possibility of there needing to be a further request for documents, potentially leading to a further application, was floated by Mr Hodges. The approach taken in

the Skeleton Argument of the Advocate then representing the Applicant was, in my view, untenable and so flawed. The application before the Court did not seek an order that the former trustees comply with the asserted duty in respect of all trust documentation. That is the form of the present Application and one of the issues I have to resolve on the former trustees' abuse of process argument is whether this amounts to vexing the former trustees twice in respect of the same matter.

34. Moreover, at para. 12 of his judgment leading to the Delivery-Up Order, the Lieutenant-Bailiff appears to have recognised that there might be a further application in relation to documents, at least in relation to claims of privilege:

> "*It is made clear, at this stage, the new trustee is not seeking delivery of any material which may be the subject of a proper claim to professional privilege or common interest privilege on the part of the former trustees. If there is such material it can be identified and withheld. It may form the subject matter of a future application at which the issues of claimed privilege can be resolved.*"

35. The Advocates agreed that the principles I set out in *Rawlinson & Hunter Trustees SA v ITG Limited and Bayeux Limited* (unreported, 11 November 2015), at para. 42, should be applied when considering whether there has been any abuse of process. Those principles were re-stated by the Court of Appeal at para. 10 of the judgment delivered by McNeill JA (unreported, 4 October 2016), with the principal English authority from which each derived added, and so it seems to me to be more appropriate to use that re-statement here rather than revert to my first instance decision. Those principles are:

> "*1. The burden of establishing that there is an abuse of process rests on the party alleging it: Johnson v Gore Wood & Co, page 31 (Lord Bingham of Cornhill), page 59 (Lord Millett).*
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> *2. The question in every case is whether, applying a broad, merits-based approach, the party's conduct in bringing the second action is in all the circumstances misusing or abusing the process of the court: Johnson v Gore Wood & Co, page 31 (Lord Bingham of Cornhill).*
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> *3. The merits involved are not the substantive merits or otherwise of the second claim, but those relevant to the question whether the party in question could and should have brought his claim as part of the earlier proceedings: Stuart v Goldberg Linde, at paragraph 57 (Lloyd LJ).*
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> *4. The question falls to be determined as at the time when the plaintiff brings the later proceedings and in the light of everything that has happened by then: Johnson v Gore Wood & Co, page 59 (Lord Millett).*
>
> *5. It would be wrong to hold, simply because a matter could have been raised in earlier proceedings, that it should have been, thus rendering the raising of it in later proceedings necessarily abusive: Johnson v Gore Wood & Co, page 31 (Lord Bingham of Cornhill).*
>
> *6. Repetition of text from the pleaded case in the earlier proceedings does not necessarily demonstrate that the claim in the second action should have been included in the earlier action, but any overlap between the two actions must be assessed by reference to the substance of the respective claims: Stuart v Goldberg Linde, paragraph 47 (Lloyd LJ).*

7. *Provided the second action is within time, delay is not in and of itself relevant to the question of abuse: Stuart v Goldberg Linde, paragraph 58 (Lloyd LJ).*

8. *Depending on the circumstances of the case, it may be relevant to consider whether, through the use of reasonable diligence, any facts which were not known at the time of the earlier proceedings could reasonably have been ascertained and deployed in that earlier action: Stuart v Goldberg Linde, paragraph 59 (Lloyd LJ).*

9. *A party should not keep additional claims secret merely because they might involve additional, possibly complex, issues, but should put its cards on the table so as to facilitate proper case management and so that no one is taken by surprise: Stuart v Goldberg Linde, paragraph 96 (Sir Anthony Clarke MR).*

10. *In reaching its decision, the court must take into account the public interest in finality in litigation and in preventing a party being vexed twice, as well as economy and efficiency in litigation. But there had to be some acceptance that a party should have a measure of freedom, especially in complex commercial matters, to choose who to sue in which action, in the knowledge that some matters would be controlled through appropriate case management: Aldi Stores Limited v WSP Group plc, paragraphs 24 and 25 (Thomas LJ), paragraph 39 (Longmore LJ), and paragraph 6 (quoting Clarke LJ in Dexter Limited v Vlieland-Boddy [2003] EWCA Civ 14 paragraph 49).*

11. *It is more likely that a second action against a party to the earlier case will be struck out than a later action against a different party, it being generally important that A should bring all of his claims against B in one action: Dexter v Vlieland-Boddy, paragraphs 49 and 50 (Clarke LJ).*

12. *The court will rarely find that the second action is an abuse of process unless it involves unjust harassment or oppression of the party alleging abuse: Dexter v Vlieland-Boddy, paragraph 49 (Clarke LJ).*

13. *The decision as to whether the proceedings constitute an abuse of process is not a discretionary one: either the second set of proceedings is an abuse of process or it is not (although even if found to be an abuse it may be possible, in an exceptional case, that a court might exercise its discretion not to strike it out): Stuart v Goldberg Linde, paragraph 24 (Lloyd LJ).*"

In these circumstances, there is no need for me to refer in any more detail to the cases mentioned in this passage, namely, *Johnson v Gore Wood & Co* [2002] 2 AC 1 and *Stuart v Goldberg Linde* [2008] 1 WLR 823, because these principles have clearly been adopted as forming part of Guernsey law. Similarly, I do not find it necessary to refer to the case of *Arthur JS Hall and Co v Simons* [2000] 3 WLR 543, to which Advocate Richardson drew my attention, because it adds nothing further to these principles.

36. Advocate Shepherd recognised that the former trustees had the burden of establishing that the Application was abusive, in the sense of being a misuse of the Court's processes. He placed particular weight on the eighth principle, arguing that the origins of the request by the Applicant for information arose in respect of Ms Green's enquiry about the alleged indebtedness of Robert Tchenguiz to the TDT. This was an issue that was known about or,

with reasonable diligence, could have been ascertained at the time the Applicant sought the Delivery-Up Order and so it should have been addressed within that earlier application. Given the extent of the material supplied when complying with the Delivery-Up Order, the former trustees were entitled to think that this type of issue was at an end. Moreover, the adverse comments of Lieutenant-Bailiff Sir John Chadwick, with which I had aligned myself in the decision from which these principles were taken, shows that the Applicant had failed to review properly, or adequately, the material supplied under the Delivery-Up Order in the period following when it was supplied. Accordingly, this Application should properly have been brought as seeking a variation to the Delivery-Up Order rather than starting again generally. This made it equivalent to a collateral attack on that previous decision, which had been recognised by me at para. 48 of that judgment as applicable in Guernsey, adopting the way it had been put by Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1.

37. Advocate Richardson refuted any suggestion that the Application should be dismissed as an abuse of process. In particular, there was no challenge mounted to the Delivery-Up Order. What was effectively being sought was the remainder of the material held by the former trustees relating to or connected with the TDT, to which the Applicant was entitled as the new trustee, unless there was some accepted justification for not granting an order relating to any item. The Application expressly excluded anything to which the former trustees were entitled to assert privilege. It was being made to fill in the gaps in what had already been provided, whether voluntarily or through the Delivery-Up Order. The Application should not be regarded as abusive solely on the basis of the time taken from compliance with the Delivery-Up Order to the making of this Application. In other words, the delay in this case was not a ground for dismissing the Application as being abusive.

38. I have considered all of the principles set out above as they apply in the present Application and concluded that the former trustees have failed to discharge the burden on them. Accordingly, I will not dismiss the Application on the basis of this type of alleged abuse of process. As I will explain in more detail shortly, the problem really arises from the deeply entrenched nature of these parties.

39. Had the application leading to the Delivery-Up Order been in the same all-encompassing terms as the present Application, the Applicant would either have obtained everything to which it claims to be entitled at that stage, or the Court would have reduced the ambit of what needed to be provided through its order and, if still aggrieved, the Applicant's principal remedy would have been to appeal. In such circumstances, I take the view that simply making the present Application some years later could well have been regarded as being an abuse of process. This is because it would appear to be vexing the former trustees twice on the same basis and so amount to unjust harassment or oppression. However, despite the lazy approach adopted in the Application of seeking many of the documents already provided, in reality the Application is, as I have indicated, only in respect of material not previously supplied. Accordingly, I consider that it is more appropriate to categorise it as an application supplementing the Delivery-Up Order rather than it being any form of collateral attack on that Order.

40. It is fair to say, though, that the all-encompassing application could have been made in 2011. However, it seems to me that the reason why it was approached in the targeted manner that it was arose from the Applicant being pragmatic. Mr Hodges gave forewarning that there might need to be a second phase of the process if it were discovered that not all the relevant documentation had been supplied. I suspect that no one imagined that it would take around four years for the Applicant to revert but, because delay in itself is not abusive, when this is placed into the overall context of the other proceedings in which these parties have been engaged, and because I have, in any event, chosen to treat the Application not as overlapping

with what has already been addressed in the Delivery-Up Order (thereby ignoring the all-encompassing wording actually used), this does not, in my view, make the Application an abuse of process.

41. I have, for these reasons, concluded that the Application should not be dismissed on this basis. In doing so, I have assumed that these principles can be applied to an Application made under the Trusts Law or in accordance with the supervisory jurisdiction of this Court in respect of trusts. However, I am not convinced that it is necessarily right to treat this Application as if it were "*litigation*" in the same way that hostile non-trusts litigation is covered by the principles to which I have referred. Advocate Shepherd acknowledged that he had not found any authority on which he could rely to say that this was the appropriate approach in an application relating to a trust. The terminology itself used in those principles does not readily fit with an application for directions in respect of a trust. Whilst I recognise that a party invoking this jurisdiction in respect of something that has effectively previously been adjudicated upon might face the response that the application should be rejected as an abuse of the court's process, the notion of keeping claims that could be made against the other party "*secret*", where they should properly have been brought in the earlier proceedings, is not easily applied in the context of a trustee seeking assistance from the Court in relation to the proper administration of a trust. For those reasons, although I have approached this element of the former trustees' opposition to the Application on the basis that these principles can be adopted, I expressly leave open the question of whether that is correct as a matter of law.

Convening other parties

42. Having decided that the Application falls to be determined on its merits, another issue I can deal with briefly is the submission made by Advocate Shepherd that consideration might need to be given to hearing from the joint liquidators appointed to some of the companies in the TDT structure (and who were parties in Guernsey 1) and/or from the joint receivers, ie, Ms Green and her colleague, appointed by this Court. In making that submission, Advocate Shepherd referred to *Volaw Trustee Limited v Chiddicks* [2015] JRC 196C (also referred to as *Representation of the ZII Trust*). The Royal Court of Jersey clarified that it used the label "*insolvent trust*" as convenient rather than an accurate description as a matter of law. That Court recognised that "*once there is an insolvency or probably insolvency of a trust, the trustee and all those holding fiduciary powers in relation to the trust can only exercise those powers in the interests of the creditors. The trustee or fiduciary of such a trust would be wise therefore to exercise their powers either with the consent of all of the creditors or under directions given by the Court*" (para. 32). Accordingly, that Court set aside the appointment of additional trustees on the basis that the power had not been exercised in the interests of the creditors of the trust. It followed, in Advocate Shepherd's submission, that the Applicant needed to have considered whether bringing the Application was in the interests of the creditors of the TDT because it was common ground that the current position is that the liabilities associated with the TDT exceed the assets. Moreover, the assets of the TDT are under the control of the persons appointed either as joint liquidators or as joint receivers and they had a legitimate interest in being heard on this question.

43. Advocate Richardson sought to distinguish the position in the *ZII Trust* case, where the power being exercised was a fiduciary one, and the position in which the Applicant finds itself, which is that it is having to apply to the Court to gain access to documents to which it is, in principle, entitled to be afforded access so that it gains a full picture of the TDT and can undertake its duty to ascertain whether everything has been carried out properly historically. He referred in particular to the indication given in the Third Affidavit of Mr Gonzalez that the joint liquidators had been informed by the former trustees about the Application and that no steps had been taken by them to seek to be heard. Although it is not clear whether the joint receivers are aware of the Application having been made, Ms Green was informed by Mr McCallum that the Applicant intended to make the Application. In those circumstances, I

consider it proper for me to conclude that both the joint liquidators and the joint receivers are aware of what is happening and have chosen not to seek to be joined to the Application.

44. I do not find it necessary to hear from either the joint liquidators or the joint receivers before determining this Application. Their interests, if any, in the documents are distinct from the interests of the former trustees and the Applicant as the incoming trustee (albeit that referring to it as the "*incoming trustee*" so many years after its appointment seems slightly odd). I regard the issues raised on the Application as being issues solely between the former trustees and the Applicant. The documentation to which the Application relates remains, at least as I understand it, under the control of the former trustees. Some of the documentation may have been supplied to the joint liquidators and/or the joint receivers but that step in itself does not mean that it is necessary to hear from any of them in relation to whether there are documents that the former trustees have not yet provided to the Applicant but which they should be ordered to provide. This is not an instance where any fiduciary power is being exercised where the interests of the creditors may need to be taken into account. Moreover, in relation to documents in which the former trustees claim any privilege, such an assertion would, I suspect, be of general application and so does not particularly engage the joint liquidators and joint receivers in any event.

Applicable legal principles

45. As Advocate Richardson points out, the jurisdiction under sections 68 and 69 of the 2007 Law is a wide one. Section 68 provides that:

> "*a trustee may apply to the Royal Court for directions as to how he should or might act in any of the affairs of the trust, and the court may make such order as it thinks fit.*"

Section 69 enables *inter alia* a trustee to invite the Court to make an order in respect of "*the execution, administration or enforcement of a trust*" (para. (a)(i)) and also "*any trust property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof*" (para. (a)(iv)). Being in Part IV of the Law, these provisions apply to a foreign trust, such as the TDT.

46. On behalf of the former trustees, Advocate Shepherd accepts the applicability of the statement in *Lewin on Trusts* (19th ed.), at para. 23-105:

> "*A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust.*"

This principle was accepted when the Delivery-Up Order was made by reference to the way in which it has been put in Jersey in *Ogier Trustee v CI Law Trustees* [2006] JRC 158 (para. 7):

> "*On the transfer of a trusteeship the outgoing trustee is under a duty to co-operate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee*."

47. In a subsequent case, *In the matter of the Bird Charitable Trust and the Bird Purpose Trust* 2012 (1) JLR 62, the Royal Court of Jersey endorsed its description of that duty and explained that the obligation necessarily has to involve some element of control as to the reasonableness of the incoming trustee's requests for information. Such an approach was consistent with how requests for information by beneficiaries were dealt with following *Schmidt v Rosewood* [2003] 2 AC 709, although, as Advocate Richardson pointed out, in *Hartigan Nominees Pty*

Ltd v Rydge 29 NSWLR 405, from which the Privy Council quoted at para. 52 of its Opinion, the situation of a trustee is a stronger position for affording access than that of a beneficiary. Questions of disclosure are "*best approached as an aspect of the court's inherent jurisdiction to supervise and, where appropriate, intervene in the administration of trusts*" (*Bird*, para. 25(iii)). The Royal Court of Jersey considered that the position is accurately stated in *Lewin*, and the paragraphs from the 18th edition quoted at para. 26 are now differently numbered in the latest edition, as follows:

> "***Transfer of trust papers on change of trusteeship***
>
> ***23-105*** *A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust. He is also entitled to inspect and copy other papers (not belonging to the trust) in the hands of the former trustee so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee, and correspondence files.*
>
> ***Judicial discretion***
>
> ***23-106*** *We consider that the court may, in exercise of the trust supervisory jurisdiction, qualify the above rights of new trustees to delivery up and disclosure in special circumstances. But we do not consider that the same restrictions apply as in the case of disclosure to and inspection by beneficiaries. A beneficiary, for example, is not normally entitled to a sight of documents concerning the trustees' exercise of discretions under discretionary trusts or fiduciary powers, but they contain precisely the kind of information which a new trustee may need to have from the former trustee to enable him to exercise the discretions in the light of what has been done before. The same applies to a settlor's letter of wishes.*"

48. Advocate Richardson further draws attention to the summary provided in the *Bird* case (at para. 29), which I consider also accurately reflects the state of law here in Guernsey:

> "*In summary, an outgoing trustee will normally be under a duty to hand over to an incoming trustee all documents and information which relate to the administration of the trust so as to enable the incoming trustee to fulfil his duties. However, the court has a discretion to direct that documents or information not be supplied where satisfied, in its supervisory role, that this is the appropriate course. The onus lies on the outgoing trustee to show why the normal rule should not be followed.*"

Albeit in the context of a decision on costs, in the *Ogier* case (*supra*, at para. 20), the court commented that "*It is very important to bring home to trustees their duty to comply fully when handing over a trusteeship.*"

49. One issue arising from the *Bird* case that may impact on the dispute between the parties is whether what is sought can properly be categorised as "*trust property*". In that case, the material in question was legal advice. The Royal Court of Jersey stated (at para. 21):

> "*In our judgment, the expression "trust property" refers to the assets in the trust which are being held for the benefit of the beneficiaries and may be paid or applied for their benefit. It is not possible to distribute legal advice; it is simply something which is obtained by a trustee in order to help him in connection with the administration of the trust. This is so even where the legal advice is paid for out of the trust property.*"

50. In section 80(1) of the 2007 Law, "*trust property*" is defined as "*property held on trust*". Section 1 of the Law provides:

> "*A trust exists if a person ("a "**trustee**") holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate –*
>
> *(a) for the benefit of another person (a "**beneficiary**"), whether or not yet ascertained or in existence, and / or*
>
> *(b) for any purpose, other than a purpose for the benefit only of the trustee.*"

51. It seems to me that these definitions potentially mean that "*trust property*" under the 2007 Law is a wider concept than it was found to be in Jersey. There is a distinction between something that forms part of a person's own estate (and which is not held on trust) and something which does not. This arguably extends to documents. If so, there is obviously a distinction between documents that have been obtained, even as trustee, solely for the benefit of a trustee. However, those documents may not be held "*for the benefit of another person*" and so not themselves form part of the trust property. However, I do not think that it matters much in the context of this Application whether the documents sought are trust property or not. The only difference would be that an order pursuant to section 69(1)(a)(iv) could not be made, but there are, in any event, other bases under which the Court could make the order sought by the Applicant. Because the relief sought remains available, I do not need to conclude whether any of the documents covered are trust property.

The former trustees' contentions

52. In the light of these principles, Advocate Richardson has been able to advance a simple case, arguing that there are acknowledged gaps in what has been provided by the former trustees to the Applicant and that the underlying purpose of this Application is to fill those gaps. It would, of course, have been better had the Application expressly set this out rather than being an all-encompassing application for provision or inspection of "*all files and documents relating to, connected with or otherwise concerning*" the TDT. Taken at face value, the Application would require provision, or inspection, of a whole raft of documents running to many thousands of items to which the Applicant already has access. It is perhaps self-evident that seeking the duplication of that amount of material is hardly a reasonable request.

53. Having advanced the simple case on the basis of following the normal rule, the onus shifts to the former trustees setting out why there are special circumstances in this case justifying the Court exercising its discretion against making the order sought. The primary contention made by Advocate Shepherd is to point out that the former trustees have already made available the vast amount of material that was provided first as part of an initial handover, then under the terms of the Delivery-Up Order and then under the disclosure obligations of the former trustees in the Guernsey 1 proceedings. All of this needs to be put into the context of the TDT being the subject of long-running litigation involving multiple parties. More particularly, the reasons advanced by the Applicant for making the Application have shifted over time and that in itself raises the spectre now of the Application being something that is designed to assist the Applicant in its appeal to the Privy Council in Guernsey 1. The proper forum, according to the former trustees, for such an application is within those proceedings, rather than by way of this standalone Application. Another issue raised by Advocate Shepherd relates to the timing of the Application and the delay in bringing it. This issue also impacts on whether the Applicant has established that there is something for it to do in relation to which the documents sought are relevant.

Discussion

54. I do not consider it necessary or helpful to trawl through the minutiae of the correspondence prior to the making of the Application and thereafter prior to the hearing. Instead, I consider that a broad overview is all that is required.

55. I have previously concurred in the view expressed by Lieutenant-Bailiff Sir John Chadwick that there seemed to have been little point in making the application that led to the Delivery-Up Order if the Applicant had not intended to make use of the documents provided quicker than it seemed it ultimately did. The Lieutenant-Bailiff had inferred that the documents delivered had not been read within about a year from receipt. In terms of the present Application, it may be no more than coincidence that the instruction of a different firm of Advocates by the Applicant has resulted in an Application being brought to fill the gaps. However, there is an implication from the chronology that no one within the Applicant's team was particularly troubled by the absence of any documents that had not already been provided in compliance with the Delivery-Up Order. However, some fresh eyes may well have noticed that the Delivery-Up Order had not been couched in all-encompassing terms and that the time had been reached where the gaps should be filled so that the Applicant can feel that it has as full a set of documents as are available.

56. It is perhaps also significant that the early correspondence shows that there had been an approach in respect of documents relating to other trusts relating to the wider Tchenguiz family, which appears to have been resolved without particular difficulties. The Applicant contrasts the approach taken by the former trustees in respect of those trusts with the active opposition raised in respect of this Application. The Applicant had expected the former trustees to have adopted a more neutral stance. Given the nature of the proceedings involving these parties as they have played out before Guernsey's courts in recent years, that expectation was, it seems, an unrealistic one to adopt. However, the comparison of the positions taken by the former trustees in broadly similar situations does mean that I have naturally given most anxious scrutiny to the reasons advanced on behalf of the former trustees as the justification for a departure from the normal rule of granting access to trust documents.

57. The delay before making this Application cuts both ways. As I have just indicated, it is possibly symptomatic of the way in which the Applicant did not immediately review the documentation provided to it under the Delivery-Up Order in order to ascertain whether there was something more that was identifiable as needed. By analogy with a civil action, there can be standard disclosure undertaken by reference to electronic searching with everyone realising that the first set of search terms may generate the need for there to be a second phase of searching where the new search terms have been formulated as a result of the review of the material originally supplied. Had that happened, I expect that the prospect of the former trustees being in a position to oppose what would probably have been a reasonable request would have been slim. But events did not unfold in that fashion. The Application has not been put in the targeted way that it might have been and, in any event, the second phase is not being sought shortly after the first phase. The delay, therefore, can be taken to point away from there being any need, as such, for the Applicant to have the additional material covered by the Application. As the former trustees argue, this Application is a form of diversionary tactic being deployed by the Applicant where there is no real purpose to the Application other than to deflect the attention of the former trustees from matters on which they might prefer to focus, such as the forthcoming appeal to the Privy Council. On the other hand, the delay might be nothing more sinister than the Applicant's new Advocates realising that there had been forewarning of a second phase in the evidence of Mr Hodges, but that step had not been undertaken.

58. Because of the relevance of the underlying purpose of the Application to resolving what weight, if any, to give to the delay in bringing the Application, I have been forced to look in more detail than I might have wished at the changing basis on which the Application has been advanced. Initially, it appears that it was being made so as to be able to answer the queries

raised by Ms Green towards the end of 2015. I am not persuaded that there is much substance in that assertion on behalf of the Applicant. Having regard to the terms of the Order under which Ms Green and her colleague were appointed as joint receivers of some of the assets of the TDT, if there were deficiencies in the assistance being given to the joint receivers, the remedy potentially lay in the hands of those joint receivers rather than it being something over which the Applicant (or the former trustees) might take the initiative. Even if the Applicant wished to act, para. 13 of that Order appears to me to provide a mechanism under which directions could have been obtained from the Court in relation to the enquiries about the alleged indebtedness of Robert Tchenguiz. When coupled with the all-encompassing terms of the Application, I am satisfied, on balance, that, in the minds of those directing the Applicant, the purpose of the Application at the very outset was not directed only towards answering the queries raised by Ms Green. Accordingly, I have concluded that those enquiries were not the principal reason for the making of the Application and that the Applicant had a wider intention. Had the purpose of the Application been dictated by the enquiries of Ms Green it should have been made in as specific a manner as possible and, because it was not, I regard that purpose as being camouflage for the wider purpose the Applicant obviously had in mind.

59. That purpose can, I think, be identified by reference to the concerns raised in the Third Affidavit of Mr Davis about the way in which privilege has been asserted by the former trustees incorrectly. As Advocate Richardson put this bluntly, the mistakes made, which have been conceded on behalf of the former trustees and supposedly rectified, leave the Applicant lacking confidence that the former trustees' reviews of the files they retain have been conducted adequately. The implication is that there could be more that should have been disclosed than there has been and that the former trustees should, therefore, perform the reviews again and explain in detail why it is that certain documents can still be retained rather than disclosed. This stance leads more towards the second paragraph of the Application being pursued than the all-encompassing first paragraph. But for the way that reference to Guernsey 1 later crept in, I would have been persuaded that this concern accurately reflected the stance of the Applicant. However, the reference in the Fourth Affidavit of Mr Davis to the suggestion that an independent person carry out the review in order to allay concerns held by the Applicant, all in the context of the Guernsey 1 situation, has left me to wonder whether, by the time of the hearing, the Applicant had started to concentrate more on what the position is in relation to Guernsey 1 rather than generally.

60. Advocate Shepherd referred to the decisions reached by the Court of Appeal when the Applicant tried, within the context of the appeal proceedings in respect of Guernsey 1, to obtain further orders for disclosure. When delivering the decision of the Court of Appeal on the costs orders to be made, including in respect of those interim applications (unreported, 19 April 2016), McNeill JA characterised them "*as a determined attempt to derail the appeal process*" (para. 143). In doing so, Advocate Shepherd has suggested that a similarly dim view can be taken of the Applicant's tactics in bringing this Application. If one steps back and considers whether this is really an attempt to obtain access to more material to assist the Applicant in its conduct of the Privy Council level of the Guernsey 1 proceedings, the first question is whether an application for disclosure could be made in those proceedings.

61. The Judicial Committee (Appellate Jurisdiction) Rules 2009, as amended, were cited by Advocate Shepherd as showing why, if the Applicant wanted specific material to assist it in those appeal proceedings, the application could be made to the Judicial Committee of the Privy Council. Rule 31 deals with incidental applications, which must be made in the appropriate form and must set out the reasons for making the application and, where necessary, be supported by written evidence. Although no further information was given as to the likelihood of such an application being available, in the absence of any guidance either way, I have proceeded on the basis that the Judicial Committee is unlikely to look favourably on such an application for the same reasons as those given by the Court of Appeal. The issues in the Guernsey 1 proceedings crystallised in this Court. The attempts of the Applicant to

seek further information and to rely on material generated in proceedings in England and Wales were rejected. I would be extremely surprised if the Judicial Committee was minded to permit any of the parties to the appeal proceedings with which it is now seized to develop fresh cases outside of the grounds that have already been presented. Quite how any such application for further disclosure could be framed was not canvassed and, in any event, Advocate Richardson refuted any suggestion that such an application was appropriate for the Applicant to make. From what I understand about the overall proceedings, I agree. Accordingly, although it may be technically available, I do not regard any application to the Judicial Committee as being the appropriate way for the Applicant to resolve the position in which it says it finds itself. In those circumstances, I treat the raising of the avenue of the appeal proceedings as something of a red herring. If there are documents to which the Applicant should be afforded access, then an application to this Court makes far more sense, making use of the general supervisory function of this Court in respect of the trust.

62. Having decided, though, that the Application should not be rejected because of the possibility of seeking disclosure within the appeal proceedings, I am still left with a residual concern that the real purpose of the Application has been acknowledged to be at least related to the Guernsey 1 appeals. However, I have concluded that this is a consequence of the passage of time rather than being determinative of whether this Court should exercise the discretion not to grant the relief sought. I do so because when the Application was first made the full extent of the appeal in Guernsey 1 had not been settled. This is because permission to appeal was only granted after the Application had been made. (I realise that the Court of Appeal had previously given permission to appeal on certain aspects of its decisions, but that a wider appeal process is now underway as a result of the decision of the Judicial Committee.) Moreover, had the hearing of this Application occurred in the summer of 2016, when it should have, this later evidence would not have fallen to have been taken into account and the position in respect of Guernsey 1 would not have been clarified in the way it now has. In my view, the shifting of the underlying purpose is a factor that I can properly take into account but the Applicant's changing position is not determinative of the issue because I am persuaded that this results as much as anything to how matters evolve with time. In short, although the changing purpose does not assist the Applicant, I do not consider that the former trustees have discharged the onus on them to demonstrate that this in itself is a ground for refusing the relief sought by the Application.

63. Reverting briefly to the question of delay, I find that there has been delay on the part of the Applicant. Had I been persuaded that the Application arose from Ms Green's queries, there would be no issue about delay. Similarly, had I been persuaded that the Application arose because of the state of affairs in the Guernsey 1 appeal proceedings, I would not have found that there was any delay affecting the approach to the Application because it was being made after the Court of Appeal stage. However, neither of these factors has a significant part to play as to the reason why the Application has been brought. Accordingly, the Application could and possibly should have been brought earlier than it has been and this is something I have to bear in mind. However, taken in isolation, I am not satisfied that the Application falls to be dismissed by reason of the delay involved in making it. It must be viewed within the context of all the proceedings in which the parties have been engaged; it has not come out of the blue.

64. In relation to the former trustees' contention that the Applicant has failed to explain satisfactorily how access to further documents will facilitate its administration of the TDT, I do have some concerns here. The former trustees have suggested that, because of the roles of the joint liquidators and the joint receivers, there is effectively nothing for the Applicant to do in respect of the assets of the TDT. Whilst it would have been helpful if the Applicant had set out more fully than it has seen fit to do why it is that it says that its administration is being hampered, with at least one concrete example, I am prepared to take a broad view and to conclude that the Applicant, as the incoming trustee, is entitled to be put in the same position

knowledge-wise as the outgoing trustees and, on the basis that it has been accepted that there have been documents that the Applicant has not yet seen, it follows that there is something that in principle is capable of being disclosed, even at this late stage, to the Applicant. Accordingly, I find that the former trustees have not discharged the onus on them in relation to this point.

65. Because the spotlight has been focused more on the way in which privilege has been asserted and then it has been acknowledged by Mr Gonzalez that mistakes have been made, I find that there is some residual concern that the reviews undertaken on behalf of the former trustees have not been explained as fully as they should have been. I share the suspicion that the Applicant has articulated that there might be documents that fall to be disclosed that have not been. As such, I consider that the lack of confidence in the former trustees is a reasonable position for the Applicant to take. I fear that the level of mistrust between the parties arises as much as anything out of the attritional nature of the litigation in which they have become embroiled. I doubt that either side is able to step back and seek to be as objective as they might have been some years ago. The impression I have formed is that the former trustees have almost started from the premise of trying to identify some reasons to oppose the Application rather than volunteering to accept any suggestion made on behalf of the Applicant, such as that of a third party privilege review of the materials in question. A similar comment can be made about the way in which the former trustees have suggested that the Application was unclear. It could have been drafted more precisely, but I can find no real support for the contention of the former trustees that they believed that the Application was targeted only at so-called trust-level documentation. I regard this as a further example of the way in which the former trustees have sought to complicate rather than simplify matters. As a result, I take the view that there remains a residual concern that the Applicant has not been given everything that it is in principle entitled to and that is a concern that has not been adequately addressed by the former trustees.

66. The consequence of all these factors is that I accept that the former trustees have raised factors that involve me considering whether or not they justify refusing the relief to which the Applicant claims to be entitled. This is clearly not a case where the former trustees have raised spurious matters just for the sake of it. For example, I have found that the Application could, and perhaps should, have been made sooner than it was. I am critical of the Applicant for the manner in which its position has changed since making the Application, but I am prepared to recognise that in part this is attributable to the time taken to hear the Application and the way matters have a habit of evolving between these parties over that time-frame. None of the factors I have mentioned is, on its own, sufficient to warrant dismissing the Application so the next question is whether, when taken together, they should lead to that outcome.

67. I have found the decision as to how to exercise the Court's discretion finely balanced. Ultimately, though, I am not satisfied that the former trustees have done enough to discharge the onus on them. I have been influenced by the importance attached to the duty of an outgoing trustee to co-operate fully and actively. To an extent, this is what the former trustees did during the handover phase. The Delivery-Up Order should have been understood by both sides to be a pragmatic way of obtaining the bulk of the relevant documents, but may not have been the final answer to that issue. Accordingly, there was always a real possibility of the Applicant having to ask for more. Such a request should have been made promptly and ideally in a targeted manner. The timing and breadth, at least on its face, of the Application are factors for which the Applicant must take its share of the fault. However, I do not consider what has happened to have displaced the normal rule that an outgoing trustee responds to reasonable requests for information. Clarity about exactly what was being sought should have been capable of being elicited without the need for this Application to be argued in the way it has been. By taking a step back and considering whether it is reasonable for the

Applicant to ask the former trustees for documents or a detailed explanation of why any particular documents cannot be disclosed, I am satisfied that these are reasonable and proportionate requests. For these reasons, I am not satisfied that the former trustees have put forward arguments, when taken as a whole and viewed broadly, that warrant refusing the Applicant relief.

Conclusion

68. Although Advocate Richardson submitted that it was a straightforward application based as it is on a normal rule to be applied by this Court that it will order disclosure from a former trustee to assist a new trustee to administer the trust, Advocate Shepherd has come close to persuading me that this is one of the special cases in which the Court should decline to make an order. On balance, though, I find that the Applicant's ability to rely on the supervisory jurisdiction of the Court has prevailed over the option available to me to exercise the Court's discretion against making any order. In reaching that conclusion, I consider that it is a just outcome to direct that the former trustees should fill the gaps that I have found exist in the documents already provided to the Applicant. As I have stated, I find that the way in which the questions relating to privilege have been addressed and the reviews carried out, even following the specific terms of the Delivery-Up Order, give rise to sufficient concern that there needs to be something more expansive provided to the Applicant. Having decided not to dismiss the Application, the precise form of the relief to be awarded is a matter on which I now invite further comments from the Advocates.

69. By way of assistance to them, my provisional view is that paragraph 1 of the Application cannot be granted; it is couched far too broadly for such an order to be made without further qualification. Accordingly, and particularly because of the way that the privilege question has influenced my decision, I am more inclined to make an order in terms drawn from paragraph 2. However, that paragraph is also couched in terms that refer to <u>all</u> the documents of the TDT. There is no reason to make such an order because compliance would involve duplicating effort and so involve disproportionate expense. The best that could be done is to order that any documents that have not been disclosed to date and which are no longer to be covered by an assertion of privilege be disclosed, or permission to inspect be given. Because of the ongoing relevance of claims to privilege, I take the view that a detailed affidavit setting out all the documents retained and the right or duty relied on to justify retention should be provided to the Applicant. However, it may be that the parties would prefer that a third party conduct this exercise and so I would be open to making such an order as effectively being alternative relief made pursuant to paragraph 3 of the Application.

70. The question of the costs order to make is something on which I also invite Counsel's comments.