



In re the Tchenguiz Discretionary Trust
Royal Court
29th June 2017

JUDGMENT
49/2017

Second Judgment on Costs

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Civil No. 1505/2010

IN RE THE TCHENGUIZ DISCRETIONARY TRUST (“the TDT”)

SECOND JUDGMENT ON COSTS

Before Patrick John Talbot, Esq., QC, Lieutenant Bailiff – sitting alone

Oral hearings 24-26 May 2016, 2 August 2016, 17-18 August 2016, 30 September 2016,
19 October 2016, 24 November 2016, 30 November-1 December 2016 and 12-13 December 2016

Judgment handed down *in private*: 29 June 2017

Advocate Jessica E Roland for the Former Trustees of the TDT

Advocate Nicholas J Robison for the Current Trustee of the TDT

Advocate Elaine R Gray for the Joint Liquidators of four BVI Companies, creditors of the Former Trustees of the TDT

Advocate Paul Richardson for the Protector, Robert Tchenguiz, who is also joined as a party as an adult member of the class of Beneficiaries under the TDT

(Advocate Christian Hay is the appointed representative of the minor, unascertained and unborn Beneficiaries under the TDT, including the two minor children of Robert Tchenguiz)

1. The background to this judgment is mostly to be found in the judgments of the Court of Appeal in the appeal in Guernsey 1 delivered on the 27 June and 29 October 2014 and 10 August 2015, and in my first judgment on costs in these proceedings (“Guernsey 2”), which I delivered on 27 November 2015 (“the first costs judgment”). In this judgment I shall use the same abbreviations as I used in the first costs judgment, except that I shall refer to Mr Robert Tchenguiz as “the Present Protector”.
2. In the first costs judgment I set out and applied the general principles of law applicable to cases where trustees and protectors claim reimbursement of their proper expenses, including costs of proceedings, and then applied those principles to the claims of the Former Trustees,

the Current Trustee and the Present Protector for reimbursement of their costs and expenses incurred in Guernsey 2. Except where I expressly cite from the authorities below, it is not, in my view, necessary for me to set out in this judgment in any depth the effect and scope of those principles.

3. This judgment relates to challenges raised by the Joint Liquidators, the Current Trustee and the Present Protector to the sums claimed as costs by the Former Trustees in Guernsey 2 and also to challenges made by the Joint Liquidators to the sums claimed as costs by each of the Current Trustee and the Present Protector in Guernsey 2. No challenges were raised by the Former Trustees to the sums claimed as costs by any other party.
4. In paragraph 36 of the first costs judgment, I made a proposal for the procedure to be adopted so that the challenges of the Joint Liquidators, the Current Trustee and the Present Protector could be determined. In the event, I took into account the guidance contained in the judgment of Vos J.A. in *Alhamrani v J. P. Morgan Trust Company (Jersey) Limited* [2007] JLR 527 at [54], [59] and [63] and decided that it would not have served any purpose for me to direct either pleadings or other statements of case in conducting what the learned Judge of Appeal at [66] described as a “*quantification of the trustee’s entitlement*”.
5. At the outset of this part of the costs hearings in about May 2016, the challenges which were then maintained were, mostly, considerably broader in scope and quantification than they had become by the December 2016 hearings. In my view, this was largely to be expected since it was only as a result of a considerable number of requests, primarily from the Joint Liquidators, that the challenged, claiming parties should produce further material, including invoices from their Guernsey Advocates and English lawyers, that the overall picture became clearer and consequently the challenges became more precisely directed. It is, of course, likely that on such challenges the bulk of any relevant documentary evidence will come from the files and records of the challenged parties and their lawyers, and this proved to be the case here. The Current Trustee’s challenges to the costs of the Former Trustees, which were supported, and indeed adopted, by the Present Protector, were, however, mostly crystallised in May 2016.
6. It took a long time for the Joint Liquidators to be in a position to identify and, where appropriate, to limit their challenges to the costs of the Former Trustees, the Current Trustee and the Present Protector. By the time of the last hearings early in December 2016, the Joint Liquidators were able to present their final arguments in support of their respective challenges to part of the costs claimed by the Former Trustees, the Current Trustee and the Present Protector, and the Current Trustee and the Present Protector were able to present their final

arguments in support of their respective challenges to part of the costs claimed by the Former Trustees. In saying this, I do not intend to criticise any of the parties. It is enough, I think, for me to say that, in my judgment, it was only during the last run of hearings that the true nature of all the challenges, which were by then still being pursued, especially so in the case of the Joint Liquidators' challenges, became finally fixed.

7. With the exception of an Order made by me on 26 May 2016 relating to lawyers' invoices, I had declined to direct evidence from the challenged parties, whilst encouraging them to put in such evidence as would, in their assessment, assist them on their claims for reimbursement and at the same time assist the challenging parties in deciding which parts of the claimed costs they might wish to challenge. I took that decision on the ground that under Guernsey's adversarial system it is, generally at least, up to a party to decide what evidence, if any, he wishes to adduce, and not for the Court to require him to adduce evidence of any particular character – see also the basis of procedure which I endorsed in paragraph 36 of the first costs judgment. In particular, the Court does not, in my view, have power in proceedings like this stage of Guernsey 2 to direct a party to adduce evidence from a specific witness; the parties are entitled to choose which witnesses' evidence, if any, they wish to adduce in support of their challenge or their opposition to a challenge.
8. The challenges were made on the basis of the skeleton arguments and other written submissions, including documents produced on 30 November and 1 December 2016 by Advocate Gray on behalf of the Joint Liquidators on their *modus operandi* in examining the claims for reimbursement of the Former Trustees, the Current Trustee and the Present Protector, and, to a more limited extent, on the basis of affidavit evidence. By way of summary, the challenges which were finally pursued by both the Joint Liquidators, the Current Trustee and the Present Protector amounted primarily to challenges to the amount of the costs claimed for reimbursement and less so to the nature of the work to which such costs related. In short, the Joint Liquidators, the Current Trustee and the Present Protector contended that, to the extent of the sums challenged, the amounts claimed for reimbursement were unreasonable and should therefore not be reimbursed to the Former Trustees, the Current Trustee and the Present Protector respectively.
9. The affidavit evidence sought to explain and amplify what appears from other documents prepared by their Advocates and in-house legal teams. The Former Trustees adduced an affidavit by Mr Brian Williams, a director of one of the Former Trustees and also a director of the corporate shareholders in the other, sworn on 4 April 2016, and two affidavits by Mrs Louise Ann Hargreaves of Mourant Ozannes sworn respectively on 16 August 2016 and 22

November 2016. This evidence included explanations of (i) the way in which invoices had been generated and information taken from them, and (ii) computer-generated fee systems which had been used to calculate the sums claimed by the Former Trustees as costs within Guernsey 2. In their letter to the Court dated 5 August 2016, Mourant Ozannes also explained the method which had been used by them to redact privileged parts of their invoices and the invoices of the Former Trustees' English lawyers.

10. In his 3rd affidavit sworn on 18 February 2016 Mr Andrew McCallum of the Current Trustee set out how it claimed to be entitled to be reimbursed on a month by month basis, and explained the legal representation of the Current Trustee over the course of Guernsey 2. In his 4th affidavit sworn on 8 April 2016, he set out more clearly his company's claim for reimbursement on an application by application basis. In his 1st and 2nd affidavits sworn on behalf of the Present Protector on 18 February 2016 and 8 April 2016, Mr Shane William Robert Wallace of R20 Limited took similar approaches to the Present Protector's claims for reimbursement of his costs as Mr McCallum had taken in respect of the Current Trustee; in paragraph 12 of his 1st affidavit Mr Wallace said that the Present Protector made no claim for reimbursement in respect of English lawyers, but Advocate Richardson told me that, in fact, the Present Protector had instructed English lawyers in, and with regard to, applications AP1 and AP2.
11. By their letter to the Advocates for the Joint Liquidators, the Current Trustee and the Present Protector dated 13 October 2016, Mourant Ozannes on behalf of the Former Trustees updated matters and explained the colour-coded documents which they had prepared, linking the challenges still then being maintained by the challenging parties to larger claims, *i.e.* claims of £100,000 or more relating to some of the applications within Guernsey 2, to Mourant Ozannes' own invoices; they also provided spreadsheets relating to those of their costs of less than £100,000 which were then still challenged and also relating to the costs incurred by the Former Trustees' English solicitors, Macfarlanes. On 9 December 2016, Mr Daniel Lavender, a litigation partner in Macfarlanes responsible for his firm's input into material lodged from time to time in Guernsey 2, swore an explanatory affidavit dealing, in particular, with points arising from the Joint Liquidators' *modus operandi* documents dated 30 November and 1 December 2016, and referring to what he described as the staffing arrangements used by his firm on Guernsey 2.
12. It is also necessary to mention that the Joint Liquidators have adopted what they claim to be a pragmatic approach to amounts of costs claimed of £5,000 or less of not challenging such costs, whilst still maintaining the position that, in principle, such costs were likely to be unreasonable and therefore irrecoverable. Many of these claims related to English lawyers

being instructed for what the Joint Liquidators have claimed were substantially Guernsey-related matters; accordingly, that approach was relevant to their challenges to the costs of the Former Trustees and of the Current Trustee until about April 2012, when it decided not to instruct its English lawyers any more on Guernsey 2 matters.

13. I am satisfied that it is possible for me to determine the challenges on the basis of the material presently before the court. In the long period between the first costs judgment and the early December 2016 hearings, a very large amount of material was provided by those parties who claim the reimbursement of their legal fees, including, in the case of the Former Trustees and the Current Trustee, to a large extent, fees incurred by them using English solicitors and, to a lesser extent, English counsel. During the oral hearings, a thorough examination of this material was conducted by counsel for the challenging parties, especially by Advocate Gray on behalf of the Joint Liquidators and Advocate Robison on behalf of the Current Trustee.
14. By way of general summary, as I decided in the first costs judgment in reliance upon the decisions of the Court of Appeal of Jersey in *Alhamrani* and *des Pallières v JP Morgan Chase & Co.* [2013] (2) JLR 239, claims for reimbursement of costs and other expenses will be met in full unless the court, under its supervisory jurisdiction over trusts, otherwise decides on any challenges raised to the amounts claimed.
15. On the challenges to the costs of the Former Trustees, the Current Trustee and the Present Protector respectively, the challenging parties had to establish, in order to succeed, that the challenged costs were either unreasonably incurred or had been incurred in an unreasonable manner. As Vos J.A. said in *Alhamrani*, at [57 – 62], this is a high hurdle. It is also important, in my view, to bear in mind that the challenged party, *i.e.* the Former Trustees and the Current Trustee and the Present Protector respectively, will be given the benefit of any doubt. The learned Judge of Appeal said at [62]:

“... once a challenge is made, costs and expenses will only be disallowed if they are shown clearly to have been unreasonably incurred – that is the high hurdle – and the trustee will have the benefit of any doubt on that issue.”
16. Accordingly, in this judgment I am concerned with the quantification of the sums to which the Former Trustees, the Current Trustee and the Present Protector respectively are entitled to have reimbursed to them for their costs and expenses of Guernsey 2 – see, again, [66] in *Alhamrani*. In doing so, scales of costs applicable on a normal taxation of costs in hostile litigation are, in my judgment, of no relevance - *Alhamrani* at [66(i)]. Further helpful guidance was given by Vos J.A. in [66/7]:

“[66] ...

- [ii] *A trustee’s duty embraces an obligation to consider whether a particular lawyer or firm of lawyers is appropriate to the problem upon which advice is sought and the scale of the trust assets. Some firms may be more expensive than others. A trustee should be alert to the necessity of employing advisers whose skills and charges bear a proper relationship both to the nature of the problem and to the size of the trust fund. Provided that the hourly rates charged are not out of line with those charged by other comparable firms of an appropriate standing for the job they are asked to undertake, the hourly rate allowed should be the standard rate of charge for the fee earner in question.*
- [iii] *The [court] is therefore likely to be concentrating on two aspects, namely, whether a particular matter is one upon which it was reasonable to spend time; and secondly, whether the degree of time spent on a particular matter was reasonable.*
- [iv] *The test is not whether the [court] thinks the fees were incurred at the right level; it is whether they were reasonably incurred. This may only be disallowed if they were unreasonably incurred. As has been said on many occasions, two people can come to two completely different decisions, both of which are reasonable. ... In most cases, it will not be possible to say that one is right and one is wrong; they are simply two different ways of achieving the same end and both are reasonable.... It is only if something falls outside the band of reasonable actions that it should be disallowed.*
- [v] *The [quantification] process should be exercised against the background of the general rule, viz. that a trustee acting reasonably is entitled to a full indemnity out of the trust fund. If costs or expenses are to be disallowed in relation to a specific item, it must be on the basis that the item was incurred unreasonably, and that is a high hurdle. The [court] should also resolve any doubts that [it] might have as to whether the costs were reasonably incurred or of a reasonable amount in favour of the trustee.*
- [67] *Finally, I would also expressly approve the Bailiff’s comments (2006 JLR 176, at para. 28) as to the engagement of overseas lawyers in complex trust litigation. For the reasons the Bailiff gave, it is desirable in appropriate cases for assistance to be obtained from English solicitors and English Chancery counsel and, where that is reasonably done, the trustee will recover his reasonable costs so incurred.”*

17. It is, therefore, these principles which I shall apply to the various challenges to be determined in this judgment.

18. It is necessary to record at the outset that it is for the challenging parties to establish each of their challenges: that is the purpose of this part of the costs hearings.

19. The role of the court is to determine the challenges, but not to conduct a 'normal' taxation of the challenged parties' costs.
20. I am satisfied that on the challenges now before the court the best way to have proceeded, and the best way for me now to determine the challenges, has been in a summary manner, without conducting a procedure equivalent to a taxation. Although at times during parts of the oral hearings it may not, I believe, have felt like a summary process either to the parties or to their Advocates, the use of skeleton arguments, other Advocate-work-products and in-house work-products and the swearing of affidavit evidence has, in the end, concentrated the arguments and has, in my judgment, proved sufficient to enable me to determine all the challenges which are still maintained by the challenging parties.
21. In my judgment, the challenging parties have now each had sufficient opportunity to examine the costs claimed by the challenged parties in order to take a reasonably-formed view of them, and, by the time the final, oral hearings took place on 12 and 13 December 2016, the Advocates for the challenging parties, with the possible exception of Advocate Gray, did not seem to me to be arguing otherwise to any great extent.
22. It is not contended by any of the challenging parties that any of the challenged parties had acted improperly in the sense of acting without due probity in instructing lawyers in Guernsey or England. Indeed, in the light of my findings in the first costs judgment, no such argument could, in my judgment, have been put. Nor is it suggested that any of the challenged parties had misconducted themselves in the way in which they had conducted any specific part of Guernsey 2 – see also my findings in the first judgment on costs at [30] to [31] and the passage from paragraph 27-113 of *Lewin on Trusts* (19th edition) there cited.
23. Nor was it submitted by any of the challenging parties that either the Guernsey Advocates or the English lawyers for the challenged parties had used excessive hourly charging rates.
24. The main thrust of the challenges was, however, (i) that the legal teams for the challenged parties had used too many lawyers for some of the tasks with which they were concerned, *i.e.* it is argued that the charges raised were unreasonably high because too many lawyers had been involved, not, I repeat, because the charging rates used by Guernsey and English lawyers were unreasonably high, and also (ii) that, on some occasions, it was unreasonable for English lawyers to have been instructed to the extent which the invoices from English lawyers have now established.

25. In her oral submissions on 30 November 2016, Advocate Gray for the Joint Liquidators described this approach as an evaluative one. She submitted that it was impossible for her to identify which individual lawyer's services had been unreasonably used by the challenged parties, but that it was plain that an unreasonable number of lawyers had been used from time to time. She explained that she had carried out an analysis of the number of lawyers used, the number of hours charged and the charging rates used so as to reach what she described as a '*not unreasonable*' figure and she submitted that anything beyond that figure amounted to what she called '*over-resourcing*' by the challenged parties. It was not the case, she continued, that she had drawn a sharp line in the sand. It appeared though, in my judgment, that the Joint Liquidators had decided what sums of costs on each AP application in issue were acceptable to them as reasonable costs of the challenged party on each such application and had then concluded that any sums over and above those accepted sums were unreasonable, and therefore not reimbursable. Nevertheless, Advocate Gray made it clear once again that the Joint Liquidators did not object to the charging rates used by the lawyers for the challenged parties.
26. On 30 November 2016, Advocate Robison for the Current Trustee, adding orally to his submissions made in writing and orally in May 2016 challenging parts of the Former Trustees' costs, said that the Current Trustee had compared its own fees and the Former Trustees' fees and applied what he called '*broad brush methodologies*'. In his reply submissions delivered orally on 12 December 2016, he stressed that most of his client's challenges were to the costs claimed by the Former Trustees for their English lawyers, especially in relation to applications AP26, AP28, AP30, AP31, AP33 and AP36, although he submitted that the challenges also related to what he called '*overuse of Guernsey lawyers*'. I considered this approach took Mr Robison as close as possible to an argument which might have been of assistance to him on a 'normal' taxation of costs in hostile litigation, but which could not avail him on this, second part of the Guernsey 2 costs hearings.
27. Advocate Gray accepted that there was no comparative evidence put before the Court on behalf of her clients either of her firm's or of her clients' English solicitors' and counsel's charged costs. For, although her firm's letter to other Counsel dated 25 May 2016 gave headline figures for the sums charged to the Joint Liquidators by her firm and English solicitors and counsel for Guernsey 2 and other Guernsey litigation to December 2014, it is not possible to see with any degree of certainty what had actually been charged either for Guernsey 2 itself or for the AP applications in respect of which the Joint Liquidators maintained challenges to parts of the Former Trustees' claimed costs. So it did not prove possible, as part of the summary process adopted, for me to compare like with like from, as it

were, the opposing sides to the argument, *i.e.* a comparison between the costs charged to the Joint Liquidators by their lawyers for those AP applications and the costs charged to each of the parties whose costs they were challenging for the same AP applications. In saying this, I do not intend in any sense to criticise the Joint Liquidators or their lawyers; for they were challenging the challenged parties' claims for reimbursement and, in such circumstances, it was not, in my judgment, necessary for them to put any such comparative figures before the Court.

28. Nevertheless, Advocate Gray contended in conclusion that her approach was an appropriate and proportionate way for me to determine each of her challenges above £5,000 on those AP applications which still remained in issue.
29. In the final version of the table produced by her in December 2016, the challenges then maintained by Ms Gray on behalf of the Joint Liquidators to the Former Trustees' claims for reimbursements had been calculated as follows: (i) approximately 14% of the Former Trustees' Advocates' fees, amounting to £121,484.36, and (ii) approximately 52% of their English lawyers' fees, amounting to £438,320.08. In the final version of the table produced for the court by her in December 2016 the challenges then maintained on behalf of the Joint Liquidators to the Current Trustee's claims had been calculated as follows: (i) approximately 12% of the Current Trustee's Advocates' fees, amounting to £139,116.85, and (ii) approximately 35% of their English lawyers' fees, amounting to £195,953.19.
30. On 30 November and 1 December 2016, Advocate Gray explained her *modus operandi* documents, which related primarily to applications AP1, AP2, AP25, and Advocates Robison and Richardson closed their arguments in support of their challenges to the costs claimed by the Former Trustees, only for them to be reopened, with my leave, on 12 and 13 December 2016. It seems clear that the approach taken by Advocate Gray was to identify what were described as not unreasonable sums and then to apply what was usually a relatively small percentage rounding to come to the finally propounded percentages of (i) the costs accepted by her clients and (ii) the costs still challenged by them respectively. On 9 December 2016, in her further written submissions Advocate Roland responded to the Joint Liquidators' *modus operandi* document relating to her clients' claims for reimbursement.
31. On 13 December 2016, Mr Robison produced coloured charts, prepared by R20 Limited and Ms Nicole Martin, who was then one of the Current Trustee's London legal team, analysing the costs on which his client was then still being challenged by the Joint Liquidators. I directed that it was not necessary for Ms Martin, who had already sworn an affidavit on 5 December 2016, to swear a further affidavit explaining and exhibiting the charts and that it

was sufficient for Mr Robison to make his submissions on the charts orally. In these submissions, which related to ten applications, *i.e.* AP1, AP2, AP3, AP6, AP8, AP10, AP16, AP36, AP38 and AP41, he sought to justify the sums claimed by the Current Trustee. I took these submissions into account as well as the detailed and comprehensive written table and analysis which formed the schedule to the Current Trustee's Reply submissions; in this schedule Advocate Robison answered in some depth each of the outstanding challenges to his client's claims for reimbursement of its costs, and highlighted the size and complexity of the TDT and the justification for the Current Trustee using English lawyers in the period up to about April 2012 on certain applications within Guernsey 2.

32. In his closing submissions on 13 December 2016, Advocate Richardson addressed Ms Gray's *modus operandi* document which related to the costs claimed for reimbursement by the Present Protector. He showed how the challenges made by the Joint Liquidators to such costs had been reduced from an extremely high level of challenge to a much lower level of challenge, but submitted that approximately 37% of such costs, amounting to £186,459.55, were still challenged by the Joint Liquidators, taking into account that they were by then only challenging approximately 9% of the fees claimed by the Present Protector on application AP1, to which the Joint Liquidators' *modus operandi* document solely related. It appears, however, from the coloured table produced by the Joint Liquidators on about 14 December 2016, *i.e.* after the last day of the oral hearings, that their challenges had been reduced to (i) approximately 25% of the Present Protector's Advocates' fees, amounting to £128,075.55, and (ii) approximately 43% of their English lawyers' fees, amounting to £6,000 claimed under AP2.
33. In written and oral submissions in the May 2016 hearings, Advocate Roland had presented her clients' arguments opposing the challenges made against them, and after those hearings, as I have mentioned above, a large amount of further material, including Guernsey and English lawyers' invoices and analyses of those invoices, had been produced by her and her firm. On 12 December 2016, Miss Roland summarised her argument. Reliance was placed on the written submissions made on behalf of her clients in May and August 2016, on the 2nd affidavit of Mrs Hargreaves sworn on 22 November 2016, and on her own written comments on Advocate Gray's *modus operandi* document relating to the Former Trustees. Advocate Roland described Guernsey 2 as one application with many sub-applications which had involved a huge amount of work both by her clients, and for them by their lawyers in England and Guernsey, mostly connected with important assets of the TDT and its family of companies. I accept this general summary. I also accept her description of Ms Gray's *modus*

operandi document as demonstrating a novel and unusual approach to establishing a challenge to costs of a trustee or other fiduciary.

34. In dealing with this part of the challenging parties' submissions, I refer to the express findings which I made in paragraphs 34 and 35 of the first costs judgment, which, in my judgment, now limit the extent of permissible challenges to the use of English lawyers to challenges that the sums charged by them were, in part at least, unreasonable sums.
35. In summary, the challenging parties submitted that a proportion of many of the costs raised by the challenged parties on a large number of the separate applications within Guernsey 2 had been unreasonably charged, thus making what on any view were very substantial claims for reimbursement of costs in part unreasonable claims, which should to that extent be refused – see, once again, paragraphs 6 to 14 of the first costs judgment, and the cases there cited by me, for the general principles relating to claims for reimbursement.
36. In support of their respective challenges, the Joint Liquidators, the Current Trustee and the Present Protector invited the Court to bear in mind some or all of the following factors, (which were described by Advocate Gray for the Joint Liquidators as “*key factors*”), when determining the costs claims: (i) that the probable insolvency of the TDT was known from the outset of Guernsey 2, which should have limited the amount of legal fees, (ii) that there were multiple parties to Guernsey 2, *i.e.* the Former Trustees, who were seeking to enforce a lien over the TDT assets, the Current Trustee, the Present Protector, whose role was described as a limited role, and that it was unnecessary that each of those parties were separately represented, (iii) that the claims set out in the costs summaries were so vague and unparticularised as to be unreasonably claimed, including, especially, substantial sums claimed for attending meetings and other attendances and a lack of ‘*work-type*’ allocation in the invoices of Macfarlanes, the English solicitors for the Former Trustees, and (iv) in the case of the Former Trustees, in particular, that they had failed to meet the requirements imposed on them as fiduciaries holding the TDT assets by acting either solely or mostly in their own interests so as to protect their claim to a lien over the TDT assets rather than in the interests of the beneficiaries and the class of probable creditors of the TDT, who included the Joint Liquidators themselves.
37. The Current Trustee's detailed submissions in support of its challenges to the sums claimed for reimbursement of costs made by the Former Trustees were primarily contained in the written submissions of Advocate Robison prepared for the first full, oral hearing, which commenced on 24 May 2106. Indeed, throughout the later hearings the Current Trustee

maintained these submissions, and relied upon them as its substantive case. In relation to application AP1, the Current Trustee argued that the Former Trustees had been the trustees of the TDT for a considerable period before the issue of Guernsey 2, *i.e.* from about mid-2008, and that they had built up over the years of their trusteeship a large degree of knowledge which should have had the effect of limiting the amount of work which their lawyers, especially their English lawyers, would have had to perform to prepare for, institute and present Guernsey 2, and especially what might be called the ‘founding application’ within Guernsey 2, *i.e.* AP1.

38. As at 30 September 2016, the specific challenges to the sums claimed by the Former Trustees, the Current Trustee and the Present Protector were addressed by Advocate Gray in her written submissions of the same date. With regard to many of the AP applications, Ms Gray made separate submissions, explaining her clients’ challenges. It seemed to me that the approach then taken by her was one of (a) calculating with regard to each application a sum which was regarded by her clients as either reasonably charged or not unreasonably charged, and then, after applying what was usually a relatively small percentage rounding, (b) coming to the finally propounded percentages of (i) costs accepted by her clients and (ii) costs which were still challenged by them.

39. As I have already mentioned, the challenging party has to establish clearly that the sums claimed for reimbursement which are challenged by them were unreasonable in amount or nature. As Vos J.A. said in *Alhamrani* at [66]:

“As has been said on many occasions, two people can come to two completely different decisions, both of which are reasonable. ... In most cases, it will not be possible to say that one is right and one is wrong; they are simply two different ways of achieving the same end and both are reasonable. ... It is only if something falls outside the band of reasonable actions that it should be disallowed.”

40. I have concluded that, with a relatively few exceptions to which I shall refer later in this judgment, none of the challenges made to the Former Trustees’, the Current Trustee’s and the Present Protector’s claims for reimbursement of costs have been clearly established by the respective challenging parties. By way of a general summary, I have concluded that the high hurdle which each of the challenging parties had to surmount on each such challenge was too high for them to overcome. Following the guidance of the Court of Appeal in *Alhamrani*, the approaches taken by each of the challenging parties to the great majority of the costs claimed by the challenged parties to be reimbursable did not, in my judgment, show, or even approach showing, clearly that those challenged costs had been unreasonably incurred.

41. In my judgment, most of the challenges made were, in essence, arbitrary in nature rather than analytical and probative, and, in the case of some of the challenges made, *e.g.* in the oral submissions made by Advocate Gray in support of her *modus operandi* document relating to the Former Trustees' costs, there was also, in my view, a degree of inconsistency in the approach taken. In particular, the use by the challenging parties of percentage allowances or percentage reductions did not, in my judgment, establish clearly that the sums which remained challenged by them had been unreasonably incurred, leaving me with the clear impression that the challenging parties were, in reality, seeking to persuade me to conduct a 'normal' taxation of the challenged parties' costs rather than decide whether their challenges had been proved to the required standard as explained by Vos J.A. in the passages in *Alhamrani* cited by me in paragraphs 14 to 16 above.
42. Before turning in the next paragraph to the key factors relied upon by the challenging parties, (or on some occasions those relied upon by the Joint Liquidators alone), it would, in my judgment, be wrong in principle for me to approach any of the sums claimed for reimbursement by any of the challenged parties sceptically, as Advocate Gray submitted I should do. In my judgment, there is no justification for me taking such an approach to the challenges made by her clients; indeed, I consider that it would be wrong in principle for me to do so. There is also no evidence upon which the Joint Liquidators can, in my view, rely for such a contention. I therefore reject it.
43. I return to the matters summarised in paragraphs 36 and 37 above. It is clear to me that the probable insolvency of the TDT formed part of the central background to the applications considered and decided in Guernsey 2; furthermore, the parties all seemed to me to understand that this was so throughout most of the course of Guernsey 2. Secondly, the probable insolvency of the TDT formed part of the circumstances taken into account by the parties (i) in August 2010, when agreeing the Protocol Order, and (ii) in July 2011, when agreeing the terms of the undertakings given in Guernsey 1. I would also mention that I have borne in mind throughout the hearings in Guernsey 2, (as I have occasionally mentioned during the oral hearings,) that part of the role of the Court, in dealing with the various applications brought for directions by either the Former Trustees or the Current Trustee, was to ensure that the net assets of the TDT were maintained in value for the benefit of the beneficiaries and for the creditors of the TDT. In these circumstances, I have taken, I think, a similar approach to that taken by Commissioner Clyde-Smith and the Jurats in the Royal Court of Jersey in *In re the Z II Trust* [2015] JRC 196C at [5], [29] to [33] and [42], to the so-called insolvent trusts dealt with in that case.

44. I have come to the conclusion that the fact that the parties knew, or perhaps understood, that the TDT was an insolvent trust at the time Guernsey 2 was commenced, or at least pretty soon thereafter, did not require any of the challenged parties either to reduce the degree of attention which they could properly give to the various applications within Guernsey 2 or to reduce the number of lawyers used by them on each such application from the number which either their Guernsey Advocates or their English lawyers independently considered appropriate. I considered it both important and beneficial for each of the challenged parties to be represented and that it was helpful that they each had the opportunity to present evidence and argument, the preparation of which had, in part at least, involved their English lawyers. Not only were the arguments and affidavit evidence on several applications within Guernsey 2 sometimes complex, they also often related to English-based assets, *e.g.* on many occasions the RCO and the Farnborough Companies, and the UK tax liabilities of the Farnborough Companies, and, in my judgment, it was understandable and reasonable that the challenged parties had consulted their English lawyers as well as their Guernsey Advocates to the extent which they did. In reaching my conclusion on this part of the argument, I also took into account the submissions on this topic in paragraph 9 of the Reply submissions of Advocate Robison for the Current Trustee dated 10 May 2016. In so far as the challenges of the Joint Liquidators to the claims for reimbursement made by the Former Trustees, the Current Trustee and the Present Protector, depended on an argument that the Former Trustees and, where appropriate, the Current Trustee or the Present Protector, bearing in mind the probable insolvency of the TDT, had used their English lawyers and their Guernsey Advocates to an unreasonable extent, including from time to time using too many lawyers on several of the applications, these challenges were not, in my judgment, clearly established, and I therefore reject this ground of challenge.

45. Secondly, although on quite a large number of occasions the Current Trustee and the Present Protector took the same, or very similar, positions on the matters then before the Court on applications for directions, I consider that both the intricate nature of many of the applications and the necessary joinder of each of them as parties in Guernsey 2 required them to be separately, rather than jointly, represented before the Court so that all the necessary parties had the opportunity to address me in their different capacities on matters which clearly affected the administration of the TDT. It is not unusual, in my experience at least, for trustees, protectors and beneficiaries to hold the same, or very similar, positions on applications brought by trustees for directions concerning the administration of the relevant trust. In such events, it is customary for the court concerned to allow counsel for all the parties to address it, even if it is only to express their agreement with the trustee's or another party's arguments, and for the court to allow such parties to claim their costs out of the trust

fund on an indemnity basis. Accordingly, whilst I have taken into account the approach taken by Mr Justice Morgan, on the facts of that case, in the English High Court case of *Ong v Ping* [2015] 6 Costs LR 997, I rule that the challenges made on this basis, which it seemed to me were not pressed as much as other challenges, have not been clearly established.

46. In my judgment, the costs summaries relied upon by (i) the Former Trustees and (ii) the Current Trustee, with the Present Protector's support, to explain and particularise their arguments on the challenged AP applications within Guernsey 2 cannot be fairly described as either vague or unparticularised. In my view, the costs summaries were adequate to explain the work done on each such application and the invoices and other explanatory documents produced by the challenged parties also adequately explained that work. In particular, I do not consider that it was necessary for the challenged parties to produce more details of the time spent by their lawyers in meetings with, or attendances on, their clients, to justify their claims for the costs of such matters, despite the fact that very considerable sums had been claimed for them. Whilst the position might well have been different on a 'normal' taxation in hostile proceedings when it is usually the case that the recipient party will produce a detailed bill of costs, I consider that the amount of material produced by the challenged parties, to which I have referred above, was sufficient to enable me to understand what work had been done and, mostly, when it had been done. This ground of challenge to the costs of the challenged parties has not, in my judgment, been clearly established, and I therefore reject it.

47. Nor was I persuaded that either the Former Trustees or the Current Trustee or the Present Protector had acted unreasonably in their use of either their Guernsey Advocates or, especially, their English lawyers at any stage of Guernsey 2. During the whole relevant period between 2010 and, at least, the appointment of the Joint Receivers in December 2013, the parties in possession of the TDT assets were the Former Trustees, who were asserting their lien, and their primary duty, in particular in the light of the claim of the Joint Liquidators that the assets needed to be protected for the benefit of the creditors of the TDT, was to ensure that the assets were preserved so far as was possible and to ensure that (i) from August 2010 to about July 2011, the terms of the Protocol Order in Guernsey 2 and (ii) from July 2011 onwards, the terms of the undertakings in Guernsey 1, were complied with to the full. This led to several of the AP applications being brought before the court in Guernsey 2. Indeed, it could be said, in my view, that one of the primary purposes of Guernsey 2 was to ensure that the assets of the TDT were kept available for the creditors of the TDT and it was not surprising, in my view, that the Former Trustees and the Current Trustee respectively had considered it necessary to apply to the Court for directions in Guernsey 2 on so many

occasions. True it is that the Former Trustees were at the same time maintaining their claim to a lien, but (i) up to about July 2011 they were also complying with the Protocol Order in Guernsey 2 and (ii) thereafter up to about December 2013 they were complying with the undertakings given to this court in Guernsey 1 in July 2011. I therefore reject this basis of the challenges to the Former Trustees' claims for reimbursement of their costs and expenses.

48. In summary, with the exceptions to which I shall refer below, I was not persuaded by the arguments in support of each of the challenges made, all of which had been capably presented by Advocate Gray on behalf of the Joint Liquidators, Advocate Robison on behalf of the Current Trustee and Advocate Paul Richardson on behalf of the Present Protector.
49. In reaching this conclusion on each such challenge, I have not found it necessary, with the exception of the costs of the Former Trustees on application AP1, to give any of the challenged parties, *i.e.* the Former Trustees, the Current Trustee and the Present Protector, the benefit of any doubt.
50. I would add that, in my judgment, the principle expressed by Vos J.A. that the benefit of any such doubt should be allowed to '*the trustee*' is as equally applicable in Guernsey 2 to the claims for reimbursement made by both the Former Trustees and the Present Protector as it is to the claims for reimbursement made by the Current Trustee. In the circumstances of this case, I can see no justifiable reason for taking a different approach in the case of the challenges made to the costs of the Former Trustees or of the Present Protector from the established position applicable to the Current Trustee in its capacity as trustee of the TDT.
51. As mentioned, I have allowed the benefit of the doubt to the Former Trustees on their claims to be reimbursed for their English and Guernsey lawyers' costs of preparing for the first, founding application in Guernsey 2, (AP1). Accordingly, I have concluded that the challenges made to the extent of those costs have not been clearly established. In my judgment, the Former Trustees were, in particular, entitled to claim reimbursement on the basis of a full indemnity of such of those costs as had been reasonably incurred before the application was lodged with the Court, and I find that the Joint Liquidators, and the Current Trustee and the Present Protector have not clearly established that any part or parts of such a claim was unreasonable in either nature or amount.
52. It is self-evident from application AP1, and the affidavit evidence filed in support of it, - and it is, in my judgment, unsurprising - that a very considerable amount of time and attention had been given to preparing the founding application in Guernsey 2 before it was lodged in the

Royal Court. But the sums claimed for that work looked to me, at least on first inspection, to be unexpectedly high. Nevertheless, I have decided that it is right to give the Former Trustees the benefit of any doubt relating to the extent and cost of the work done by them and on their behalf since I do not consider that any of the challenging parties has shown clearly which part or parts of such costs, in particular which part or parts of their English lawyers' fees, was or were unreasonable.

53. In giving the Former Trustees the benefit of the doubt, I have taken into account, and accept as being of general assistance, the judgment of Lieutenant Bailiff Day C.B.E. in *Brown v Orion Trust Limited* (2004), 10 May 2004, relating to the taxation of full indemnity costs. The main issue in that case was whether certain, considerable costs incurred two or so years before proceedings were instituted, and incurred not by the defendant trustee but by a third party, should be met out of the trust fund – [1] of the judgment. At [15] the learned Lieutenant Bailiff gave the following guidance, which I consider to be of general application in Guernsey to *Beddoe's* applications or applications by trustees for other directions relating to the administration of Guernsey trusts or trusts, like the TDT, where the Royal Court has jurisdiction under section 4 of The Trusts (Guernsey) Law, 2007:

“.. Beddoe's applications ... cannot be made in a vacuum, but will always be based on prior work, research, inquiries, etc. to a greater or lesser degree depending on the circumstances of the case, in order that any appropriate application can be properly formulated. ...”.

54. In Mr Williams' 1st affidavit sworn on behalf of the Former Trustees, he put forward a claim that they were entitled to be reimbursed a total of over £170,000 for what were termed 'Non-Application Specific Costs', namely, costs which had been charged to the Former Trustees by their lawyers as having been incurred in connection with Guernsey 2, but which it had not been possible to allocate specifically to specific applications within Guernsey 2. On 24 May 2016, Advocate Roland for the Former Trustees handed in during oral argument a written breakdown of these costs; the breakdown analysed how the sum then claimed under this head was said to amount to £170,109.52, at least £152,390 of which seems to have been charged for unallocated matters which were not charged either as billed drafting or as disbursements.

55. Both the Joint Liquidators and Current Trustee challenged, in part, this aspect of the Former Trustees' claim for reimbursement. Whilst the Current Trustee accepted that £85,054.76 could be reimbursed, and Advocate Gray accepted that a proportion could be reimbursed, each of them maintained their clients' challenges to the remainder of the Former Trustees' claim for Non-Application Specific Costs. Advocate Robison submitted that it was obviously impossible for the Former Trustees to maintain this claim and that the claim was insufficiently expressed or explained so to be accepted as a reasonable claim. I would not go

so far as Mr Robison, but I have concluded that the challenge to this part of the Former Trustees' claim has been clearly established. In my judgment, since the challenged parts of the large sum claimed under this head cannot be attributed by either the Former Trustees or their Advocates to any specific application within, or to any specific part of, Guernsey 2, it is unreasonable for the Former Trustees to be reimbursed for the costs of this nature which are still challenged. In reaching this conclusion, I have taken into account the persuasive submissions on this issue contained within the Joint Liquidators' written submissions prepared for the first full oral hearing of the issues to which this judgment relates, which hearing commenced on 24 May 2016. No other party than the Former Trustees can, in my view, fairly have been expected to be able to allocate such costs to any particular application within Guernsey 2 and the Former Trustees have been unable to show how or why the challenged parts were charged to them by their lawyers. In those circumstances, I conclude that the challenges of both the Joint Liquidators and the Current Trustee to the challenged proportions of Non-Application Specific Costs of the Former Trustees have been clearly established. I, therefore, find that to that extent the Former Trustees are not entitled to be reimbursed out of the TDT trust fund.

56. In paragraphs 12 to 14 of Mr Andrew McCallum's 4th affidavit sworn on behalf of the Current Trustee, he put forward a claim that it was entitled to a sum between about £35,000 and £65,000 for its Non-Application Specific Costs; these costs were said by Mr McCallum to be identifiable as costs relating to Guernsey 2, but were not directly referable to specific applications within Guernsey 2. Using the same reasoning, *mutatis mutandis*, to that in the previous paragraph, I conclude under this head that the challenge of the Joint Liquidators to the challenged proportion of the Current Trustee's Non-Application Specific Costs has been clearly established. I, therefore, find that to that extent the Current Trustee is not entitled to be reimbursed out of the TDT trust fund.

57. In paragraphs 10 and 11 of his 2nd affidavit sworn on behalf of the Present Protector on 8 April 2016, Mr Wallace said that he had been informed by the Present Protector that he intended to make a claim for Non-Application Specific Costs and that he, (Mr Wallace), expected such a claim to be for a sum between £15,000 and £20,000. But I believe that no such claim was, in the end, put forward on behalf of the Present Protector. For the sake of completeness, I therefore find that any such claim, if still maintained by the Present Protector, was unreasonably made and I, therefore, find that to that extent the Present Protector is not entitled to be reimbursed out of the TDT trust fund.

58. Lastly, I turn to a matter which may, at least in the context of Guernsey 2, be of relatively little financial value. The Current Trustee objected to the Former Trustees being able to

recover from the TDT the costs of their applications to the Court seeking permission to extend the number of employees of their professional indemnity insurers who could be brought within the scope of the privacy umbrella in Guernsey 2; I believe that these applications related to the provision of information by the Former Trustees to their insurers so as to ensure that their insurance cover was maintained. In paragraph 3.2 of her written submissions dated 22 November 2016, Advocate Roland made it clear that the Former Trustees accepted that the costs of such applications should not be reimbursed out of the TDT and I, therefore, find that this objection on the part of the Current Trustee has been clearly established and that to that extent the Former Trustees are not entitled to be reimbursed out of the TDT trust fund.

59. Finally, strictly speaking, no point arises about the reasonableness of the costs of Mr Richard Hillier incurred within the early parts of Guernsey 2 when he was joined as a party in his capacity as Protector of the TDT before being replaced by the Present Protector on about 28 June 2010. Since no argument has been separately put forward on behalf of Mr Hillier, it seems to me that the safe course is for me merely to record that fact and for me not to make any finding with regard to him one way or the other, leaving him to make a claim for reimbursement, if so advised, within a reasonable period, which I consider to be 42 days from the handing down of this judgment. If it be the case that any of the costs claimed on behalf of the Present Protector are costs incurred when Mr Hillier was a party to Guernsey 2 in his capacity of the then protector of the TDT, which the Joint Liquidators seem to contend and as seems to be indicated in Mr Wallace's 2nd affidavit sworn on behalf of the Present Protector, then the Present Protector's own right to reimbursement cannot, in my judgment, include such costs.
60. Nevertheless, although I am not deciding the issue, I consider, subject to any argument from any other party to the contrary, that I would be likely to treat any claim for reimbursement made by Mr Hillier on the same basis as I have treated the claims of the Present Protector for reimbursement of his costs. I see no reason why a copy of the judgment should not be sent to Mr Hillier, one of the original parties to Guernsey 2; indeed, it seems to me to be fair that he should be able to read and understand the reasoning which I have applied to the challenges made to the costs of his successor, the Present Protector. In these circumstances, I ask the parties and the Joint Liquidators to agree that a copy of this judgment may be sent to Mr Hillier in his capacity as former protector of the TDT and an original party to Guernsey 2 so as to allow him to make any such claim as he wishes for reimbursement of the costs incurred by him within Guernsey 2, which I believe may have amounted to a substantial sum.

61. I ask Counsel to do their best to agree the terms of an Order which comprehends the entirety of the costs and remuneration issues in Guernsey 2 within 28 days of the handing down of this judgment. If the parties and the Joint Liquidators are unable to agree the issues of costs arising from the Guernsey 2 Costs applications and hearings, including the costs of this judgment, within 28 days after the handing down of this judgment, they should arrange for the matter to be listed for further directions on such issues and, if necessary, on the form of any parts of such an Order which might still be in issue.
62. The Court file remains sealed in Guernsey 2 and most of the hearings have been conducted in private (*in camera*). But on 30 June 2016, without objection from the parties then represented before the Court, *i.e.* the Joint Liquidators and all parties except Advocate Hay, I directed that the remainder of the hearings should be in open court, with the Court file remaining sealed and I imposed a ban on publication of either the name of the trust, or the names of the parties, or the names of the children of the Present Protector or the identity of any of the assets of the trust. I rather expect that this restriction might now mostly be redundant, and therefore unnecessary, since most of such matters have already been mentioned in judgments of this Court and the Court of Appeal which have been released into the public domain, and I would be minded to release this judgment into the public domain free of such a wide embargo, only restricting the reporting of the names and present ages of the minor children of the Present Protector, (who are part of the class or classes represented by Advocate Hay). But I shall not do so without first hearing from any party who might wish to argue to the contrary; if any party should wish to raise an objection, they should do so within a period of 28 days from the handing down of this judgment.

PATRICK TALBOT QC
Lieutenant Bailiff

29 June 2017