IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Civil No. 1505/2010

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

J U D G M E N T

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

***Oral hearing* 19 and 23 May 2017**

Judgment handed down: 22 November 2017

Advocate Jessica E Roland for the Former Trustees of the TDT

Advocate Nicholas J Robison for Rawlinson & Hunter Trustees S.A., a Swiss corporation, which was the sole trustee of the TDT between about 2 July 2010 and 5 September 2017 and a co-trustee of the TDT until about 3 October 2017

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.

Introduction

1. This judgment relates to the costs issues in the remuneration applications of the Former Trustees, R&H and the present Protector. These issues were argued before me on 19 and 23 May 2017. I agreed at the close of the oral hearing that I would not prepare my judgment on them until after I had conducted the oral hearing relating to the costs of the costs and expenses applications of the same parties; that hearing took place on 12 and 13 September 2017.
2. In this judgment I shall only deal with the costs issues in the remuneration applications of the Former Trustees, R&H and the present Protector and I shall deliver a separate judgment on the costs of the costs and expenses applications at a later date.

3. In this judgment I shall, with one exception, use the same abbreviations as I used in the two judgments on the remuneration application dated 18 December 2015 (**the first remuneration judgment**) and 1 December 2016 (**the second remuneration judgment**). Since it appears that R&H ceased to be a trustee of the TDT on about 3 October 2017, in order to avoid any misunderstanding, I shall refer to it as "**R&H**" rather than as the Current Trustee.

General principles relating to costs in the Royal Court

4. Rule 82 of the Rules of the Royal Court, 2007, (**the RCCR**), provides:

> "82. (1) *The Court may, in any action –*
>
> *(a) make such order as to the costs of the proceedings, or of any stage or application in the proceedings,*
>
> *…*
>
> *as the Court thinks just.*"

5. As was made clear in the Court of Appeal of Guernsey in *Hulme v Matheson Securities (Channel Islands) Limited (No. 2)* (1997) 24 GLJ 75 in relation to rule 48 of the Royal Court Civil Rules 1989, the predecessor of Rules 82 and 83 of the RCCR, the discretion as to costs vested in judges of the Royal Court of Guernsey is

> "*… not to be fettered or circumscribed, and is a discretion to be exercised judicially in the light of the particular facts of each case.*" (*per* Southwell J.A., p. 81 A/B).

6. The Royal Court's wide discretion under rule 82 when awarding costs at the end of proceedings, or at the end of a contested application, was explained in the decision of Deputy Bailiff Collas in *Shaham v Lloyds TSB Offshore Treasury Limited and Fooks* [2007-08] GLR 323, at [6] to [12]. At [10] and [11], Deputy Bailiff Collas said that "*the guiding principle*" in the Royal Court was to be found in the judgment of Lord Woolf M.R. in *A.E.I. Rediffusion Music Limited v Phonographic Performance Limited* [1999] 1 WLR 1507, where Lord Woolf said as follows:

> "*When deciding on what is the appropriate order for costs to make it is always desirable and usually essential to consider the circumstances of the case as a whole.*
> *…*
> *I draw attention to the new Rules because, while they make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the Court making*

different orders as to costs. From 26 April 1999 the "follow the event principle" will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new Rules coming into force. The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

7. The further passages which I cite below are, in my view, consistent with Deputy Bailiff Collas' explanation of the Royal Court's discretion as to costs.

8. In her judgment in *Jefcoate v Spread Trustee Company Limited* (2014), 17 Nov 2014, unreported, Lieutenant Bailiff Hazel Marshall QC explained the modern practice of the Royal Court in awarding costs in this way:

> "*4. Who is the "successful party" is not to be judged on technicality, but as a matter of common sense: BCCI v Ali (No 4) [1989] 149 NLJ 1734 at [7] per Lightman J. Therefore, a very small recovery out of a very large claim may produce the result that the "successful party" is sensibly seen as being the Defendant rather than the Plaintiff: see Fulham Leisure Holdings v Nicholson Graham [2000] EWHC 2428 (Ch).*
>
> *...*
>
> *6. On the other hand, it is recognised that even a successful party is unlikely to win on all points and that mere failure to win some issues is not, without more, a reason for penalising a party in costs (HLB Kidsons v Lloyds Underwriters [2008] 3 Costs LR 427)."*

9. The approach to costs following the event in this court was also explained by Deputy Bailiff Collas in *Buckley v Ronez Limited* [2009-10] GLR 120. At [18], he cited in support of his decision the observation of Sir Thomas Bingham M.R. in *Roache v News Group Newspapers Ltd* [1998] EMLR 161, at pp 168/9, (which was later discussed by Mr Justice Briggs in a case in the Chancery Division in England, *Magical Marking Limited v Ware & Kay LLP* [2013] 4 Costs LR 535, at [5] to [16], (where he helpfully cited and applied recent English cases,) as "*a more nuanced approach*" than merely, in a money-related claim, deciding which party at the end of the case has to pay the other and ordering the paying party to pay the receiving party's costs). Sir Thomas Bingham M.R. said:

> "*The judge must look closely at the facts of [the] particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?*"

I also mention the decision of the Court of Appeal in England in *Singapore Airlines Limited v Buck Consultants Limited* [2012] Pens. L.R.1. At [67], [69], and [71], Lady Justice Arden said that the court must have regard to the substance as well as to the form of the proceedings.

10. In *Propinvest Group Limited (in administration) v Glenn Maud* (unreported) (Guernsey Judgment 18/2014*)* Deputy Bailiff McMahon said as follows:

> "*6. Both parties accept that the Court has a wide and unfettered discretion in relation to ordering costs. Rule 82 of the 2007 Rules simply provides that the Court may make*

such order as it thinks just. Further, it has also been acknowledged on behalf of the Plaintiff that the starting point is that the unsuccessful party will be ordered to pay the costs of the successful party (see, e.g., Shaham v Lloyds TSB Offshore Treasury Limited and Fooks [2007-08] GLR 323, in which it was also recognised that there needed to be appropriate flexibility to move away from that starting point, otherwise a winner-takes-it-all attitude could result in wastefulness and act as a disincentive to focus clearly on the most efficient way to seek success in the case). It is clear, therefore, that the Court retains a discretion to depart from that starting point in any case where that is appropriate."

11. It is also now clear that the exercise of the Royal Court's discretion as to costs sometimes results in costs being ordered on an issue by issue basis rather than by applying the general rule that costs follow the event – see *Shaham v Lloyds TSB Offshore Treasury Limited* (*supra*), at [12]. But, generally, it is to be remembered that the *basis* of taxation should be the recoverable basis under the Royal Court (Costs and Fees) Rules, 2012, sometimes called the standard recoverable basis, unless the circumstances merit a full or partial taxation on an indemnity basis.

12. In the much-cited English High Court decision of *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2008] EWHC 2280 (TCC), [2009] 1 Costs LR 55, at [72], Mr Justice Jackson conducted a helpful and full review of post-CPR English costs cases, which I consider is equally applicable in Guernsey, and said:

"*From this review of authority I derive the following … principles.*

(i) In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.

(ii) In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.

(iii) The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.

(iv) Where the circumstances of the case require an issue-based costs order, that is what the judge should make. However, the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7).

(v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.

(vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers made but also to each party's approach to negotiations (insofar as admissible) and general conduct of the litigation.

…

(viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs."

Advocate Hay's costs of the remuneration applications

13. All the other parties, including the Joint Liquidators, agreed that the costs of Advocate Christian Hay, who was joined as a party in Guernsey 2 to represent the minor, unborn and unascertained beneficiaries of the TDT, relating to the remuneration issues should be raised

and paid out of the assets of the TDT on an indemnity basis. I shall therefore make such an Order in favour of Advocate Hay.

The costs of the Former Trustees' remuneration application

14. In the first remuneration judgment, I dismissed the claim of the Former Trustees for remuneration in the period after their removal as trustees on about 2 July 2010 during which they had retained possession of the assets of the TDT in support of an alleged lien (**the FT remuneration application**). I decided that they were not entitled to any such remuneration at all, whether under the TDT trust deed or under the Trusts (Jersey) Law, 1984, (**the Jersey Law**), or under the inherent jurisdiction of either the Royal Court of Jersey or this Court.

15. R&H, the present Protector and the Joint Liquidators all submitted that the Former Trustees should pay their costs of the first part of the FT remuneration application up to the delivery of the first remuneration judgment on the recoverable basis, but accepted that, save in relation to Advocate Hay, I should make no order as to the costs, if any, of any of the parties, including the Former Trustees, of the second part of the FT remuneration application, *i.e.* for the period after the delivery of the first remuneration judgment, save, that is, for the order which I make below in relation to the shortfall costs of R&H, the present Protector and the Joint Liquidators.

16. The Former Trustees opposed the making of any order for costs against them for the first part of the FT remuneration application and contended that the FT remuneration application amounted to an application under Part IV of the Trusts (Guernsey) Law, 2007, relating to the administration of the TDT and that, in the usual way, their costs, and those of the opposing parties, should all be paid out of the assets of the TDT on the indemnity basis. The Former Trustees also sought an order, in the event that I should order them to meet the costs of other parties incurred in defending the FT remuneration application, entitling them to recover their own costs of the FT remuneration application out of the assets of the TDT on the indemnity basis.

17. The first question for me to decide is, therefore, whether or not I should order the Former Trustees to pay the costs of R&H, the present Protector and the Joint Liquidators, all of whom successfully opposed the FT remuneration application, on the recoverable basis for the period up to and including the delivery of the first remuneration judgment.

18. In the first remuneration judgment, I described the nature of a trustee's, or a former trustee's, claim for remuneration out of the trust as a claim for the taking of a profit out of the trust, rather than a claim for reimbursement of costs or expenses, from the trust assets. As I have already mentioned, I dismissed the FT remuneration application on the basis that the Former Trustees were not entitled to remuneration either under the TDT trust deed or under the Jersey Law or under the inherent jurisdiction of the Royal Court of Jersey or of this court to supervise and, where necessary, govern the affairs of, trusts.

19. A trustee or former trustee who makes any such claim which is contested is, in my judgment, in substance making an adverse, hostile claim against the beneficiaries of a solvent trust or the creditors of an insolvent trust as the case may be. In my judgment, whilst such a claim may be a claim arising in the administration of the trust, it is in substance a claim against the trust which, if successful, would diminish the trust fund or the parts of the trust fund available to meet the claims of creditors of an insolvent trust such as the TDT. The fact that the first remuneration judgment contained a rejection by me of the FT remuneration application in terms which included construing the TDT trust deed and the Jersey Law and a consideration, in relation to the FT remuneration application alone, of the inherent jurisdiction of this court, did not, in my judgment, bring into play any part of the costs

principles applicable to category 1 or category 2 claims as explained by Mr Justice Kekewich in *In re Buckton* [1907] 2 Ch. 406.

20. In considering the incidence of costs of the first part of the FT remuneration application, I have carefully taken into account the way in which the *Buckton* principles, and the decisions of Mr Justice Lightman in *Alsop Wilkinson v Neary* [1996] 1 W.L.R. 1220 and of the English Court of Appeal, *per* Lord Justice Hoffmann, in *McDonald v Horn* [1995] 1 All E.R. 961, were persuasively explained by Nugee J.A. in [28] to [35], [43] to [46] and [51] to [59] of his judgment in the Court of Appeal of Jersey in *des Pallières v J.P. Morgan Chase and Company* [2013 (2) JLR 239]. I am satisfied that the guidance of the Court of Appeal of Jersey there given should be applied to the FT remuneration application in this court.

21. Furthermore, I have concluded that the FT remuneration application was not a *Buckton* category 2 application since it did not concern a question of construction of the TDT trust deed which the trustee of the TDT had found so difficult to determine that it needed a decision of the court under its supervisory jurisdiction. Nor, in my view, can it properly be described as an application which was necessary, and hence for the benefit of the TDT. In my judgment, the FT remuneration application was a hostile application akin to, but not precisely within, the class of *Buckton* category 3 applications At pp. 414-415 in *Buckton*, Mr Justice Kekewich said, in relation to category 3 claims which were unsuccessful, that

> "… *when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, [to] be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, the respondents, or not is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court.*"

22. It therefore follows, in my judgment, that the FT remuneration application was, in substance, an unsuccessful, hostile claim against the TDT, being, subject to the result of the appeals before the Privy Council to be heard on 27 to 30 November 2017 in Guernsey 1, primarily a claim against the creditors of the Former Trustees in their capacity as trustees of the TDT in the period between about 2008 and 2 July 2010. Those creditors would be likely to include the Joint Liquidators and it is in this capacity that they have played a part in Guernsey 2 and, in particular, in the FT remuneration application. In these circumstances, costs would normally follow the event, the event being the failure of the FT remuneration application, and the general principles set out above would be applicable.

23. In her written submissions dated 5 and 19 May 2017, Advocate Roland submitted that, in the first remuneration judgment, I had recognised that the fiduciary role of the Former Trustees in preserving the assets of the TDT held by them pursuant to their claimed lien had been considerably more active than the role of R&H as trustee of the TDT during the same period and that in performing that role they had acted for the benefit of the TDT. But that is, in my judgment, not directly relevant to the FT remuneration application. The central issue was not, in my view, whether such work had been done for the benefit of the TDT and its beneficiaries or for the benefit of the creditors of the Former Trustees as ex-trustees of the TDT, but whether or not the Former Trustees were entitled to claim remuneration for doing that work. Against that factual background, I dismissed the FT remuneration application. In effect, as Advocate Robison argued in his written submissions on behalf of R&H dated 16 May 2017, the Former Trustees had accepted the risk that they might fail, a risk which most unsuccessful parties in adversarial or so-called 'hostile' litigation like the FT remuneration application are obliged to accept.

24. In my judgment, the general rule that costs follow the event should apply to the first part of the FT remuneration application.

25. During her oral argument, Advocate Roland seemed to accept that, rather than me making an order for one set of costs as between the Former Trustees and R&H, the present Protector and the Joint Liquidators, each of them was a necessary and proper party to the FT remuneration application and that I should, if otherwise persuaded, make an order that the Former Trustees should pay the costs of each of them, leaving it to be argued on taxation whether any, and, if so, what, reduction should be made for the fact that each of R&H, the present Protector and the Joint Liquidators had opposed the Former Trustees' claim for remuneration during the first part of the FT remuneration application, including any argument that they were only entitled to receive one set of costs as between them. I have decided that this is the right thing for me to do and I shall not therefore order that the Former Trustees should only pay one set of costs as between R&H, the present Protector and the Joint Liquidators. So that issue will remain open to be argued on taxation.

26. In summary, I shall make an order that the Former Trustees should pay the costs of each of R&H, the present Protector and the Joint Liquidators of the first part of the FT remuneration application on the recoverable basis, to be taxed if not agreed, and I shall make no order as to the costs of the second part of the FT remuneration application, (which costs might, I suppose, in any event, be relatively small). I therefore reject the primary submission of Advocate Roland made orally on 23 May 2017 that each of R&H and the present Protector had been neutral on the FT remuneration application and that I should therefore make no order for costs as between them and the Former Trustees and should leave them to claim reimbursement of their costs out of the TDT assets, subject, of course, to issues of priority and any possible resulting *pro rata* reduction.

27. I have also decided, in the exercise of my discretion as to costs, to direct that each of R&H, the present Protector and the Joint Liquidators, but not the Former Trustees, are entitled to claim any shortfall in their received costs out of the assets of the TDT, whether such shortfall should arise on the taxation of their costs on the recoverable basis or because of the difference between such taxed costs and costs on the basis of an indemnity. I should add that, in her oral submissions on 23 May 2017, Advocate Gray for the Joint Liquidators, accepted that the successful challenges of R&H and the present Protector to the Former Trustees' claims were proper challenges and that their shortfall costs, as well as those of her clients, the Joint Liquidators, were properly claimable out of the assets of the TDT on an indemnity basis.

28. But, for the detailed reasons given by me in the first remuneration judgment in dismissing their claim and in this judgment, I have concluded that is not appropriate for me to order that the Former Trustees are entitled to claim any part of their costs of the FT remuneration application out of the assets of the TDT. Although the assets of the TDT were largely held by the Former Trustees under their alleged lien, the Former Trustees were not the trustees of the TDT during the period for which they claimed remuneration. I consider that, as a matter of substance, the FT remuneration application was made for the benefit of the Former Trustees only, and not for the benefit of the TDT, and that the costs of making it could not properly be described as having been expended for the benefit of either the beneficiaries of the TDT or the creditors of the TDT. I therefore reject the Former Trustees' application to recover their costs of the FT remuneration application out of the assets of the TDT. The Former Trustees must bear all those costs themselves.

The costs of R&H's remuneration application

29. In the first and second remuneration judgments, when read together, I allowed the claim of R&H for remuneration in the period from its appointment as sole trustee of the TDT on about 2 July 2010 (**the R&H remuneration application**). I decided that R&H was entitled to remuneration under the inherent jurisdiction of either the Royal Court of Jersey or this Court, but not under the express terms of the TDT trust deed. The evidence which established the

right of R&H to remuneration was mostly filed after the first remuneration judgment, in which I had allowed an adjournment of the R&H remuneration application so as to allow R&H to add to its evidence so as further to justify its claim. Although at the start of the R&H remuneration application the reliance by R&H on the inherent jurisdiction of the court was, at least as I understood it, at most slight, after its evidence and written submissions had been added to, and then completed, it was quite clear to me that, in the period after the first remuneration judgment had been considered by it, R&H's case was centrally based on the inherent jurisdiction of the court.

30. Despite the bold submission of the Joint Liquidators to the contrary contained in paragraph 3 of the written submissions of Advocate Gray dated 5 May 2017, I consider that, as a matter of common sense and reality and in light of the circumstances of the R&H remuneration application as a whole, R&H was substantially successful, and I am also of the clear view both that R&H had to fight the R&H remuneration application to an end in order to win its claim for remuneration out of the TDT assets and that the Joint Liquidators had substantially denied R&H the prize which it had fought to win.

31. Pursuant to the direction given by me in the second remuneration judgment, R&H's evidence was completed by late January 2017, and the size of its entitlement to remuneration under that judgment was calculated in exhibit "AMC 4" to Mr Andrew McCallum's 5th affidavit sworn on behalf of R&H on 30 January 2017 as approximately CHF1,028,171.31, *i.e.* (a) 65% of CHF1,316,308.95 = CHF855,600.82 **plus** (b) 20% of CHF862,852.43 = CHF172,570.49. Using the conversion rate of 1.25 Swiss francs to the pound, which seems to have been applicable on about 30 January 2017, the total claimed would, therefore, have amounted to approximately £822,537. But the parties are apparently agreed that R&H's permitted claim amounts in total to £808,142.56, which, subject to any submissions received by the Greffe from R&H before the Order is perfected, will therefore be the sum awarded to R&H in the Order flowing from the first and second remuneration judgments. In my view, that represents substantial success on the part of R&H. The Joint Liquidators continued to oppose the R&H remuneration application to the end and failed in their argument that it should be dismissed.

32. R&H and its supporter, the present Protector, each argued that in these circumstances costs should follow the event and that I should order the primary opposing party, *i.e.* the Joint Liquidators, to pay their costs on the recoverable basis and that any shortfall should be reimbursed to R&H, which had been the sole trustee of the TDT during the entire period to which the R&H application related, and to the present Protector, out of the assets of the TDT on an indemnity basis, pursuant to the principles set out in my first costs and expenses judgment. R&H accepted that I did not allow its remuneration claim in full, but submitted that a winning party does not need to have a complete victory in order to obtain an order for costs in its favour. On behalf of R&H and the present Protector, Advocate Robison and Advocate Richardson contended that no special factor arose to justify an exercise of the court's discretion by me departing from what the usual order that costs follow the event and submitted that I should therefore order the Joint Liquidators to pay R&H's and the present Protector's costs of the R&H remuneration application to be taxed, if not agreed, on the recoverable basis.

33. The Joint Liquidators submitted that the appropriate order was that there should be no order as to R&H's costs and the present Protector's costs of the R&H remuneration application.

34. On behalf of the Joint Liquidators, Advocate Gray referred to the fact that in *Shaham* (*supra*), at [12] to [17], Deputy Bailiff Collas had made an issue-based costs order or a proportionate costs order, imposing a percentage reduction reflecting the relative amount of time spent and the success or failure of the plaintiff on various issues. She submitted that, applying this approach in line with the principles listed by Mr Justice Jackson in the English

High Court in *Multiplex* (*supra*), I should have regard to the manner in which R&H had conducted the R&H remuneration application, including the fact that it had relied upon arguments based on the TDT trust deed, which it had not been reasonable, so Miss Gray argued, for it to pursue, and that it followed that I should reduce the proportion of costs awarded to R&H to nil, *i.e.* by making no order as to costs, or, in the alternative, to a relatively small proportion.

35. In my judgment, it was not unreasonable for R&H to have relied first upon the express terms of clause 12 of the TDT trust deed which deal with a trustee's remuneration, although those arguments did not succeed. In my view, it is understandable for R&H to have attempted to bring its remuneration claims within the express terms of the trust deed as its primary argument rather than to have accepted from the outset, as the Joint Liquidators seemed to me to have argued R&H should have done, that such an argument was not reasonably tenable.

36. Next, Advocate Gray argued that, but for me permitting R&H to expand its evidence and also to rely in the hearings after the first remuneration judgment upon the inherent jurisdiction of the court as its primary legal argument, R&H would not have succeeded, and that this factor should be substantially reflected in the order which I make. I accept this submission.

37. Both in her written submissions and in her oral argument on 19 May 2017, Miss Gray sought to demonstrate how R&H's case had been put over the whole course of the R&H remuneration application and, especially, to identify the time at which R&H had, in reality, changed horses to the inherent jurisdiction argument upon which it won, and she submitted again that I should not allow R&H any costs at all or that, as an alternative, I should make a proportionate order for costs against the Joint Liquidators by awarding R&H a limited, small percentage of its total costs. Advocate Gray described this as "*a further milestone*" for me to reach in considering my costs decision. She took me through the state of evidence and submissions as at the hearings on 24 to 26 May 2016, on 30 June 2016 and on 1 and 7 July 2016, reminding me of the circumstances in which I had permitted R&H to file further material between the delivery of the first remuneration judgment and the delivery of the second remuneration judgment. Miss Gray submitted that "*the Joint Liquidators had undertaken significant work in preparing and reviewing materials and in preparing and conducting the hearing which had been substantially wasted due to [R&H]'s failure to present its case effectively*." Although I would not go so far as to say that such work had been substantially wasted, I accept that the Joint Liquidators were put to extra work and that they had incurred further costs by the rather late stage at which R&H added to its evidence and submissions and that such work and consequential costs would not have been required, or at least not required very much, if R&H had put its full case, both on the law and on the facts, at the outset of the R&H remuneration application.

38. In further support of her arguments, Advocate Gray relied upon both of the reductions which I had made in the second remuneration judgment to the total sums claimed by R&H, *i.e.* reductions (i) of 35% in respect of the period from about 2 July 2010 to 22 December 2013 and (ii) of 80% thereafter, and Miss Gray reminded me of the reasoning which I had used in the second remuneration judgment for making the reductions. In summary, she submitted that the usual starting point of costs following the event should not be used. The Joint Liquidators' position was that, whilst the balance of costs lay in their favour, they accepted that I should make no order as to costs, and they contended that, in doing so, they would be taking what Miss Gray described as "*a sensible and pragmatic approach*".

39. Advocate Robison's arguments on behalf of R&H in response were contained in his written submissions dated 19 May 2017 and in his full oral response to Advocate Gray's submissions. First, he submitted that it had been necessary for R&H to make an application to be allowed its remuneration out of the TDT assets primarily because of the undertakings

contained in the Order in Guernsey 1 dated 6 July 2011, which had the effect of preventing R&H's remuneration from being paid from the TDT without further order. R&H's argument was that the R&H remuneration application was, at least at the beginning, of an administrative nature to have a question resolved which had arisen in the administration of the TDT and that the usual costs order would, therefore, have been that its costs could be taken out of the TDT assets on an indemnity basis. R&H argued that only when the Joint Liquidators opposed the R&H remuneration application did it become a hostile application as between R&H, which was claiming remuneration for the period of its trusteeship, and the Joint Liquidators.

40. In my judgment, the R&H remuneration application was an adversarial, hostile application almost from the start. It was an opposed application by the trustee of the TDT to be permitted to draw a profit out of the TDT assets in the form of remuneration for the period during which it had been acting as trustee of the TDT, and the TDT's defence to the R&H remuneration application was conducted on the other side of the issue, as it were, by the Joint Liquidators, who were acting on their own behalf and also on behalf of other creditors of the Former Trustees in their capacity as trustees of the TDT up to 28 June 2010. In summary, therefore, the defence of the assets of the TDT, (which was probably insolvent,) against which the Joint Liquidators and other creditors would wish to make claims, was being presented by the Joint Liquidators. The trustee of the TDT, R&H, had made the R&H remuneration application, and the present Protector had supported it rather than either opposing it or remaining neutral in the interests of the beneficiaries and creditors of the TDT. The protection of the TDT assets against the R&H remuneration application had, therefore, been undertaken by the Joint Liquidators alone. Since the present Protector supported, rather than not opposing, the R&H remuneration application, he openly aligned himself with R&H's case and in these circumstances would have been open to an adverse costs order if the R&H remuneration application had failed or had substantially failed – see also the approach taken by Deputy Bailiff McMahon at [26] in *Albany Trustee v Jeandin and Christofolini* (2012), unreported, 10 September 2012. In my judgment, it also follows that the Joint Liquidators should have appreciated that if in the end they were found to be the unsuccessful party, they might have to meet the recoverable costs of the present Protector as well as those of the applicant trustee, R&H, so long as their opposition had substantially failed.

41. I consider that R&H was the overall winner of the R&H remuneration application and I agree with Advocate Robison's submission on its behalf that, after giving the undertakings on its part to this court in Guernsey 1 on 6 July 2011, R&H would not have been able to recover its remuneration out of the TDT assets without making an application, either within Guernsey 2 or by separate proceedings. But R&H succeeded only on the inherent jurisdiction ground and, in order to have done so, it was necessary for it to have applied to this court for that jurisdiction to be exercised in its favour in the form of an order authorising the taking of remuneration out of the assets of the TDT in the sum ordered by the court. Accordingly, as it turned out, R&H had to apply to court for the relief which it obtained at the end of the remuneration hearings and the giving of the undertakings on its part in Guernsey 1 on 6 July 2011 was not the only reason why R&H had to apply to court for such relief. The position might have been different if I had found in favour of R&H on its arguments based on the express terms of the TDT trust deed, but, in the event, I do not need to decide that question.

42. Whilst the Joint Liquidators might have decided not to have opposed the R&H remuneration application at all or to have opposed it on the inherent jurisdiction ground alone, they decided to oppose it strenuously, in a fully contested way. The starting point is, therefore, in my judgment, that R&H and the present Protector, its supporter, are each entitled to an order for costs in their favour against the Joint Liquidators.

43. Whilst remembering that the recent, post-CPR cases in England establish that a winning party will not necessarily be penalised in costs if it does not win every point in the case, I must next consider whether, in all the circumstances of the case, there should be a departure from the starting point. As I have mentioned in general terms above, Advocate Gray submitted that I should move so far away from this starting point as to make no order as to the costs of the R&H remuneration application, or, at most, an order that R&H and the present Protector should receive no more than a small percentage of their costs which, in her oral submissions, she said should amount to between no more than 10 to 20% of its recoverable costs, arguing, as she put it, that R&H and the present Protector would thereby be accepting responsibility for the way in which they had argued the case until about June 2016. Alternatively, Advocate Gray submitted that R&H and the present Protector should pay the Joint Liquidators' costs of the R&H remuneration application until about 10 June 2016 so as fairly to reflect what she described as "*a wasted process*" in which work and time had been thrown away in dealing with R&H's case dependent on the terms of clause 12 of the trust deed rather than its case in reliance upon the inherent jurisdiction of the court.

44. The question, therefore, arises for decision whether I should, in the exercise of my discretion, depart from the starting point and make either an issue-based order or a proportionate costs order. I am not persuaded, despite the fact that R&H lost its arguments under clause 12.1, that an issue-based order would be either appropriate or required; the carrying out of such an order would also, in my view, add extra complications for the parties on taxation, and probably extra costs as well, which I am satisfied would not be in the interests of the parties. But I do consider that a just and proportionate order for costs should include some percentage reduction in the costs of both R&H and the present Protector which I would otherwise have ordered the Joint Liquidators to pay so as to take into account that, were it not for the fact that R&H had expanded its evidence after the first remuneration judgment and for the fact that it relied fully, rather than, in my view, peripherally, on the inherent jurisdiction of the court as the basis of its claim in the hearings which led to the second remuneration judgment, R&H would not have succeeded. I do not, however, consider that any further reduction should be made to take into account the probable insolvency of the TDT; I have already taken this factor into account in the second remuneration judgment in making percentage reductions in the sums allowed to R&H for its remuneration, and I see no good reason to make any further reduction in the costs to be paid by the Joint Liquidators.

45. In my judgment, a reduction of 30% should be made from the total of the costs of R&H and the present Protector of the R&H remuneration application to be recovered from the Joint Liquidators. I therefore order the Joint Liquidators to pay 70% of the costs of R&H and 70% of the costs of the present Protector of the R&H remuneration application, to be taxed on the recoverable basis, if not agreed. I consider such a reduction to be a fair one in all the circumstances of the case, being one which properly reflects the substantial success of R&H whilst also reflecting the fact that R&H had to improve its position in a material way, and that it did so by May 2016, *i.e.* about two years after the R&H remuneration application had been issued and several months after the first remuneration judgment, thereby changing the nature of the R&H remuneration application both legally and factually. Since the present Protector supported the R&H remuneration application rather than remaining neutral, I shall make the same reduction in his costs of the R&H remuneration application as I have made in the case of R&H.

46. The Former Trustees were neutral on the R&H remuneration application and R&H did not claim any order for costs against them. In the exercise of the court's discretion as to costs, I shall therefore make no order as to the costs of the Former Trustees of the R&H remuneration application, leaving them to bear their own costs.

47. I now turn to deal with the arguments of the parties about any shortfall costs of R&H and the present Protector which will remain unpaid after the recoverable costs order, as taxed or agreed, has been satisfied, whether wholly or in part.

48. R&H and the present Protector submitted that any of their costs of the R&H remuneration application, which were not in the event recovered from the Joint Liquidators under the order for recoverable costs, should be reimbursed to them from the TDT on an indemnity basis under the principles set out in my first costs and expenses judgment which I had decided applied to both R&H and the present Protector. The Joint Liquidators opposed this and contended that R&H's and the present Protector's shortfall costs should not be paid from the TDT, leaving them to bear the shortfall loss, a loss which I understand is likely to prove substantial, themselves. Advocate Gray submitted that the R&H remuneration application had been brought by R&H out of self-interest, that it was a hostile claim against those for whose benefit the assets were being held, that is to say, as a result of its probable insolvency, the creditors including the Joint Liquidators themselves rather than the beneficiaries, and that it did not benefit the TDT. She further submitted that the R&H remuneration application could not be said to fit within any of categories 1, 2 or 4 of the *Buckton* categories, which might have justified an order of the type sought by R&H and the present Protector.

49. A helpful discussion about such issues can be found in the judgment of Nugee J.A. at [32] and [42] in *des Pallières v J.P. Morgan Chase and Company* (*supra*). It is also important to note, as Nugee J.A. did at [30] in *des Pallières,* that the decision of Mr Justice Kekewich in *In re Buckton*

> "*… does not say anything about the trustees' right of indemnity, or indeed very much about the costs of the trustees at all. In the case before him there does not appear to have been any argument about the trustees' costs. … The principles that Kekewich, J. laid down are therefore (as [Birt, Bailiff] correctly said in In re Dunlop Settlement) principles as to the costs of beneficiaries; and in particular as to when they can have their costs out of the estate despite not succeeding in their argument….*"

50. On behalf of R&H, Advocate Robison invited me to step back from a rigid application of *In re Buckton* and instead look at R&H's remuneration application "*in the round*". He characterised the R&H remuneration application as an application which had been made necessary after the undertakings had been given in Guernsey 1 on 6 July 2011 and submitted that it had been necessary for R&H to seek a court order upholding its claim to remuneration, both in principle and in quantum, and that those questions were questions which had arisen in the administration of the TDT, *i.e.* in the course of carrying out the trusts of the TDT, and which required resolution in the form of an order of the court.

51. In support of his argument, Mr Robison submitted that no finding had been made by me that, in the course of its trusteeship, R&H had acted in breach of trust or otherwise unreasonably, and that it followed that I had taken R&H's good conduct as sole trustee of the TDT into account when I exercised the Royal Court's inherent jurisdiction to award R&H remuneration out of the trust for its services as sole trustee of the TDT, and that it would seem perverse for the court to refuse to allow R&H's shortfall costs to be paid out of the assets of the TDT.

52. R&H also submitted that it was the approach of the Joint Liquidators to the R&H remuneration application which had materially affected the character of the application and that if the Joint Liquidators had consented to the relief claimed – or had even offered to consent to a (lesser) sum being allowed – the application would have been straightforward and all costs incurred (including their own) might have properly come from the TDT. Finally, by way of summary, Mr Robison contended that in the R&H remuneration application R&H had been seeking payment for services which it had rendered to the TDT,

as trustee of the TDT, and that if the court were not to allow R&H to rely on its indemnity for reasonably incurred costs and expenses, it would send a unacceptable message to other Guernsey (and Jersey) trustees that, in seeking to be paid remuneration under the court's inherent jurisdiction, they would not recover all the costs incurred in obtaining an order from the court in their favour, at least if the application were substantially opposed.

53. In my judgment, if I had decided that R&H had been entitled to remuneration under the express terms of either part of clause 12.1 of the TDT trust deed, there might have been a good reason for allowing R&H and its supporter, the present Protector, to claim their shortfall costs out of the TDT assets on an indemnity basis. For, in my view, there would then have been little, if anything, which the Joint Liquidators could have argued to prevent R&H recovering under clause 12 of the TDT trust deed either under an agreement previously reached between it and the present Protector or under any R&H published terms and conditions or under any determination by R&H of reasonable remuneration rates. But the evidence disclosed no such agreement, terms or determination. Since I had decided that R&H's claim under clause 12.1 could not succeed, R&H had been forced to rely upon its inherent jurisdiction argument and, importantly, had had to come to court to claim a specific sum for its remuneration. For, in my judgment, in many, if not all, cases, trustees and beneficiaries or, as in this case, creditors, cannot simply agree between themselves that the Royal Court would award a trustee remuneration under the court's inherent jurisdiction for services performed or to be performed in the future and also agree the extent of any such remuneration. It is the Royal Court's own supervisory jurisdiction which is being invoked in such a case and, as I see it, it is for the Royal Court itself to decide whether or not to allow a trustee to receive remuneration out of a trust's assets either when the trust deed does not contain any provisions allowing a trustee remuneration or when, as here, a trustee's claim for remuneration does not come within the express terms of the trust deed in question. In summary, I consider that, in the circumstances of this case, R&H required an order of the court under the court's inherent jurisdiction authorising, and calculating, its claim for remuneration out of the assets of the TDT. Otherwise, R&H would not have been entitled to any such remuneration.

54. In my view, the Joint Liquidators were entitled to challenge the total sums claimed by R&H as its remuneration, and when challenges were mounted by the Joint Liquidators, they and R&H and its supporter, the Present Protector, respectively became at risk as to the costs of the 'hostile' challenges.

55. Since R&H was claiming a profit out of the TDT assets, it cannot, as I see it, be said that R&H was acting as a neutral trustee within the R&H remuneration application, even though it is right for me also to have borne in mind that no allegations were made by the Joint Liquidators that R&H had misconducted itself as trustee during the period to which the application related. But, in my view, it cannot be said that R&H was acting in the interests of either the beneficiaries or the creditors of the TDT in pursuing the R&H remuneration application.

56. In these circumstances, I have concluded that it would not be appropriate for me to allow either R&H or the present Protector to claim any of their respective shortfall costs out of the TDT assets either by way of indemnity or at all. The position might have been different if, under the Royal Court's inherent jurisdiction, I had awarded R&H either the entire sum claimed by it or almost the entire sum claimed. But I did not do so. On the contrary, in reaching my decision under the inherent jurisdiction, I reduced the entire sum claimed by R&H much more than minimally. In monetary terms, the effect of the reductions which I made in the second remuneration judgment was substantial. In my judgment, it would not be just for me to allow either R&H or the present Protector to recover the costs which they will not recover from the Joint Liquidators under the proportionate costs order which I have made in their favour in this judgment in relation to the R&H remuneration application. I shall

therefore declare that they are not entitled to claim any of their shortfall costs incurred in relation to the R&H remuneration application out of the assets of the TDT. As a result, they must bear any such shortfall themselves.

The costs of the present Protector's remuneration application

57. In the first and second remuneration judgments, when read together, I allowed the claim of the present Protector for remuneration as protector of the TDT from about 28 June 2010 which was made in his application for remuneration dated 11 April 2014, as amended on 1 July 2016, (**the present Protector's remuneration application**). As in the case of R&H, I decided that the present Protector was entitled to remuneration under the inherent jurisdiction of either the Royal Court of Jersey or this Court, but not, in his case, under the express terms of clause 14 of the TDT trust deed. The evidence which established his right to remuneration was mostly filed after the first remuneration judgment, in which I had allowed an adjournment of the present Protector's remuneration application so as to allow him to add to his evidence so as further to justify his claim and it was clear to me that the reliance by the present Protector on the inherent jurisdiction of the Royal Court to found his claim for remuneration had first been made in earnest after the first remuneration judgment.

58. The present Protector sought an order that his recoverable costs should be paid by the Joint Liquidators, with any shortfall costs permitted by the court to be paid from the TDT on an indemnity basis. Advocate Richardson's shortfall costs argument was based on the reasoning set out in *Lewin on Trusts*, 19th edition, paragraphs 27-139 & ff., which was discussed by the Deputy Bailiff in *Albany Trustee* (*supra*).

59. The present Protector claims that he was the successful party on the present Protector's remuneration application, in which he obtained a total award of £113.375.33 remuneration, which, again, is a sum which has been agreed between the contesting parties. Advocate Richardson submitted that, since the Joint Liquidators had objected to the present Protector being remunerated at all, it follows that the Joint Liquidators' opposition to the present Protector's remuneration application was unsuccessful and that the Joint Liquidators should therefore be ordered to pay the present Protector's costs, and those of his supporter, R&H, on the recoverable basis since the Joint Liquidators' objection had been a hostile challenge to the present Protector's rights as protector of the TDT. The Joint Liquidators opposed the making of any order that they should pay the present Protector's or R&H's costs of the present Protector's remuneration application.

60. I consider that, as a matter of common sense and reality and in light of the circumstances of the present Protector's remuneration application as a whole, he was successful to a substantial, though by no means, of course, a total, extent, and I am also of the view both that he had to fight the present Protector's remuneration application to an end in order to win his claim for remuneration out of the TDT assets and that the Joint Liquidators had substantially denied him the prize which he had fought to win since the challenge of the Joint Liquidators to the entirety of his claim for remuneration had been maintained at all times.

61. As I have mentioned, the size of the present Protector's entitlement to remuneration has been calculated under the terms of the second remuneration judgment at £113,375.33, which cannot, in my judgment, properly be characterised as a small sum even though that sum amounts to approximately 8% only of the total claim for remuneration made by him of over £1.375 million. Accordingly, over 90% of the sum claimed as remuneration had been represented by a total of £1.255 million claimed by the present Protector in the form of director's fees from TDT companies, a claim which I rejected in the second remuneration judgment. Nevertheless, in my view, the remuneration which I have awarded to the present Protector is a substantial, six-figure sum.

62. In my judgment, the starting point is that the present Protector and R&H are entitled to seek an order for costs in their favour against the Joint Liquidators on the basis that the costs of the present Protector's remuneration application should follow the event.

63. Advocate Gray again submitted that an issue-based costs order or a proportionate costs order, imposing a percentage reduction reflecting the relative amount of time spent and the success or failure of the present Protector, was appropriate. She submitted that I should have regard to the manner in which the present Protector had conducted the present Protector's remuneration application, including the fact that he had relied upon arguments based on clause 14.7 of the TDT trust deed, which it had not been reasonable, so Miss Gray argued, for him to pursue, and that it followed that I should reduce the proportion of costs awarded to him to nil, *i.e.* by making no order as to costs, or, in the alternative, to a relatively small proportion.

64. In my judgment, it was not unreasonable for the present Protector to have relied first upon the express terms of clause 14.7 of the TDT trust deed which deal with a protector's remuneration although those arguments did not succeed. In my view, it was understandable for the present Protector to have attempted to bring his remuneration claims within the express terms of the trust deed as a primary argument rather than to have accepted from the outset, (as, again, the Joint Liquidators seemed to me to have argued,) that such an argument was not reasonably tenable.

65. Next, Advocate Gray argued that, as in the case of R&H, but for me permitting the present Protector to expand his evidence and also to rely as part of his legal argument in the hearings after the first remuneration judgment upon the inherent jurisdiction of the court, he would not have succeeded. I have reached the same conclusions, *mutatis mutandis*, in relation to the present Protector's remuneration application as I have reached in relation to the R&H remuneration application in paragraph 37 above.

66. In further support of her arguments that I should make no order as to the costs of the present Protector's remuneration application, Advocate Gray relied upon the rejection by me in the second remuneration judgment of almost 92% of the sums claimed by the present Protector as remuneration. But it is, in my judgment, right that I should also take into account the fact that the Joint Liquidators had opposed the present Protector's remuneration application root and branch and that such opposition was only partially successful. Nor was I told of any offer on the part of the Joint Liquidators to remain neutral on the quantum of the remuneration which, in the exercise of the Royal Court's inherent jurisdiction, I should award the present Protector or that they would not oppose me awarding him remuneration of a sum in the region of £110,000 to £120,000.

67. In all the circumstances, I consider that the present Protector was the overall winner of the present Protector's remuneration application and I agree with Advocate Richardson's submission on his behalf that, after undertakings had been given to this court in Guernsey 1 on 6 July 2011, the present Protector would not have been able to recover remuneration out of the TDT assets without making an application, either within Guernsey 2 or separately. But he succeeded only on the inherent jurisdiction ground and, in order to do so, it was necessary for him to have applied to this court for that jurisdiction to be exercised in his favour in the form of an order authorising the taking of remuneration in the sum ordered by the court. Accordingly, as it turned out, the present Protector had to apply to the Royal Court for the relief which he obtained at the end of the remuneration hearings and the undertakings given on the part of other parties in Guernsey 1 on 6 July 2011 were not the only reason why he had to apply to court for such relief. The position might possibly have been different if I had found in his favour on his arguments based on the express terms of clause 14.7 of the TDT trust deed, but, in the event, once again I do not need to decide that question.

68. The question, therefore, arises for decision whether I should, in the exercise of my discretion, depart from the usual starting point and make either an issue-based order or a proportionate costs order in relation to the costs of the present Protector and R&H of the present Protector's remuneration application. I am not persuaded, despite the fact that the present Protector lost his arguments under clause 14.7 of the TDT trust deed, that an issue-based costs order would be either appropriate or required; I repeat in relation to the present Protector's remuneration application that the carrying out of such an order would also, in my view, add extra complications for the parties on taxation, and probably extra costs as well, which I am satisfied would not be in the interests of the parties.

69. I consider that, in exercising the court's discretion as to costs, it would be just and proportionate for me to make an order for costs which includes some percentage reduction in the costs of the present Protector's remuneration application of both the present Protector and R&H his supporter, which I would otherwise have ordered the Joint Liquidators to pay, so as to take into account that, were it not for the fact that the present Protector had expanded his evidence after the first remuneration judgment, he would not have succeeded. Again, however, I do not consider that any further reduction should be made to take into account the probable insolvency of the TDT; I have already taken this factor into account in the second remuneration judgment in deciding the sums which I allowed the present Protector for his remuneration, and again I see no good reason to make any further reduction in the costs which are to be paid by the Joint Liquidators.

70. In my judgment, a reduction of 30% is a proper reduction to be made from the total of the recoverable costs of R&H and the present Protector respectively and I therefore order the Joint Liquidators to pay 70% of the costs of the present Protector and 70% of the costs of R&H of the present Protector's remuneration application, to be taxed on the recoverable basis, if not agreed. I consider such a reduction to be a fair one in all the circumstances of the case and that it properly reflects the substantial success of the present Protector, whilst also reflecting the fact that he had to improve his position substantially, about two years after the present Protector's remuneration application had been issued and several months after the first remuneration judgment, thereby changing the nature of the present Protector's remuneration application both legally and factually. Since, in my view, R&H supported the present Protector's remuneration application rather than remaining neutral, I shall make the same reduction of 30% in its costs as I have made in the case of the present Protector.

71. The Former Trustees were neutral on the present Protector's remuneration application and he did not claim any order for costs against them. In the exercise of the court's discretion as to costs, I shall therefore make no order as to the costs of the Former Trustees, leaving them to bear their own costs.

72. Most of the reasons which I gave in paragraphs 48 to 55 above for declining to permit R&H and the present Protector to claim their shortfall costs of the R&H remuneration application out of the TDT assets apply, in my judgment, *mutatis mutandis*, just as much in relation to their claims to recover their shortfall costs of the present Protector's remuneration application. If I had decided that the present Protector had been entitled to remuneration under the express terms of clause 14.7 of the TDT trust deed, there might, in my view, have been a good reason for allowing both him and his supporter, R&H, to claim their shortfall costs out of the TDT assets on an indemnity basis.

73. By way of summary, Advocate Richardson submitted that it would be unjust if the present Protector were left with a shortfall in recovering any of the costs incurred by him in the present Protector's remuneration application since it would, in effect, impose an additional personal liability on him for carrying out his duties as protector under the TDT trust deed.

74. On behalf of the Joint Liquidators, Advocate Gray submitted that the position taken by the present Protector was ill-conceived. In support of her argument, she reminded me that I had held that there was a clear distinction to be drawn between a fiduciary, like the present Protector, being indemnified for costs and expenses actually incurred by him and a claim made by him for remuneration. She relied upon a passage in Hubbard, *Trust Protectors*, at paragraph 7.47, which explains that distinction in this way:

> *"Remuneration is the right to be paid for acting as protector. Unlike the right of indemnity, remuneration involves payment over and above what the protector has expended in acting as such. A right of remuneration is thus a right to profit from the trust, and is subject to altogether different considerations from a mere right of indemnity."*

75. Advocate Gray summarised the Joint Liquidators' position by submitting that any shortfall costs of the present Protector's remuneration application of the present Protector and of R&H fell to be dealt with in the same way as she had submitted in relation to R&H's remuneration application. She contended that, in making a claim for remuneration, the present Protector had not acted in the beneficiaries' interests or in the creditors' interests, being concerned purely with recovery of his own remuneration by way of profit out of the TDT assets.

76. Since I had decided that the present Protector's claim under clause 14.7 could not succeed, he was forced to rely upon his inherent jurisdiction argument and, importantly, in my view, he had had to apply to the Royal Court to claim a specific sum for his remuneration. As I have ruled in the case of the R&H remuneration application, it is the Royal Court's own supervisory jurisdiction which is being invoked in such a case and, as I see it, it is for the Royal Court itself to decide whether or not to allow a protector to receive remuneration out of a trust's assets either when the trust deed does not contain any provisions allowing him remuneration or when, as here, his claim for remuneration does not come within the express terms of the trust deed in question. In summary, I consider that, in the circumstances of this case, the present Protector required an order of the court under the court's inherent jurisdiction authorising, and calculating, his claim for remuneration out of the assets of the TDT. Otherwise, he would not have been entitled to any such remuneration.

77. In my judgment, the Joint Liquidators were entitled to challenge the total sums claimed by the present Protector as remuneration, and when challenges were mounted by the Joint Liquidators, they and the present Protector and his supporter, R&H, respectively became at risk as to the costs of the 'hostile' challenges.

78. Since the present Protector was claiming a profit out of the TDT assets, it cannot, as I see it, be said that he was acting neutrally. Nor, in my view, can it be said that he was acting in the interests of either the beneficiaries or the creditors of the TDT in pursuing the present Protector's remuneration application. I have therefore concluded that it would not be appropriate for me to allow either the present Protector or R&H to claim any of their respective shortfall costs out of the TDT assets either by way of indemnity or at all. The position might have been different if, under the Royal Court's inherent jurisdiction, I had awarded the present Protector either the entire sum claimed by him or almost the entire sum claimed by him. But I did not do so. On the contrary, in reaching my decision under the inherent jurisdiction, I reduced the entire sum claimed by the present Protector very considerably. In monetary terms, the effect of the reductions which I made was, self-evidently, highly substantial. In my judgment, it would not be just in these circumstances for me to allow either the present Protector or R&H to recover out of the assets of the TDT the costs which they will not recover from the Joint Liquidators under the proportionate costs order which I have made in their favour in relation to the present Protector's remuneration application. I shall therefore declare that they are not entitled to claim any of their shortfall

costs of the present Protector's remuneration application out of the assets of the TDT. As a result, they must bear any such shortfall themselves.

Priorities

79. As I have already mentioned in several judgments during the course of Guernsey 2 and also in oral argument on these applications relating to the costs of the remuneration applications, generally, Guernsey 2 is not the forum for arguments on matters of priority or set-off. Such matters will fall to be resolved either in Guernsey 1 or in separate proceedings brought after the results of the many appeals to the Privy Council in Guernsey 1 are known. It therefore follows that the orders made by me on the R&H remuneration application and the present Protector's remuneration application respectively should be expressed in terms reflecting that the orders are made without prejudice to the determination of all issues as to the priority, if any, of the orders and judgments made in favour of R&H and the present Protector.

Leave to appeal applications

80. As I confirmed at the start of the oral hearing on 19 May 2017, I have extended time for appealing against all orders and judgments made by me in Guernsey 2 until after I have delivered this judgment and the forthcoming judgment on the costs of the costs and expenses applications in Guernsey 2.

Patrick Talbot QC
Lieutenant Bailiff

22 November 2017