Investec Trust (Guernsey) Limited v Glenalla and Rawlinson & Hunter
Royal Court
3rd July, 2018

JUDGMENT 29/2018

Application to vary the terms of a Receivership Order. Further applications to add Fort Trustees Limited and Balchan Management Limited to the proceedings and stay the judgment of LB Chadwick of December 2013.

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION
Civil No. 1462/2010

Between:

(1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED

Plaintiffs

and

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LTD
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) RAWLINSON & HUNTER TRUSTEES SA

Defendants

and

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LTD
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED

Third Parties

and

(1) FORT TRUSTEES LIMITED
(2) BALCHAN MANAGEMENT LIMITED

Intervening Parties

Hearing dates: 2nd and 3rd July 2018

Judgment handed down: 3rd July 2018

Before Her Honour Hazel Marshall QC. Lieutenant Bailiff
Sitting alone

Counsel for the Plaintiffs: Advocate J M WESSELS

Counsel for the First to Fourth Defendants: Advocate E R GRAY

The Fifth Defendants did not attend and were not represented

Counsel for the Intervening Parties: Advocate N ROBISON

Cases, texts and legislation and other materials referred to:

Legislation:

Royal Court Civil Rules 2007 rule 50.2

Cases

(a) Guernsey

Murfitt v States of Alderney (No 2) [2003] GLR note 10 (25th September 2003)
Investec Trust (Guernsey) Limited and anor v Glenalla Properties Ltd & Anor [2018 UKPC7]

(b) United Kingdom

Locabail (UK) Ltd v Waldorf Investment Corporation (No 4) [2000] HRLR
Westminster City Council v Porter [2003] Ch 436
Taylor v Lawrence [2003] QB 528
Lawal & Anor v Circle 33 Housing Trust [2014] EWCA Civ 1514

(c) European Court of Human Rights

Gençel v Turkey App No 53431/99 (23rd October 2003)
Assanidize v Georgia App No 71503/01 (8th April 2004)
Zehenter v Austria App No 20082/02 (16th July 2009)
Vojtechova v. Slovakia App No 59102/08 (25th September 2012)
Bochan v Ukraine (No 2) App No 22251/098 (5th February 2015)
Piper v United Kingdom App No 44547/10 (21st April 2015)
Moreira Ferreira v Portugal (No 2) App No 19867/12, 11th July 2017
Aviakompaniya A.T.I ZAT v Ukraine App No 1006/07 (5th October 2017)

Other materials

European Convention on Human Rights and Fundamental Freedoms: Articles 6, 8 and 41

JUDGMENT

THE LIEUTENANT BAILIFF:

Introduction and summary history

1. There are before me today, in effect, three applications, which are part of the aftermath of the Tchenguiz litigation which has been become known as the "Guernsey 1" proceedings. I am not going to try to recite in detail what has happened in that case, so what I say may well be an over-simplification (and to that extent, inaccurate) of the background. It is though, sufficient, for the purpose of these applications.

2. The two Plaintiffs in this matter are Investec Trust (Guernsey) Ltd and Bayeux Trustees Ltd ("I&B" or "the Trustees"), who are the original Trustees of a Guernsey based trust (although its operation is governed by Jersey law) known as the Tchenguiz Discretionary Trust, or the "TDT". The Tchenguiz Discretionary Trust is the name of the trust from the point where it was formed in 2007, as part of a split of a larger family trust (the Tchenguiz Family Trust) that had been previously operated for the benefit of the larger Tchenguiz family. The TDT operates for the benefit of Mr Robert Tchenguiz and his own family, and through it Mr Robert Tchenguiz effectively ran a business empire.

3. The TDT owned its investments through some 30 or so companies, with complex inter-company loans and financing arrangements, structured for best taxation and commercial effect. The detail, which is described in the recent Privy Council judgment in this case *Investec Trust (Guernsey) Limited and anor vs Glenalla Properties Ltd & Anor* [2018 UKPC7] paragraphs [5]-[11], is not particularly important. The important background point is that the way in which the Trust was operated resulted in various inter-company indebtednesses arising, and also loans being in effect made by what one might call "the Trust" to companies within the structure which were in need of finance. The way in which finances were deployed amongst the relevant companies was recorded as a series of loans (or loan re-payments) made from the company with available assets up the chain of holding company ownership to a common parent (or to the Trustees themselves) and then down the chain of subsidiary companies to the company requiring the finance. This, and the origin of the TDT in the split up of the TFT, had resulted, at the material time, in there being large loans recorded as owed by the Trustees to the First Defendant (Glenalla) and to the second Defendant (Thorson), but it was all as part of the investment operation of the overall assets of the Trust, for the benefit of the Robert Tchenguiz family.

4. In late 2007, in the aftermath of the general financial crash and turmoil that began in mid-2007 and worked its way through to 2008 and even later, the TDT operating companies exhausted their then loan facility with the Icelandic bank, the Kaupthing Bank, and needed a refinancing package. Some company restructuring was required in order to implement this. The arrangements were apparently conceived and implemented in something of a hurry, at or around the beginning of December 2007. The idea was that the shares of 11 BVI companies owned by the TDT (including Glenalla and Thorson) would be transferred into a company (the Fourth Defendant, Oscatello Ltd,) which was acquired off the shelf by the third Defendant (Eliza Ltd, already owned within the TDT), and the shares of Oscatello would be used as security for a very large loan (some £371 million I think it was) to be granted by Kaupthing to Oscatello, to refinance the existing indebtedness of the companies. At the same time, as part of the package Mr Robert Tchenguiz was released from a personal guarantee to Kaupthing which he had given to support emergency lending previously granted by it.

5. The idea, it is said, though, - at any rate by the parties on Mr Robert Tchenguiz's side of the arguments which have developed - was that not only the assets, but also the liabilities between the transferred companies and the Trust itself (ie the Trustees) would be transferred into the new framework. Thus, the loans recorded as outstanding and due from the Trustees to Glenalla and Thorson ought, it is said, to have been novated into the new company structure such that the Trustees would no longer be under this recorded liability. In practice, though, this did not happen; those debts were not included in the liabilities recorded as being

part of the pool of assets and liabilities put into Oscatello, and which was to be the security for the refinancing package.

6. This matter was not dealt with prior to the eventual collapse of the Kaupthing Bank, later in 2008. The BVI companies, including the first four Defendants went into liquidation at about this time, as well. Arguments then ensued, including about whether the Trustees, as Trustees of the TDT, actually did owe the money to Glenalla and Thorson, or, if they did, whether the Trustees had been negligent, and indeed grossly negligent, in failing to secure the novation of these loans into the new company structure, and the release of the Trust's liability.

7. The argument that it was negligent of the Trustees not to ensure the novation of these loans was something which would have depended, obviously, on the possibilities of both lawfully effecting such a transaction at the time when it would have to have been undertaken (given the perilous financial state of the companies involved), and also of obtaining the consent of the Kaupthing Bank to accept the novation and thereby accept what would have been an effective reduction in the apparent value of its security.

8. I will mention at this point, as it becomes very relevant later, that one of the companies which was *not* included in the refinancing package arrangements, but which was owned directly or indirectly by the Trustees as part of the TDT, is a company called Iver Resources Limited, ("Iver"). Iver owns a long leasehold (I believe it is) on a very prominent and unusual building in London. This is the Royal College of Organists building ("the RCO"), a grand house which is also the family home of Mr Tchenguiz, his lawful wife, his children and his partner, and has been for some 27 years. The effect of this structure of ownership, of course, is that ultimately Iver, or its interest in the RCO, is an asset which is an asset of the Trust, and in a situation where the trust assets are insufficient to discharge any other liabilities that may be found to have been incurred by the Trustees, or otherwise to rest on the TDT, it is potentially capable of being realised for the purpose of contributing to the discharge of such liabilities.

9. Returning to the history, the Guernsey 1proceedings were then commenced, in 2010. They were initiated by the Plaintiffs, the two Trustees, seeking (relevantly for present purposes) declarations that they were not indebted to Glenalla and Thorson, who were by then in liquidation and acting through their liquidators. This prompted Defences and Counterclaims with regard to this and other matters, including the counter-allegations that the Trustees had been negligent and indeed grossly negligent, to which I have already referred. Ultimately, the disputes led to a major trial which was held, in June 2012, taking some three weeks, before Lieutenant-Bailiff Chadwick.

10. What then happened, expressed neutrally, is that there was a 17 or 18 month delay before the judge actually issued his judgment. This is obviously rather unfortunate. It is said that it was occasioned principally by the fact that in October 2012 there was an application made by the then trustees (by then the Fifth Defendants, "R&H") to adduce further evidence into the case. R&H had become trustees, at the point where I&B, the original Trustees came into conflict with the interests of the companies within the trust and so forth, because of the various claims being made. It was, not surprisingly, inappropriate for them then to continue to be trustees of the TDT, and I understand that Mr Tchenguiz, exercising his power as protector of the Trust to replace or appoint trustees, procured the result that R&H took over as the then trustees of the TDT, in particular for the purpose of dealing with the issues between the beneficiaries of the TDT and I&B that were arising in these proceedings.

11. As I said, there was an application by R&H to adduce further evidence, made in October 2012, and based, I understand, from information which Mr Tchenguiz had obtained in other

proceedings in the UK, the detail of which is not relevant just here. It was followed later by applications to amend the pleadings, for more discovery, and to recall witnesses. These applications were made to Lieutenant Bailiff Chadwick, who had not yet handed down his judgment, but were refused. This produced further appeals to the Court of Appeal, which were unsuccessful, the Court of Appeal holding that the Lieutenant Bailiff had acted within the proper scope of his jurisdiction in terms of case management and so forth. Consequently, the judgment in the actual case was then handed down only shortly after the termination of the final appeal in that series in the Court of Appeal. This was only in December 2013, hence the amount of the delay.

12. It is said on the part of the Applicants in these applications, the intervening parties, Fort Trustees Limited and Balchan Management Limited, ("F&B"), who are the current trustees of the TDT after being appointed in place of R&H in circumstances which I will mention in due course, that in the course of the delay in giving his judgment the Lieutenant Bailiff sent papers back to the parties, and he then had to recover those papers in order to complete his judgment, giving rise, they say, to the clear inference that the delay caused the judge to forget, or not to attribute appropriate weight, to the evidence. This allegation is supported, they also say, by the fact that it was found on the substantive appeal from his decision that the judge had expressed his reasons, in particular (I think) those for holding, ultimately, that the original Trustees had been negligent but not grossly negligent in the way in which they handled the matter, in such a succinct way as to be described as "*in telegraphic form*", indicating that he could not really have remembered or considered the evidence properly. These allegations have endured through the further and later conduct of the proceedings, and I mention them because they are rather important in relation to the applications before me today.

13. Again returning to the story, what happened subsequently was that various matters went further. The ultimate substantive judgment of Lieutenant Bailiff Chadwick went to the Court of Appeal in Guernsey and his judgment was upheld in relation to his findings of fact and his conclusions about negligence. As I understand it, the only matter on which the Court of Appeal did reverse the Lieutenant Bailiff's decision was the question of the extent of the Trustees' personal liability. The Court of Appeal held, reversing the Lieutenant Bailiff, that this was not an unlimited personal liability of the Trustees, but was a liability that was limited to the trust assets. That was a major aspect of the arguments before the Court of Appeal, but not one with which I am here concerned.

14. There were, though, more appeals (in fact on eight particular matters) to the Privy Council. Those appeals were all heard together, and the Privy Council's judgment was handed down relatively recently, in April or May this year (this detail does not really matter). In their judgment, the Privy Council reviewed the history of the matter and in regard to the issues which are relevant here, they upheld the judgments of the Court of Appeal, and thus of the judge below in so far as he had been upheld in the Court of Appeal. In particular, the Privy Council considered and dismissed arguments that, in effect, there had been a mistrial, in that the introduction of the proposed further evidence, and amendment of pleadings, etc, ought to have been allowed but was not. The Privy Council agreed that the matter had been dealt with appropriately in the Court of Appeal, upholding the case management decision of Lieutenant Bailiff Chadwick at the time.

15. It is also important for present purposes to note what occurred in the appeals, remembering the paucity of reasons given by the judge. The Court of Appeal commented that although there had been a paucity of reasons, nonetheless they had reviewed the evidence and had come to the conclusion that the evidence justified the conclusions that the Lieutenant Bailiff had actually expressed at the end of the day. As a matter of procedure, the Privy Council itself would normally not go into evidence in detail, but would usually, if it concluded that there had been a mishap in some respect, simply decide to remit the matter for a retrial. In

this instance, however, it emailed the parties prior to the hearing of the appeals to it, and said as follows:

> *"The Board is alert to the possibility that the determination of the issues arising in these appeals might require consideration of the question whether even if not grossly negligent the former trustees unreasonably incurred their liabilities to the BVI companies within the meaning of Article 26 of the Trusts (Jersey) Law…"*

(I should pause here to recall that although these proceedings have been carried on in Guernsey that is because Guernsey is where the Trustees are resident and the Trust itself is a trust that is governed by Jersey law.)

> *"…by not arranging for their discharge or novation during the period between August 2007* [the inception of the Trust] *and October 2008* [the time of the collapse of Kaupthing bank] *inclusive. This might require a further factual analysis of the evidence deployed before the Lieutenant Bailiff, which, so it is submitted, neither he nor the Court of Appeal considered it necessary to undertake. The Board wishes to hear brief submissions tomorrow about the following matters:*
>
> 1. *Whether in that eventuality it should simply remit that factual analysis and if so to whom;*
>
> 2. *Alternatively, whether the Board should conduct that analysis itself and if so on the basis of what evidence deployed before the Lieutenant Bailiff.*
>
> *"The Board is not seeking oral submissions or even detailed written submissions about the merits of that factual analysis but in the event that any party submits that the Board should conduct it, all parties will be requested to provide a summary reading guide identifying the relevant evidence from among the materials already before the court."*

16. That email was followed up, and I am told that the ultimate result was that all parties did provide the Board with a reading list which the Board then considered. As it says in its judgment, it actually went and considered those particular matters of evidence, to analyse them for itself, and those were the foundations of the conclusions which it expressed that, at the end of the day, the Court of Appeal had not in fact breached any Article 6 rights (or indeed any Article 8 rights as was also mentioned) of the parties, in particular of the then trustees, or the, so to speak, "trust interested" parties, in its conduct of the matter. Having looked at the evidence the Board appears to have concluded that the findings made showed that there was a clear basis on which the evidence supported the conclusions that had been reached.

17. It is said by Advocate Robison, appearing on behalf of the current Trustees of the TDT as Applicants and intervening parties, that the email shows that the Board did not in fact consider the full scope of the matters that it would have needed to consider if it had carried out a complete review of all the matters that needed to be gone into to assure itself that all the evidence in relation to those matters was before it, and that it had carried out a review of that evidence. That is a submission which I will return to later, as it is part of his later submissions about breaches of the Trustees' right to a fair trial, in effect, in the Privy Council.

18. That, then, provides the background to the relevant findings at the end of the day. The crucial findings for present purposes are, firstly, the finding that in fact (and law) there had

been no novation of the relevant liabilities of the Trustees to Glenalla and to Thorson, such that the trust assets in the hands of the trustees were still liable for those loans, which are the subject of the claims made on behalf of those companies by their liquidators, and, secondly, the finding of the Lieutenant Bailiff, endorsed by the Court of Appeal and held again in the Privy Council to be sufficiently supported, that whilst the Trustees might have been negligent in not actually ensuring that these liabilities were included in the novation within the financial restructuring package that was designed at the end of 2007 (it being there assumed, of course, that this could have been achieved) they were not grossly negligent then, nor in failing subsequently to procure that those liabilities were effectively novated into the structure, so as to protect the trust assets further, at that stage. Those were the crucial findings for present purposes, because it is on those findings that the ultimate decision in the case, which has resulted in a judgment in favour of the BVI companies and against the trustees, actually rests.

Overview of the present position

19. It will be appreciated that the upshot has been that the TDT assets are burdened with the money judgment in favour of Glenalla and Thorson which was originally obtained from Lieutenant Bailiff Chadwick, quite apart from any issue about sums which I&B (or R&H) may be entitled to by way of remuneration or indemnity as trustees of the TDT. Assets of the TDT are, it is common ground, insufficient to meet all its liabilities, and it is therefore what has come to be known as an "insolvent" trust. I refer to the current extent of trust assets later.

20. As to the amounts actually in question, I am told that the current state of the judgment in the case is that the judgment itself totals some £139 million. Interest is running on that, (and I think it would be at judgment rate, although that has not been confirmed but it does not matter for present purposes,) at about £32,000 a day, or £224,000-odd a week, or £973,000-odd a month. Consequently, there is a significant further amount accruing. I pause to note that if that is at judgment rate, it might be said that, in terms of loss to the joint liquidators and those who are entitled to the assets that comprise the repayment of these loans, that is a high rate relative to normal commercial rates these days. However, even if commercial rates are a better comparison, the interest is still likely to be significant.

21. The position with regard to the assets with which I am concerned today is that as a result of the judgment of Lieutenant Bailiff Chadwick delivered in December 2013, there was an order setting up a receivership ("the Receivership Order"), although on examination the powers granted to the Joint Receivers are said to be those of a receiver and manager, to get in and control the assets of the trust in the interim period. The interim period was, of course the period necessary to protect those assets, pending the appeals that were then on foot in the Court of Appeal in Guernsey and then ultimately the Privy Council.

22. The Court of Appeal granted a specific stay of execution in relation to that order, to protect the potential threat at the time to the RCO building, the family home. The terms were that by the order that was made, I think initially on 24th January 2014, but subsequently repeated in material respects on 28th April 2015, Mrs Helen Foster Green and Mr Kelvin Mark Hudson were appointed without security until further order as Joint Receivers and managers of the assets described in a schedule, effectively of the assets of the various companies in the TDT. They were also authorised to take such steps as they considered appropriate to obtain possession and control of and to realise those assets, including assets of the companies listed in the schedule. Upon written notice from the Joint Receivers, the former trustees (that was a reference to I&B) were forthwith to transfer to the Joint Receivers such of the assets that were requested by the Joint Receivers. Pending such transfer, the former Trustees should hold the assets to the order of the Joint Receivers. The Joint Receivers were also given, specifically, full powers to do various matters, such as postponing the realisation of assets or taking any step in relation to dealing with them in any way, and so forth.

23. So, the Joint Receivers were granted full powers to deal with the assets in the schedule itself, which included the 30-odd companies that I have referred to already, as being those in which the shares held by the former Trustees as trustees, the extent of this having already been ascertained, and cash held by the former Trustees. There was, though, an express exception in relation to the shares of Iver. The regime that was decided upon to deal with those shares, as I understand it, was that those shares were to be put into the possession of the Joint Receivers, but in their personal capacity. They were prohibited, at that stage, from taking any further steps to transfer those shares formally under the control of themselves in their capacity as Joint Receivers. That is the position that has pertained, firstly under the original Receivership Order that was in aid of Lieutenant Bailiff Chadwick's judgment and secondly in relation to a continuation of that order which was granted by the Court of Appeal pending appeal to the Privy Council.

The present applications

24. Since the appeal to the Privy Council has now concluded, the application which is the first in time of those before me is one made consequently on behalf of the joint liquidators of the four BVI companies that I have mentioned, made through Advocate Gray. That application is that the schedule to the Receivership Order should be varied so as to add the 2,000 ordinary shares of £1 each in Iver, together with any sums owing or due from Iver to the Plaintiffs as Trustees of the TDT, to the assets listed in the schedule to that order, so that the Joint Receivers shall be the joint receivers and managers of those assets in accordance with the terms of the Receivership Order. That is then requested to expressly be confirmed to replace the previous orders made in respect of the personal holding of those shares by the Joint Receivers.

25. That application was made on 21st May 2018, obviously in fairly short order after the decision of the Privy Council became known. It resulted in responding applications.

26. Some time in about November 2017, R&H, as the trustees of the TDT who had been charged with running affairs in relation to the Guernsey 1 proceedings up to that point, were replaced as trustees by Fort Trustees Limited and Balchan Management Limited, ("F&B") who are the Intervening Parties. The position is that they were, as I understand it, joined by the Privy Council in the proceedings in the Privy Council, presumably before the judgment was handed down, or at that time, as the appropriate replacements for R& H, they standing in the shoes of trustees of the TDT at the time. The next application in time, which has therefore been made, first, by Advocate Robison on behalf of those parties, is that they should be added to the proceedings before the Royal Court bearing the relevant Royal Court civil file number Civ. 1462.

27. His second application is then made on their behalf, for a stay of execution on the judgment of Lieutenant Bailiff Chadwick handed down on 8th December 2013 to be granted for one month from the date of the stay order, so as to allow the Intervening Parties, (that is the now trustees, F&B) to lodge an application (unspecified, though later explained) to the European Court of Human Rights (hereafter referred to as "the European Court"), and/or to file any further application within these proceedings which may result in the substitution for the long leasehold of the RCO held by the current trustees of the TDT of an equivalent sum of money or other assets. So, in effect, what is being said is that the TDT want the opportunity of getting the long leasehold of the RCO building out of the threat of realisation by substituting the equivalent sum of money, whatever that may mean or be. The stay of execution, it is suggested, should be granted only in respect of that part of the assets of the TDT which comprise the shareholding in Iver and that company's leasehold interest in the RCO building. So, it is a limited stay of execution, which, it is submitted, is in effect continuing the stay of execution that had previously been granted during the currency of the proceedings by the Court of Appeal. It is then suggested that there should be a proviso to the one month stay

requested, to the effect that, provided the European Court application and the substitution application which are envisaged are made by the Intervening Parties within the said period of a month, the stay of execution should then continue until final determination of those two applications, whichever is the later. That application was made on 5th June.

28. The matter has come on previously, I think, for directions hearings and so forth but it has eventually come before me substantively at this point in time, which is a hearing on 2nd and 3rd July.

The Joinder Application

29. The first matter which is logically to be dealt with is the application by F&B to be joined in the proceedings. Ms Gray, on behalf of the joint liquidators of the BVI companies, objects to that, because of the effect of the judgment that has now been obtained in the Privy Council. She submits that F&B, as current trustees of the TDT, have no more interest in the trust assets and that in effect there is nothing for them to be joined to, because these proceedings have already been disposed of. Advocate Wessels, on behalf of I&B, as the original Trustees, is more neutral on that point, although he says that in fact he is of the view that F&B were really joined into the proceedings by the Privy Council, so that they are effectively joined already. If they were not joined, he would argue that there is no reason why they should be joined now and to that extent, he supports Ms Gray.

30. It seemed to me at the time that this argument was really a technical objection only. In my judgment Advocate Wessels is probably right that, in fact, F&B have effectively been joined into these proceedings already, because they have been amended by the effects of what has happened in the Privy Council, and it is all one set of proceedings. On the basis that there are disputes of substance on the other applications, and that F&B are here to advance their case in that regard, the pragmatic and proportionate thing to do, it seemed to me, was to join them formally as parties if necessary, and consider those issues on the merits . I therefore did this at an early stage in this hearing.

31. I should record that there was a further objection to joinder which was advanced in Ms Gray's skeleton argument, to the effect that there was, on examination, no evidence from anyone before the court with a clear authority to act, or to give evidence, on behalf of F&B. Some of the evidence put forward by them had been given by persons who had previously given evidence on behalf of R&H, and she pointed out that it was apparent that at this time R&H's lawyers (at any rate) were saying they had never given any instructions for anyone to give any evidence. So, there was some question mark about the authority for that to be done.

32. As to the authority point, it seems to me, for a start, that a witness is entitled to give evidence for any party. It does not really matter who exactly they are at the time, so it would not have been inappropriate or improper for persons who had previously given evidence on behalf of R&H when a party, also to give evidence subsequently if requested to do so on behalf of F&B.

33. The more fundamental authority point was really pursued on the basis that there were no apparently valid instructions from the actual entities, F&B. When raised, it was dealt with by a late affidavit of a Mrs Patricia Whitfield, who was an officer in the group of companies of which F&B are part. That was on the face of it somewhat deficient initially, in that she only said that she was a director of the parent company of those companies, but I was told she was in fact a director of both companies and as she was present in court she gave formal evidence to this effect as the quickest way of resolving that point. So, the joinder issue is now effectively off the table, and Ms Gray confirmed in her skeleton argument, questioning the status of evidence that was purporting to be given by various deponents, there was no

intention to cast any aspersions on Advocate Robison's integrity or conduct of the matter. This point being of no more than peripheral relevance to the real substance of the matter, no more need be said. So, I then turn to the remaining applications.

The stay application

34. The next logical application is therefore the application of Advocate Robison, on behalf of F&B, for the limited stay of execution which he is seeking, already described. The effect of that if it succeeded would, of course, be to prevent any further step being taken, such as the step which Advocate Gray is seeking, which is the transfer of the shares in Iver into the receivership regime full and proper, such that they will be capable of being dealt with.

35. I ought to mention at this point that I enquired about the assets which were available to meet the judgment that has now been obtained. I was told that the Joint Receivers have gathered in sums of something of the order of £20-25 million as a pot of cash, in effect already realised, which might be available to meet the judgment or other claims that are made on that pot. This, it is pointed out, comprises the whole of the general receivership assets, so that, apart from the claims under the judgments that the joint liquidators are seeking to enforce against the trust assets to recover their debts, there are questions of any rights of other creditors, including the trustees, be they the original Trustees, the now former trustees R&H, or the current trustees, F&B, to claim any sums in relation to expenditure or fees, etc. which they have incurred in the process of acting as trustees. There are thus some significant claims on the assets. Given the thinness of legal authority on how the assets of "insolvent" trusts are to be dealt with, issues as to priorities may therefore arise.

36. Apart from this pool of cash, it appears that the RCO, the long leasehold interest in this family home building, is the only other material or significant asset which is within the trust structure. On enquiring about the value of this, I was told that there had been a valuation obtained from Savills, which was specifically obtained for the purposes of meeting ATED, (that is the UK's Annual Tax on Enveloped Dwellings) and was therefore not expressly (and indeed expressly was not) a valuation conducted under the Royal Institution of Chartered Surveyors' Red Book principles, which are the standard for open market valuations. It was not clear, though, what the difference was, and it is also the case that one would have expected both bases to produce an open market valuation.

37. I conclude that the Savills valuation figure therefore gives at least an indication of the market value of this property. On this basis, at the moment the value of this property would be of the order of £23 million. However there is a separate charge on the property, outside the trust and from a completely different lender, for £5 million, so that property represents potentially some £18 million of available assets. Obviously, on top of that, the question of whether that would be the net available sum would depend on questions of any tax liabilities or fees or agency costs or anything like that, in terms of the costs of a sale. So, that might not be the net figure but I conclude that, at the end of the day, the pool of available trust assets would seem to be worth somewhere between £33 million and £38 million, on the basis of the figures I am being given. At any rate, that is a working sum. However, as I have said, the claims on that are not confined to the judgment in this case, but would include other matters as well, and, as indeed is emphasised by Advocate Robison, issues of priority in terms of who might have first call, or what ranking any claims on this fund might have, will have to be sorted out at some stage. The above, though gives a broad indication of what is at stake in this matter.

38. The grounds for the stay application are that F&B, and also, it transpires, Mr Tchenguiz and two members of his family, have given instructions that an application should be made to the European Court in Strasbourg for determination that their human rights have been breached in the course of the conduct of the Guernsey 1 proceedings.

39. I did not indicate the basis of the applications to introduce amendments and fresh evidence at an earlier stage but I do so now, because it is material to this assertion. The applications that were made in late 2012 and 2013 arose because there were proceedings brought by the SFO against Mr Tchenguiz, because they considered that there was evidence that there might have been some criminal activity in the context of the conduct of arrangements with the Kaupthing Bank and the financing transactions. I think this was probably with regard the Kaupthing Bank and its affairs, but any way, in the course of the investigations which were conducted, certain warrants for searching premises and obtaining documents and so forth were obtained and executed.

40. Mr Tchenguiz and also his brother Vincent, who was in the same position with regard to his own part of the former Tchenguiz Family Trust, made complaints against the SFO in the English courts, about the obtaining and execution of these warrants, which complaints were upheld. Documents were accordingly found to have been obtained, and the warrants prosecuted, wrongfully. As a result of all this, firstly, Messrs Tchenguiz obtained certain documents which they had not, they say, known about before. Secondly, it became apparent (Mr Tchenguiz says) that the evidence of certain witnesses whose evidence was material in the context of allegations such as, in particular, whether Kaupthing would have consented to the novation of the TDT's liabilities to Glenalla and Thorson to Oscatello, in the context of the steps that were being taken regarding the restructuring, was likely to have been inhibited by the prospect of the SFO proceedings. Indeed, I think it is also said that the SFO applications resulted, in effect, on pressure on I&B to suppress relevant evidence that might otherwise have implicated them in the SFO investigation.

41. Consequently, it was argued that there was a clear and strong suspicion that the evidence that was before the Lieutenant Bailiff was incomplete or tainted. The further applications that were made to try and introduce the further evidence obtained should, it is said, have been allowed because this evidence only emerged after the trial of the action had actually taken place and could not have been reasonably obtained beforehand, but could have had a significant effect on the ability of the then trustees (R&H) to contest the evidence that was being advanced against them by the former Trustees (I&B) with regard to the questions of novation and negligence. Lieutenant Bailiff Chadwick disallowed this evidence at the time, despite the applications, on the basis in principle (I think) that it had been sufficiently reasonably available beforehand. He disallowed the requested amendments on the basis that the claims that were now being made could and should have been advanced at the time in the original pleadings. Therefore, he did not look in detail at the evidence that was put forward in support of these but disallowed it in consequence. The Court of Appeal heard appeals against these decisions and, as I have said, concluded that at the end of the day the decisions he made had been within his case management powers . They also, as I understand it, refused a separate and further application made by R&H to allow this fresh evidence to be introduced on the appeals themselves. So, on any basis they declined to allow this material into the case at all, and this was the basis of the complaints made by the then trustees (I think by then F&B) to the Privy Council about the way in which the matter had been conducted, and these complaints were, indeed, raised on the basis that there had not been a fair trial of the matter, and hence there had been breaches of the trustees' rights under Article 6.

42. It is to be noted that the grounds on which it is now said that, despite the judgment of the Privy Council, there should be a stay of execution in terms of working out the consequences of their judgment which effectively confirms the relevant orders made by Lieutenant Bailiff Chadwick, is the prospect of an application to the European Court, which must apparently be made against the UK as the High Contracting Party under the European Convention on Human Rights, responsible for Guernsey's observance of human rights principles.

43. The first grounds for the proposed appeal to the European Court were outlined in general in the stay application and evidence in support, but were then elaborated on by the production, on the second day of the hearing, of a draft Application to the European Court, which has been drafted by eminent counsel in Matrix Chambers in the UK. It, amounts to complaints that the human rights of (presumably) both the F&B, representing the interests of the trustees at the time of the TDT, and Mr Robert Tchenguiz and his brother Mr Vincent Tchenguiz and also their mother Violet Tchenguiz, have been breached because of an alleged breach of their Article 6 rights to a fair trial, arising both from the delay in the original judgment and also the refusals of the Lieutenant Bailiff and of the Court of Appeal to allow the amendment of the pleadings and refusing permission to require further disclosure, to obtain additional witness evidence and to allow the recall of witnesses.

44. The second and further grounds of the proposed appeal are that because Iver hold the long leaseholds of the Royal College of Organists, which is the family home, but which now comes under threat of being taken in satisfaction of this judgment, then, because of the fact that this threat arises from a judgment based on defective procedures in the Guernsey courts and beyond, and its thus having been both obtained and upheld on a flawed basis, this constitutes an infringement of the Tchenguiz beneficiaries' human rights because of the consequent threat to their possession of their family home if the shares in Iver, or the long leasehold, are sold and they are required to give up possession as a consequence of that happening.

45. Thus, the application is based on a complaint first with regard to the application of Article 6 and a breach in that respect and second a complaint in relation to Article 8 and a breach in that respect, as I understand it.

The law

46. Advocate Robison refers to the law in relation to stay of execution and points to the fact that under the *Royal Court Civil Rules 2007* rule 50.2 the court can grant a stay of execution at any stage. I think the phraseology that is relied on is quoted in one of the skeleton arguments. Advocate Robison quotes it from rule 50.2 (c):

> "*The court may stay the whole or part of any proceedings or judgment generally or/and to the specified date or event."*

So, that is the jurisdiction, which I am invited to invoke, and it appears to be entirely general.

47. Advocate Robison makes submissions as to the basis for operating this jurisdiction by reference to cases where a stay of execution pending an appeal has been granted. In summary, the test is along the lines of asking whether there are grounds of appeal that are not without substance and the question is whether an appeal would be rendered nugatory if a stay of execution were not granted. He referred me to authorities, but I do not think I need to refer to these. In the end, in my judgment, the principle is a balancing exercise, namely, what is the risk of injustice to one party, or to the other, if a stay is, or is not, granted?

48. Advocate Robison accepts that consideration of this can include considering the prospects of success in the contemplated appeal and I think that that is taken into account by the point that the grounds must, at least, be "not without substance". Advocate Robison invites me to rely, by analogy, on consideration of the test for granting a stay of execution pending appeal, as to which he further relies on the fact that previously the Court of Appeal has considered it appropriate to grant a stay of execution, submitting that he is effectively asking for this to be continued,.

49. It is said on the other side, however, that that is completely irrelevant because we are no longer in the situation where a judgment which has been given is at risk of being upset by a successful subsequent appeal, and that that, of course, is the occurrence against which a stay of execution pending appeal is protecting. This is because we now have, at this point (it is argued) a final judgment, in that the Privy Council's judgment is final as far as these Guernsey proceedings are concerned. So, it argued, it is not appropriate to draw any analogy between that and the prospects of success on consideration of the law regarding a stay pending an appeal.

50. I certainly take the point that this is a different case. In fact, it seems to me that that point is really at the very heart of the question, what I should do on this application. Having said that, of course, it seems to me that there is some kind of loose analogy, since the point of a stay of execution is to provide safeguards so that a party's rights which may be vindicated in the future are not irrevocably prejudiced, or unfairly or extremely prejudiced, beforehand, depending on the balance of rights as they appear at the current stage in proceedings. I do not think, however, that the actual dicta in cases of appeals, relating to prospects of leave to appeal or success on appeal, are of particular assistance. In my judgment it is in fact simply the general prospects about the relative risks of injustice which are the touchstone principle.

51. As to this, Advocate Robison's arguments in his initial skeleton argument are to the effect that if no stay is granted there is a risk of irremediable harm to the interests of, in particular the Tchenguiz family, through their becoming deprived of their family home - which is a unique and irreplaceable building - despite the prospect of a finding *ex hypothesi* (on his argument) that their Article 6 and Article 8 rights have been infringed.

52. This submission seems to me to somewhat conflate the propositions with regard to Articles 6 and 8, but in essence that was the way in which Advocate Robison put the argument in his opening skeleton argument. He contended further that matters of convenience suggested that it was better to leave the situation as it now stood. He suggested in particular that priorities between those entitled to claims on the assets of the TDT were unclear, and would need to be determined before it would be reasonable to take any further steps towards liquidating the TDT assets, and in particular the shares in Iver or the underlying long leasehold interest in the RCO.

53. He advanced the proposition that this interference with the Tchenguiz family's Article 8 rights could only be justified if it were proportionate to do so, and submitted that it was not proportionate to do so because the context of the pending application to the European Court, with some prospect of success, showed that it would not be.

54. Secondly, he submitted also that it would not be proportionate to refuse a stay, because of the possible alternatives under which the house could instead be transferred into an alternative trust for the benefit of the Robert Tchenguiz family with the cash equivalent of its value being substituted in the Joint Receivers' hands. This, he said, was a prospect that had not been examined, and it needed to be considered before any question of transfer of the shares to the Joint Receivers in that capacity arose because, he submitted, such a transfer would in effect prevent any such negotiations taking place. He also submitted that there were really no conceivable risks to the joint liquidators and the BVI companies in continuing a stay because everything is protected and in effect held in position.

55. With regard to the last proposition, this seemed to me to be rather thinly based. The conceivable risks to the BVI companies lie in the erosion of the value of the judgments that they have obtained in the event that the application to the European Court achieves nothing of success in terms of preventing the realisation of the RCO building. This is partly because of the amounts of interest that are currently accruing, but also, in my judgment is to be viewed in

the context of the fact that these debts were accrued as long ago as 2008 or 2009, and certainly no later than 2010, proceedings having been commenced then. The companies and their liquidators - more accurately the creditors of the companies - have been kept out of their money for nearly five years since judgment was actually delivered in the case by the appeals that have been unsuccessful. So, the risk, of course, is the continuing risk of the erosion of the value of their judgment, and, indeed also, as is pointed out by Advocate Gray, that of fluctuation in property values. It is, of course, general knowledge at the moment that the prices of high-end London property such as the RCO have been dropping. I think I can take general notice of that because it has been generally a commentary that has been made as a matter of public knowledge. That would not, it seems to me, be necessarily a decisive point but the broad point is that the fluctuation in the potential value of assets is a matter which in principle ought to be in the hands of those charged with actually realising those assets to best advantage in the interests of those entitled, to make a commercial decision about. So, it seems to me that there is, in principle, a potential risk and difficulty for the BVI companies in further delay, which it is only fair to take into account.

56. The second point which I can deal with at this stage is the argument about priorities. I have said that there are various people whose claims on these trust funds may need to be adjudicated in the context of priorities, and at the moment one has absolutely no idea, I think, about the way this may pan out. This is because we are not dealing with an insolvent company where there are rules laid down for the order of priorities. We are dealing with what has been described as an insolvent trust, in effect a trust that has managed to incur more liabilities than it has assets, and as to which there is no further recourse in relation to the assets because it has been decided that the liabilities incurred by the trustees extend only to the extent of the actual assets of the trust in their hand.

57. There may be further matters that need to be worked out in terms of how that applies to recoveries in such a situation, but that is the principle, and I find it quite plain in context that the judgments and the claims on the likely pool of assets, even including the value of the RCO, leave a large deficiency. How that is to be dealt with in the context of the trust and there being apparently little authority regarding such a situation would be a matter, it seems to me, of returning to first principles, and would be dependent on the facts of the case. I therefore make no judgments or findings about that at the moment, except to say that it seems to me that it would be a potentially difficult and potentially complicated matter to disentangle, given the likely conflicting arguments that are likely to be put forward by various interested parties.

58. As to that point, therefore, I put to Advocate Robison that if he were proposing to rely on the question of priorities in support of his argument for a stay, it would seem to me that he would have to put forward, at the present moment., some clear *prima facie* argument as to why his clients' position, namely F&B as the most recently introduced trustees in this matter, would have a claim that would, on the face of it, not only rank in priority to the general claims of other parties who are owed money by the trust, but also would be of such a nature and such an extent that it could be fairly said that any wishes that were expressed by them, or reasons given by them in support of a particular course of action, should be so obviously deserving of preference as to mean that, at this stage, the matter ought to be pre-emptively dealt with by the court, rather than simply leaving these assets in the hands of the Joint Receivers, as the persons charged with the obligation to consider the best overall realisation of assets for the benefit of all those who are entitled to a share in the assets. He very fairly said that he did not think he could do so. So, it seems to me that that is a matter that then falls to be left out of account.

59. I have dealt with those subsidiary submissions at this point as a matter of convenience. The real essence of the claim on this application rests on the question of what the potential effect,

or likely effect, is, or would be, of an assumed successful application to the European Court in relation to what has happened with regard to the Guernsey 1 proceedings. (I am trying to put this neutrally.)

60. As to this, Advocate Robison firstly says that the whole of the Guernsey 1 proceedings are tainted by the fact that there has been, he would submit, a breach of his clients' human rights. Viewed in this way, this effectively means F&B, as successors to R&H, standing in the shoes of the trustees of the TDT. I suppose that, indirectly the beneficiaries are concerned, but it seems to me that in this context it is always the trustees who are the party that brings the proceedings and whose rights to a fair trial are therefore in issue as trustees. The beneficiaries are behind them. The argument must therefore be based on the rights of the trustees to a fair trial under Article 6.

61. I think it is worth actually reading the text of the right to a fair trial, from the Convention, so that it is clear what is the right in issue, because it is very easy to use shorthand, which means that the actual text and its meaning may get overlooked. Article 6 (1) reads:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

A lot of that is concerned with publicity, and the further provisions of Article 6 deal with the protection of those charged with criminal offences. So, what is material in the present case is that, in the determination of civil rights and obligations, one is entitled to a fair and public hearing by an impartial and legally established tribunal, within a reasonable time.

62. I note that that it is the *hearing* that is expressed to be within a reasonable time. It has been assumed, and I do not suggest that this is necessarily wrong, that that can also be interpreted as the time that it takes for the judgment to be produced because that is one of the complaints made by the applicants in this case. I will assume this to be correct.

63. In essence what one is entitled to, and what we are looking for, is a fair trial. That means that the various aspects of what is a "fair trial" obviously have to be considered and Advocate Robison's submissions, perfectly properly, emphasise the fact that a fair trial means that one must be given a full opportunity to present one's case as fully and fairly as one can, and have the opportunity of testing the evidence and answering the arguments that are put up against one in determination of one's rights. It is said that that has not happened in this case because of the way in which the applications made on behalf of the then trustees for the introduction of further evidence, etc. were dealt with by dismissal at a lower stage, both first instance and on appeals.

64. What is said under this argument is that F&B have a reasonable, and sufficiently reasonable, prospect of convincing the European Court to make a judgment that that right of theirs has been infringed, and that this would result in an award in their favour from the European Court. Initially in his skeleton argument, it was accepted by Advocate Robison that the European Court would tend to give monetary judgments only in the context of claims regarding the infringement of Article 6 rights, and I think probably Article 8 rights as well, but in particular Article 6 rights which I am here considering; one is primarily concerned with those in this case. The point, as I understand it having looked at the cases, is that the

European Court's jurisdiction is broadly declaratory, so that it can declare that a breach of human rights has occurred in its judgment, but otherwise it is limited to giving what is described as "just satisfaction" for the infringement, under Article 41 of the Convention. "Just satisfaction" in Article 6 cases has tended to involve a possible assessment of direct monetary damage in the sense of costs that might have had to be incurred, or a sum broadly intended to represent non-monetary damage that has been sustained as a result of having been exposed to a trial process that would have been felt to be unfair.

65. At any rate, the response of I&B and the joint liquidators has therefore been, initially, to say that an application to the European Court would get nowhere in terms of preventing the enforcement of the judgment obtained in these proceedings, because the judgment of the Privy Council is a final judgment in Guernsey law. It is therefore binding at this level (my level) and there is no way in which the European Court can upset the judgment.

66. This argument was refined considerably by Advocate Robison in the course of the case. Having initially taken the stand in argument that, although accepting that a monetary judgment was usual,

> "*….a rehearing of the claim before the Guernsey courts would not be without precedent in European Court jurisprudence*",

he accepted that the likely outcome of success would be an award for (modest) compensation, made against the United Kingdom government.. He then used that to found an argument that that meant that the damage to the Tchenguiz family would be considerable. In my judgment, though, that gets him nowhere because if he cannot show that that damage to the Tchenguiz family would be *avoided* by the result of a successful application to the European Court, any stay to enable that result would not be avoiding rendering a successful application nugatory, but would simply be irrelevant.

67. In his response, however, Advocate Robison elaborated on what was said as to the possibility of a retrial being "*not without precedent*", in response to the criticism that he had not given any indications of this. He emphasised the contracting States' obligation to give effect to judgments of the European Court with regard to breaches of human rights, in a way that provides for *restitution in integrum* and submitted that this had led to development of European Court jurisprudence, to the extent that in some cases the effect of a European Court judgment could be to give rise to a re-hearing of a case in which Article 6 rights had been found to be breached. I am not, in this *ex tempore* judgment going into the detail of the cases which were cited, although I record that the main such cases were *Gençel v Turkey* App No 53431/99 (23rd October 2003), *Vojtechova v. Slovakia* App No 59102/08 (25th September 2012), *Aviakompaniya A.T.I ZAT v Ukraine* App No 1006/07 (5th October 2017) and *Assanidize v Georgia* App No 71503/01 (8th April 2004).

68. It seems to me that in summary, what one gets from the cases is that it is accepted in principle, both at the national level and at the European Court level, that the judgment that has now been obtained in the Privy Council is a final judgment. It is common ground that an appeal to the European Court is not an appeal from such a judgment, but is a separate and different claim made against the United Kingdom government. This is because the United Kingdom government has agreed by treaty to "have regard to" (think is the correct wording) European Court of Human Rights' decisions, the obvious intention being that it should implement those decisions, and it is taken to have assumed responsibility for furthering this approach in Guernsey.

69. It is also common ground, I think, that in general the European Court restricts its relief to declaratory relief, although it may indicate to the relevant State how the Court considers it

would be appropriate to remedy any breach which the Court finds to have occurred. In principle, such a breach is a shortcoming which is found to have arisen in relation to the judicial system in a particular State, although with particular reference to the specific case.

70. It is submitted by Advocate Wessels and accepted with some reservations (I think) by Advocate Robison, that the European Court does not have jurisdiction itself to require a State to hold a retrial or to reopen a case. What happens is that the European Court pays particular regard, as it is obliged to do, to the remedies available in the particular judicial system of the contracting party State. This is because the principles of a fair trial, etc can be stated at a high general level, but the more detailed way in which they are implemented can and does differ as between individual States, and the individual legal systems which they operate. A "fair trial" can be achieved by different procedural routes. For example, at a procedural level, the legal system in Guernsey operates in a slightly different way from the way it operates in the UK, although the UK is (in this context) responsible for it. The methods by which legal proceedings are dealt with may be very different, however, in other countries in continental Europe. So, out of respect for the autonomy of the individual States, the European Court may make a declaration that in fact it considers that the standards of the treaty, ie the European Convention on Human Rights, have been breached, but it cannot (and will not) make an order saying that there "must" therefore be a retrial, simply in consequence of having made such a finding.

71. As I indicated in the course of the hearing, it seemed to me that the trend of cases in the European Court had been that to begin with the European Court was extremely loathe to do anything more than state that it could and would order what was fairly limited financial compensation. This was on the basis of what was to be described as "just satisfaction" for the complainant. It very frequently, and I think particularly in criminal cases that had gone wrong, took the view that "just satisfaction" to the applicant was achieved by his obtaining the declaration that he did, against his country's government, recognising that there had been a breach of his human rights: see eg *Piper v United Kingdom* App No 44547/10 (21st April 2015). Apart from that, limited financial compensation was all that was appropriate.

72. Advocate Robison submits that the jurisprudence has moved on since then and he may well have a point in that these were cases in the 1990s. It appears that at some stage the European Court has come, in particular in the context of Article 6 requirements, to feel that maybe the powers which it has could and should be more widely exercised where a situation fell markedly short of what was desirable, and in particular where it was fairly obvious that a retrial was appropriate in a situation where there had been a breach of Article 6, and that that was, indeed, the right way of "putting matters right", if that was what the applicant's "just satisfaction" really ought to require.

73. Having looked at the various judgments that have followed since then and to which I have been referred, it seems to me, though, that the European Court has still been extremely careful to ensure that it did not intrude into dictating how the powers that were available in the national courts of the particular State should be exercised. One finds, in the context of recently cited cases, that in certain countries, in particular the eastern countries which are signatories to the Convention, there is a provision within their national legislation, or Civil Code, which expressly says that if the European Court of Human Rights does expressly make a declaration that there has been a breach of Article 6, then that provides grounds for an applicant *within the domestic context* to make an application to the domestic courts for there to be a retrial, or, in other words for the case to be reopened: see *Bochan v Ukraine (No 2)* App No 22251/098 (5th February 2015) at [26] – [27]. There is no such provision in Guernsey law.

74. The cases to which I have been referred recognise that possibility, for example: *Vojtechova v Slovakia* App No 59102/08 1757 (25th September 2012), in which the Court proceeded to entertain a case notwithstanding that the State had already admitted that there had been a breach of the applicant's (since deceased) mother's Article 6 rights, since a declaration to that effect would, in Slovakian law, entitle the applicant to apply for the case to be re-opened, and the Court also indicated that in its view this would be the appropriate form of redress (see [48]), but it was careful to say that this was only making that possibility *available*. Similarly, in cases such as, for example, *Moreira Ferreira v Portugal (No 2)* App No 19867/12, (11th July 2017), and *Aviakompaniya* case (above) and also the history of the *Bochan* case, the court has done the same thing, and has actually expressed a view that that would be the appropriate way of dealing with the breach of human rights - in effect inviting the applicant to apply to its own national court for a retrial, and thus giving the national court the opportunity to reconsider the position, and decide if it thinks it appropriate to hold a retrial in the context though of the jurisprudence of that country.

75. There has been just one case - it was quite an extraordinary case - of an applicant involving the State of Georgia, which is the case of *Assandize v Georgia* App No 71503/01 (8th April 2004), in which the Court appears to have gone further. This concerned a situation where, having been acquitted on criminal charges, the defendant applicant had nonetheless been held in prison for several years despite his acquittal. This was, I think, because of a regional government, even defying orders from central government. At that stage, the Court did take the unusual step of stating in its order that the respondent State "must secure the applicant's release at the earliest possible date".

76. In my judgment, this last case is of no assistance to Advocate Robison's argument in this case. Firstly, it was obviously a hugely extreme case, and extreme circumstances. It may also be a step where the European Court has gone further than it previously had done, and indeed it is indicative that it was thought that it had gone further than it previously had done because reservations were expressed by three of the judges as to whether it was appropriate to do so (see the Joint Partly Dissenting Opinion), bearing in mind the respect which the European Court pays to the machinery of legal process which is in place in the national context, the detail of which is within the margin of appreciation of the relevant government. Indeed, those judges expressing reservations considered that the result could have been achieved by operating provisions of Article 5, rather than Article 6, and they were disturbed about the apparent extension of the court's powers beyond simply giving declaratory relief or ordering minor financial compensation by way of just satisfaction. This, and the cases including those mentioned above where the Court has felt able to provide grounds to trigger provisions of national law, appear to be the only cases in which stepping beyond mere declaratory relief as to the occurrence of an infringement of Article 6, and an award of modest monetary compensation, has happened. I do not think it is indicative of any likely trend of the European Court to go further and to start ordering what must occur in the legal processes of a member State where there has been a breach of Article 6.

77. The principle seems to me to be clear, therefor, ,that the final judgment of a domestic court is given respect as a final judgment, and the European Court does not purport to sit as a Court of Appeal from such a judgment. This is clearly recognised in both the European Court itself, as indicated above, and as a matter of national law, as indicated by examples from English law, see, eg *Locabail (UK) Ltd v Waldorf Investment Corporation (No 4)* [2000] HRLR 623 at [19] per Evans-Lombe J and *Westminster City Council v Porter* [2003] Ch 436 at [39] per Hart J. In the *Porter* case it was stated expressly in the context of an application for a stay of execution on a money judgment which had been upheld by the House of Lords, that there was no point in taking account, on such an application, of prospects of an application to the European Court of Human Rights intended to be made on the grounds that Lady Porter's

Article 6 rights had been infringed, because it would not have any effect on actually upsetting the judgment.

78. Advocate Robison submits, though, that the proposition above is actually not the case, in that there is a domestic judicial power - an inherent power I think it would have to be - certainly by English jurisprudence (as to which he would argue that Guernsey jurisprudence must be the same) for a court to upset a judgment on the grounds of some fundamental matter which has "distorted the integrity of the judicial proceedings." (I think that is the generally descriptive phrase that is used in the White Book.). At any rate, what Advocate Robison says about that - and I pay tribute to the ingenuity of the argument - is that if you examine the cases of *Lawal & Anor v Circle 33 Housing Trust* [2014] EWCA Civ 1514 at, in particular [65] and *Taylor v Lawrence* [2003] QB 528, the latter, in particular, showed that there is a jurisdiction in a court in the common law tradition to reopen an appeal (and no doubt it would be said that the same basis would apply even at first instance) where it is demonstrated that the judgment that has been obtained has been obtained as a result of some vitiating factor such as fraud or bias, and that the jurisdiction is not limited to those factors. It is also available for such other serious grounds as would mean that the court considering the matter regarded it as being necessary in the interests of the proper and fair administration of justice to reopen the appeal and thus, in effect, to hold a re-trial.

79. What Advocate Robison submits, therefore, is that even though the European Court will respect the availability of relief to applicants as a matter of domestic law, and will not purport to overrule that availability in the sense of behaving like an appeal tribunal from the final court of such jurisdiction, nevertheless, and consistently with that principle, there *is* such a power in English (and by analogy Guernsey) jurisdiction, namely the power which is exemplified in the *Taylor v Lawrence* jurisdiction. Consequently, he submits that it *would* be open to the European Court to say that, having reviewed what happened in relation to these Guernsey 1 proceedings and having concluded (on this assumption) that there had been a breach of the trustees' Article 6 right to a fair trial because the trustees were not given the proper opportunity of presenting the evidence that they wanted to present in support of the arguments they wanted to make, the European Court *could* say that the matter was such that an application to reopen the case in the domestic courts could be brought by the trustees (now F&B) by invoking the *Taylor v Lawrence* jurisdiction, and if that is the case then the possibility *does* arise that a rehearing or a re-trial might then be ordered. I think that at this point Advocate Robison was not sure whether this would be a rehearing of the final appeal in the Privy Council, or a hearing at a lower level, but at any rate in principle, he submits that there is scope for a result which would bring about a rehearing of the case at some future state, with the relevant evidence included, so as to "level the playing field" for the trial of the substantive issues which he submits was unfairly distorted against the trustees in what in fact occurred.

80. So, what Advocate Robison says, in a nutshell, is that the domestic courts in this case do have a jurisdiction, which is not a statutory jurisdiction but an implicit jurisdiction recognised in the *Taylor v Lawrence* and *Circle 33* cases, to (as it were) correct something that has gone so far wrong in its own proceedings that it could and should reopen the case; that is a domestic jurisdiction which could be invoked, and it is therefore a jurisdiction which the European Court could be persuaded to have regard to, and intimate that it might be appropriate to invoke it and to hold a re-trial.

81. This is an ingenious argument. At the end of the day, though, it seems to me that it does not get Advocate Robison anywhere far enough for two reasons. The first is in principle that it is all predicated on propositions that "this might happen" and "that might happen", which as a matter of causation and prediction of the future, is so far attenuated in this line of argument

that it gets to the point where it seems to me really to be pure speculation, and highly optimistic speculation at that.

82. The second reason is that it appears from the material European cases to which I was referred that what then would occur, on the assumption that the European Court thought that there was any available domestic jurisdiction which it ought to prompt the respondent State (noting that it is the UK) to cause to be invoked, is that any application that was made by the trustees to reopen the case would potentially have to be made to the Privy Council, as the last tribunal in the hierarchy that has had control of the case and in which, therefore, the operative hypothesised breach of Article 6 would have occurred. I say that because the State's obligation under Article 6 is to provide for trial by an impartial tribunal established by law which is effective, and which actually has procedures that do safeguard and conduce to the granting of a fair trial. Plainly, courts of first instance are expected to do that in the first place and to have regard to human rights and so forth in their conduct, but if something goes wrong the Court of Appeal in any particular system, ie the relevant appeal mechanism, is there to try and put these matters right. If a system is provided whereby there is an appeal mechanism, ie a mechanism under which, if defects in the fair trial process are complained of, they can be reviewed and can be corrected, then that in itself would be a reason for holding that the system as a whole has provided a fair trial. The availability of and the actual going to appeal and securing an appropriate result on the appeal would be nonetheless part of a fair trial process.

83. In this case, we actually have two layers of such review and appeal which are provided and indeed which have been invoked. So, at this stage it appears that Advocate Robison is complaining at what happened at this final safeguard stage for a fair trial. If he is saying that the Privy Council, in reviewing the processes below, got it wrong and ought to have come to a different conclusion, then it appears to me to be inescapable that he is effectively saying that the European Court would be acting as a Court of Appeal from the Privy Council, which is just not permissible. His response is that that is not the case, and it is more refined than that. His argument would be that the Privy Council, in the way it conducted its hearing of the appeal complaint that was made from the appeal from the Court of Appeal, had not provided a fair trial of <u>that</u> issue,(ie, whether there should in fact be a reversal of the Court of Appeal's decision) because it had failed to apply an Article 6 compliant process to the determination of <u>that</u> issue.

84. Another way in which he puts this argument, or perhaps an explanation of it, is that the decisions, in particular about the difference between negligence and gross negligence are very refined and very fact-sensitive decisions of fact, as to which a judgment one way or the other can be quite a nuanced or subtle judgment. In that context, it is said in the draft grounds of application to the European Court that the obligation to provide the means for a fair trial - in other words procedures that provide safeguards which work in practice to ensure that a party is able to present fairly all the matters it wishes to present upon such a trial - require to be all the more carefully observed. That would be the basis of the argument that would be put to the European Court to the effect that the Privy Council itself had itself failed to appreciate that it ought to give a wider latitude (if I can put it that way) favouring the ability to introduce evidence at a late stage, but before a set of proceedings have been completely, finally and irrevocably concluded, by taking due account of the refined and nuanced nature of the dispute. That argument would be something that would give rise to a rather more narrow but nonetheless effective Article 6 complaint, ie one with regard to the process of the Privy Council, and that would not amount to an appeal from the actual decision of the Privy Council (and therefore would avoid that pitfall) but would nonetheless provide the opportunity for the case to be reopened on the basis that if this argument were upheld, the Privy Council would be able potentially to exercise the *Taylor v Lawrence* jurisdiction in order to reopen the case.

85. Once again, quite at what level, is a matter that remains somewhat to be resolved, although on the face of it, it would seem to me that any such re-opening, based on such grounds, would have to be at the level of the Privy Council Nevertheless, I will make no finding about that because it is very much entering the realms of unclear procedure, on any basis.

86. I should have said earlier on, but I make it clear now, that both the Court of Appeal and the Privy Council have, in their judgments, recited not only the general conduct of the substantive transactions, but also the way in which the litigation and the appeals had been conducted on the part of the trustees of the time. Noting the applications that had been made by them, they had concluded that the reactions of the courts had been case management decisions, with regard to a series of applications that have been characterised, at times, as a "*concerted effort to derail the process*" and to create delays. Also, the Privy Council itself said that it had considered the submissions of the trustees with regard to the Article 6 complaints which were made, (and indeed Article 8 as well), see paragraph [132], and had concluded that they were "*wholly without merit*". That phraseology indicates, in UK jurisprudence, that it is an application that is so bad and so unjustified that it would be grounds for contemplating making a civil restraint order against the person who had made it, on the grounds that they were abusing the process of the court and had shown a propensity for doing so, such that they should not be permitted to make further applications except on conditions that the court would impose. So, it is quite a strong thing for that to be said. Nonetheless, it was the phraseology that was used by the Privy Council.

87. The above is background to the point that, if Advocate Robison's argument is to be sustained, there would have to be the expectation of a real possibility that the European Court would find, both that there had been, in the Privy Council, an Article 6 type defect of process, and also that the Privy Council, on considering the matter from a dispassionate perspective but with the steer (*ex hypothesi*) that the European Court considered that there had been a breach of Article 6 in the Privy Council's procedures, would then, regard it as being so significant a breach that it passed the *Taylor v Lawrence* threshold in domestic law, of being a breach that so significantly undermined the integrity of the court process that it simply could not be allowed to stand.

88. I have to say, considering all the background (a) that the prospects of that happening appear to me to be vanishingly small, but also (b) that it appears to me that if that is the case it is not really my position as a judge at first instance in the court of Guernsey to be opining as that possibility. It is not, in my judgment, a jurisdiction that I can or should purport to exercise. I say that in the light of the fact that in this court my function as a judge in relation to the trial of Guernsey 1, or conduct of that, appears to me to have been decided to be *functus officio*. (In saying this, I am not referring to enforcement proceedings; we have to come to those in a moment.)

89. This is the phrase that is used in the case of *Murfitt v States of Alderney (No 2)* [2003] GLR note 10 (25th September 2003). Mr Murfitt sought to obtain a stay of execution from an eviction order. This was in the context that his claim had already gone to the Court of Appeal and had been rejected, his application for leave to appeal to the Privy Council had been refused, and he was proposing to apply to the European Court. The Court of Appeal, to whom he made the application, said that the insuperable obstacle to an application for a stay of execution was that there was no basis for there being any jurisdiction in the court to grant such a stay. As Advocate McMahon (as he then was) had put it, the Court of Appeal was *functus officio* and the Court itself agreed. That was the decision of the Court of Appeal, based on the fact that the matter had been referred up to Privy Council and therefore that the Privy Council was then seised of the matter (see [13]).

90. In my judgment, I am *a fortiori* in that position in this case, in relation to allegations about the proper conduct of the substantive trial, because the case went higher and the relevant allegations were made in the higher courts, in relation to the conduct of the proceedings. If this application were therefore to be made the appropriate forum would really, inevitably, be the Privy Council and not me. I would add, though, that on the basis of my view of the prospects of success, and the inter-relationship of the jurisdictions of the European Court and the Guernsey Courts, I would not be inclined to grant a stay of execution on the basis of alleged Article 6 infringements, on the grounds that I cannot see that the prospects of obtaining any relief that would ultimately give rise to a retrial of this action are sufficient to warrant the difficulties and the prospective further prejudice to those who are entitled to have recourse to the assets of this trust, by delaying that process, - at least in so far as it can do so consistently with the rights, including the human rights, of any other parties who are concerned. I make that last qualification for obvious reasons.

91. Therefore, in those circumstances, I hold that in respect of the Article 6 grounds of the intended application to the European Court in relation to what went on in the Guernsey 1 proceedings, I doubt that I have jurisdiction to grant a stay of execution in respect of the judgment. Even if I have, Advocate Robison fails to convince me that there are sufficient reasons for doing so in the face of the arguments put against him by Advocates Wessels and Gray on behalf of the opposing parties, and the analysis of the potential for relief from the European Court having any effect on what is acknowledged, both nationally and in Europe, to be a final judgment of the highest court seised of this action and which judgment is final and binding in this court.

92. Moving on, Advocate Robison at one stage sought to combine the Article 6 and Article 8 grounds of complaint in a manner which I noted as being that "*it is a breach of Article 8 to allow enforcement against property in execution of a judgment obtained in a trial process which has been in breach of Article 6*." I do not accept that the two aspects can be conflated in that manner. It is quite right that if it was obvious that there had been a breach of Article 6 then that might be an argument in favour of taking action to protect any consequent infringement of Article 8 rights, but that is not the facts of this case, because at the moment the Privy Council has considered whether there has been a breach of Article 6 and has concluded that there has not been. Its decision and dicta in this respect, as far as I am concerned, are final and binding and therefore preclude the very basis on which that proposition is made.

93. That is sufficient to dispose of the arguments in relation to Article 6, I think. I am now about to come on to the alternative way in which Advocate Robison puts his point which is in relation to Article 8. This aspect applies in relation to the potential enforcement of the judgment which has now been obtained, and is therefore a separate and distinct stage of proceedings, in respect of which I do, as the court of first instance, have a jurisdiction.

94. However, it does not seem to me that, at the moment, there is any engagement of a breach of either the trustees' (if they have any) or the Tchenguiz family's Article 8 rights, as those rights have been propounded. In other words, such an application is premature, and certainly gives no basis for my ordering a stay of execution pending any application to the European Court.

95. Article 8 rights relate to a person's right to respect for a private and family life, and his home, and so forth. Since I previously read out Article 6, I will also read out Article 8:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence.*

> *"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

96. One therefore has, relevantly for present purposes, a right to respect for one's home. "Home" is an interesting word, but this right has obviously been held, at its most basic, to protect a person from eviction from their home. Advocate Gray, at one stage, pointed out that, as this house was apparently worth £23 million and Mr Tchenguiz apparently claimed the ability, or the Trust had the ability, to provide funds to pay for it, one would have thought that he could provide himself with a home quite easily to a lesser standard with monies that would be available to him. I do not regard that as being a valid consideration at all because it is his home which is what he is entitled to respect for, and that happens to be the RCO building. So, he is entitled to respect for that property as his home, and an argument that he is in no danger of becoming homeless is beside the point.

97. However, there is expressly the derogation qualification from that right, quoted above, which permits interference with that right by a public authority for the protection of the rights and freedoms of others. It is trite law that in relation to a possession order, where one party, in vindication of its own rights, is held to have a right to have possession of property but it would mean eviction of another party, the justification for allowing that eviction is that of the protection of the rights and freedoms of "others", ie other than the occupier. That does lead to a kind of argument about proportionality. It is a feature of European Court jurisprudence, and a feature which I think many national governments have been pulled up on, that having a rigid rule in relation to various applications or the enforcement of rights is often held to be contrary to human rights principles because it simply does not allow for an individual assessment of particular circumstances which might be hard cases. This is the kind of thing that has on occasions happened to the United Kingdom in relation to possession orders. So, applying that principle, one gets a situation where the first question is, is there actually any interference with the right to respect for a home?

98. I have difficulty seeing how F&B, who are actually the only applicants in this case, can make that out at present, but since it has been argued on that basis I will assume for present purposes that they are able and entitled to put forward the rights of the Tchenguiz family as their beneficiaries and their right to respect for their home, in support of the application that they (the trustees) are making.

99. It seems to me, however, that once one has disposed, as I have disposed, of the conflating of Article 6 and Article 8 in the way I have held above, Article 8 rights are separate grounds and they have to be dealt with separately unless the actual facts show that they can be brought together. It has to be the facts as such, and not a kind of theoretical argument, which are to be considered (by which I mean the distinction which I drew just a moment ago).

100. Article 8 then engages different requirements and does so at a different stage. At the moment, nobody is threatening to evict Mr Tchenguiz and his family. It is only at the point at which there is some threat to their occupation of their property that any question of Article 8 rights arises. I accept that this need not go so far as eviction. It seems to me that it could, be tempered as I indicated in the course of argument, by being viewed as a threat to their quiet enjoyment of their property, in the sense that it might be said, for example, that requiring them to submit to valuations being obtained, or people expecting to enter and look round the property for the purpose of making an offer to purchase it, or something like that, could also a "lack of respect" for their home, which would then have to be justified on the basis of it being

required in the interest of protection of the rights and freedoms of others. That, though, is a separate and rather lesser matter.

101. Returning to simple basics, one is concerned principally, here, with the Thenguiz family's fear that they may be evicted from their home of, in Mr Tchenguiz's case, 27 years. At the moment, as I have said, nobody is threatening to do that. Advocate Robison says that the transfer of the shares is a precursor to this happening and therefore it can be restrained or stayed, and should be so restrained or stayed, in the interests of preserving the safeguards for the Article 8 rights of the Tchenguiz family. The question therefore arises as to whether there is anything in that point or not.

102. I do not think there is. It seems to me, and I think it is established by cases in the European Court, such as *Zehenter v Austria* App No 20082/02 (16th July 2009) that in effect the Article 8 point arises at the point of enforcement of a judgment by the execution of an order for possession.. It does not arise itself at the point of the actual judgment or engage the question of one's Article 6 rights to a fair trial. After any judgment has been obtained, the question is, what are the rights and freedoms of others that have necessarily been vindicated, as against the rights and freedoms and the right to respect for home, of those whose position is going to be prejudiced?

103. At the moment, all that is said by Advocate Robison is that the shares ought not to be transferred because that will give rise to the *possibility* that the Joint Receivers could proceed to sell the property. He also mentioned, and I will come back to that in a moment, a possibility of incurring a tax liability. Those were two of the matters that he specifically relied on as reasons for this court's preventing any transfer of the shares to the Joint Receivers as such.

104. Basically, as far as the family's right to occupation is concerned, my immediate reaction was that this is probably protected sufficiently anyway, because I imagine that the Joint Receivers would require a court order in the UK before they could effect a sale of the property. On examination of the Joint Receivers' powers, though, it appears that that may not be the case and they could in fact effect a sale of the property under their management powers. However, if it is necessary to impose any restraints on the exercise of their power to sell, that can easily be done, if it is thought necessary to do so in order to protect rights of anybody who has a sufficient interest.

105. The first point is therefore the location where any order to obtain possession, and thus interfere with the Tchenquiz family's occupation of the property, would fall to be executed. The answer would seem to be, in the UK where the property is situated, and the Tchenguiz family's rights would then be protected on the basis that one could not obtain possession of residential property without a court order. Thus, any question of infringement of any Article 8 rights that arose as a result of the potential enforcement of an order for possession of the RCO building could and would be capable of being considered and adjudicated upon at that stage - which has not happened yet and may not happen in this court at all.

106. At first sight, that appeared to me to be entirely adequate protection for the Tchenguiz family's position. It has been suggested, though, and in view of the *animus* which I suspect there is between the parties in these applications I think there is justification for this, that the Tchenguiz family would reasonably be apprehensive about the possibility that before any such order was made, steps might be taken by the liquidators of the First to Fourth Defendants which could prejudice their ability to resist any such order. For example, if a contract for sale were entered into that would require possession to be delivered very quickly without which it might fall through, it might then be argued against them that there was no time, and

they should not be permitted to raise any arguments in opposition to being required to give possession, thereby prejudicing the sale.

107. I remind myself that the point of the protection I am being asked to provide by refusing to allow the transfer of the relevant shares is, in principle, such protection as may enable steps to be taken to free this home from the threat posed by the fact that it is available for realisation to pay a debt that is going to have to be paid at some stage or other. *Zehenter v Austria* (above) which was cited to me is an example of a small debt that was incurred and for which summary judgment was given which then gave rise to a forfeiture proceeding by judicial sale, and it was held that this would become a breach of Article 8 rights (though not necessarily Article 6) if the procedure in the State did not allow an opportunity for the debtor to pay off the debt and avoid the forfeiture of his home, rather than simply having to submit to it.

108. That is the principle which seems to me to be engaged here, at best, ie the question of allowing the opportunity for somebody on behalf of the Tchenguiz's, if not Mr Tchenguiz himself, to come forward with an adequate offer of substitution of cash (in effect) for the house, so that the Tchenguiz family could preserve their home as such.

109. As to relevant considerations, therefore, firstly, I reject Advocate Robison's argument that this situation requires that there be a continuation of the stay of execution, and the shares in Iver remain in the hands of the Joint Receivers personally, in order for negotiations to take place. It is always open to anybody to put forward proposals that will actually produce the result that the home is preserved, and if they are accepted, that is all well and good. If they are not accepted, and the person concerned considers that there are legal grounds for saying that that rejection was wrongful, then the matter can be brought to the court - but we have not got anywhere near that situation yet. All that has happened is that F&B have written a letter to the Joint Receivers stating that they are prepared to offer to pay to the Joint Receivers the net equivalent in cash, (I think it is) of the value of the leasehold of the RCO, in order to enable the property to be transferred out of the TDT and into another trust for the benefit of the Tchenguiz family. That offer has not yet been investigated. It may not be a perfectly straightforward matter because there are quite likely, I imagine, to be arguments about what constitutes the net value, and what the cash value is of the benefits of accepting an offer from a Tchenguiz connected entity, so that third party fees and general, marketing costs, etc may be avoided, and so forth.

110. However, those are matters which it is not for me to decide on here, because unless they were so perfectly obvious that it was just as perfectly obvious what the right decision would be in regard to dealing with them, they are commercial matters, and they are matters which are confided in principle (at the moment) to the judgment of the Joint Receivers, to decide how to manage and administer the assets that are the subject of the preservation effected by the Receivership Order, for the purpose of satisfying the judgments that have been given and any other claims that there may be against those particular funds. So, it seems to me that preserving the possibility for that to be done (ie for an acceptable offer of a cash alternative to be made) is really all that is required in order to protect, to an adequate degree, the Article 8 rights of the Tchenguiz family insofar as they may potentially come to be threatened by a future order for possession, whilst also protecting the rights and freedoms of others, and in particular the rights of the creditors of the BVI companies who are entitled to the benefit of payment of the Trust's judgment debts to Glenalla and Thorson, and therefore to move towards the realisation of assets which are realisable to effect this, and which would include, in principle, the RCO or its value.

111. Advocate Gray therefore drafted a limitation which she proposed could be inserted in any order which I might choose to make, which would make it clear that the Joint Receivers, if

they did form a view that there was a potential contract of sale of the RCO which was beneficial and which they wished to enter into, they could only do so on the basis that that contract should be conditional upon obtaining the approval of the court to enter into it. It seems to me that if I make an order in those terms (and it would also have to be clear that notice would need to be given to F&B in order to enable them to know what was going on) then that would provide perfectly adequate protection of the potential Article 8 rights of the Tchenguiz family to resist an order for possession in the present context by actually providing substitute value for the amount of assets which the RCO would represent. So, in those circumstances it does not seem to me that Advocate Robison's argument actually gets to the stage of justifying my outright dismissal of the third application before me, which is for a transfer of shares of Iver to the Joint Receivers in their capacity as such.

112. In argument, Advocate Robison also pointed to a term in an agreement under which Mr Robert Tchenguiz has been discharging the outgoings on the RCO building, which was stipulated to be pending a potentially successful outcome of the proceedings in favour of the trustees, which has not happened. He suggested that if the shares were transferred, not only (I think) would such discharge of outgoings cease, but also, he says, that the transfer of the shares to the Joint Receivers in their capacity as such would incur a tax liability. He says that his clients have obtained advice to that effect. I do not think that that is accepted on behalf of the liquidators of the BVI companies, but perhaps the matter has not been investigated. Advocate Robison also said that, if the trustees are not successful in their application, then Mr Tchenguiz will still continue to indemnify the trustees against outgoings, so long as he is able to appoint a tax advisor for Iver. Interpreting that as meaning that, if in fact there is going to be a tax liability, Mr Tchenguiz wants to be satisfied that it is unavoidable on the basis of tax advice that Iver could take with regard to that matter, it is submitted that this means that the Receivers risk forgoing the potential benefit of any such indemnity, and that that obviously cannot be in the interests of those who are interested in the trust funds.

113. However, it seems to me that all that is, once again, a commercial matter and all that is required of the court is to ensure, in the interests of those who are entitled to any benefit derived from the value of the RCO building, and in the interests of ensuring, if possible, that there are no arguments in future about anything having gone awry, that the Joint Receivers are actually put on notice of the possibility of a tax liability with their attention drawn also to any potential effects on any indemnity they might be able to enforce against Mr Tchenguiz under the agreement with regard to outgoings - although I am not sure how far that would go, bearing in mind what is said about Mr Thenguiz' financial circumstances. Nevertheless, in this situation, in my judgment, all that is required is to ensure the above, and once again that does not require the prevention of any step that is designed to move towards the potential realisation of the value of this asset (at any rate, short of ordering the giving of possession) for the benefit of those who are creditors under a final judgment creditors in respect of the assets of the trust.

114. I should mention finally that Advocate Robison had a general argument, which was that the effects surrounding the potential transfer of the shares out of the personal holding of the Joint Receivers in their personal capacity to them in their capacity as Joint Receivers and managers were so complicated, and fraught with difficulties and potential problems, that this would need to be dealt with, and that this on its own militated in favour of leaving the situation as it now stands. Advocate Gray, however, says that that is not the case and that steps ought to be taken towards getting on and seeking to get as near as one can to a potential realisation of the value of these assets.

115. I prefer Advocate Gray's argument in this respect, not least because of a lack of any detail in Advocate Robison's submission. It seems to me that I really cannot leave out of account the fact that these creditors have now, for some years, been kept out of money under a judgment

that has been upheld, with a lot of side skirmishes on the way which have been the subject of criticism of the previous trustees if not necessarily the very current trustees, by both the Court of Appeal and the Privy Council. That is a matter which I am entitled to take into account, and to take the view that in the face of no compelling reasons (and I do not think there are any) to prevent matters moving forward, these should be facilitated, whilst recognising the possibility of building in safeguards such that if Mr Tchenguiz and his colleagues, or whoever, can provide funds that do in effect meet the value of the family home, then the opportunity can be preserved for him to do that. There is no reason not to enable administrative steps that need to be taken towards the potential realisation of this asset to take place.

116. Therefore, with those safeguards, I will first grant the application for F&B to be joined in these proceedings, if they need it in the light of their joinder in the Privy Council. (I suppose in so far as it now deals with potential enforcement it might be said that such joinder is necessary, although I do rather doubt it, but I grant that application.) I will dismiss F&B's application for a stay of execution pending any proposed application to the European Court of Human Rights. I make it clear that that does not prevent them making their application to the European Court. I also do not know what is the European Court's attitude to stays of execution, although I suspect they do not have any such jurisdiction here. I also make it clear that this refusal of a stay does not prevent the trustees making any application to the Privy Council, which I take still to be seised generally of the substantive Guernsey 1 proceedings in certain respects, if the trustees and their advisers take the view that, in the light of the arguments that they are proposing to make to the European Court that is appropriate. I have indicated I do not think it at all appropriate at my level of jurisdiction.

The Transfer application

117. Consequently, I will not be granting a stay of execution but I will, in recognition of the potential Article 8 rights of the Tchenguiz family, make an order in relation to the transfer of the shares for which Advocate Gray is applying which grants her application on terms which will include a restriction as she suggested, that the Joint Receivers and managers shall not enter into a contract for the sale of the property or shares in Iver that would transfer the property without making that contract conditional upon obtaining an order of this court.

118. I propose to reserve that matter to myself in the circumstances, bearing in mind that we are in Guernsey and I seem to be seised of the enforcement proceedings in the case, although as I have said, in some ways, it seems to me that administration of this might be more appropriately conduced where the site of the property is. Nevertheless, for present purposes, I will order that such a contract should not be become binding without the order of the Royal Court. If necessary, the order should, in addition, provide that notice of any such potential application for an order should be given to F&B, since they are the actual parties to these proceedings. They can obviously transmit this to the Tchenguiz family if necessary. Also, in relation to the transfer of the shares, in my judgment the appropriate form of order is not that these shares "do be transferred", but that the Joint Receivers are "authorised to transfer" these 2,000 shares into schedule 1 of the Receivership order, with a provision that it is drawn to the Joint Receivers' attention that the question has been raised as to whether this may incur some adverse tax liability. I am proposing to write these latter provisions into the order because I said in the course of argument that I would be minded to do so, and also because it seems to me that it is probably for the best that anything in this case gets written into an order if it practically can be.

119. I think that deals with the position in terms of ensuring that the Joint Receivers will know that there is a question they need to think about before they decide to exercise the authority that is now given to them to transfer the shares. I make it clear that nothing in what I am saying,

means that I think it necessary to inhibit any steps that the Joint Receivers may think it appropriate to take with regard to furthering, or progressing, the potential realisation of the value of the long leasehold in the RCO building. What I mean by that is that there are obviously potential steps that need to be taken in advance, towards marketing or suchlike, and these can be taken if the Joint Receivers think it appropriate. I emphasise that it is entirely a commercial matter for them, to start taking steps to that degree, and nothing that I have just said with regard to the transfer of the shares, in particular, should inhibit that. This latter is simply a recognition of Advocate Robison's point that he does not want an adverse potential tax liability that might affect the value of the trust assets, in which his client indeed may be interested, to be accidentally incurred or overlooked. So, that is as far as it goes.

120. I think that concludes all the matters which I am required to deal with here and now. For reasons mentioned at the start, this being an *ex tempore* judgment, it has turned out to be more repetitive than I would have wished.

Hazel Marshall QC

Lieutenant Bailiff