

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

**Between:**

- (1) ITG LIMITED (formerly INVESTEC TRUST (GUERNSEY) LIMITED)**  
**(2) BAYEUX LIMITED (formerly BAYEUX TRUSTEES LIMITED)**

**Plaintiffs**

and

- (1) GLENALLA PROPERTIES LIMITED**  
**(2) THORSON INVESTMENTS LTD**  
**(3) ELIZA LIMITED**  
**(4) OSCATELLO INVESTMENTS LIMITED**  
**(5) GENEVA TRUST S.A. (formerly 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**

and

- (1) HELEN GREEN**  
**(2) KELVIN HUDSON**

**Joint Receivers**

**Hearing dates: 21<sup>st</sup> – 25<sup>th</sup> October 2019**

**Judgment handed down: 9<sup>th</sup> December 2019**

**Before Her Honour Hazel Marshall QC, Lieutenant Bailiff**  
**Sitting alone**

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**Counsel for the Plaintiffs:** Advocate J M WESSELS  
**Counsel for the Fifth Defendants:** Advocate R A FIELD  
**Counsel for the Intervening Parties:** Advocate N ROBISON

**The First to Fourth Defendants did not appear and were not represented.**

**The Joint Receivers were excused appearance at the hearing.**

**Cases, texts and legislation and other materials referred to:**

**Legislation:**

Court of Appeal (Guernsey) Law 1961, s 16

Trusts (Guernsey) Law 2007, ss 35, 42.43

Trusts (Jersey) Law 1984, ss 26, 3243A

Bills of Exchange Act 1882 s. 61 (UK)

**Cases**

**(a) Guernsey**

*Investec Trust (Guernsey) Ltd and others v Glenalla Properties Ltd and others* (Guernsey Judgment 41/2014)

*Re the Tchenguiz Discretionary Trust* (Guernsey Royal Court, 18 December 2015, LB Talbot QC)

*Investec Trust (Guernsey) Ltd and another v Glenalla Properties Ltd and others* [2018] UKPC 7

**(b) Jersey**

*Re Esteem Settlement* [2003] JLR 188

*Re The Carafe Trust* [2015] JLR 159.

*Re the Z Trusts; Equity Trust (Jersey) Limited v E (as Executor of the Estate of C)* [2018] JRC 119

*Re the Z Trusts; Equity Trust (Jersey) Limited v E (as Executor of the Estate of C)* [2019] JCA 106 and [2019] JCA188

**(c) United Kingdom**

*Wankford v Wankford* (1704) 1 Salk 299

*Neale v Turton* (1827) 4 Bing 149

*Re Salmen*, (1912) 107 LT 108

*Re Llewellyn's Will Trusts* [1949] Ch 225 at 227

*Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221

*Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61

*Re Berkeley Applegate Ltd (in liquidation)* [1989] 1 Ch 32

**(d) Other jurisdictions**

(i) Australia:

*Bone v Stamp Duties Commissioner* (1974) 132 CLR 38

*Re Suco Gold Pty Ltd* (1983) SASR 99

*Perpetual Trustees WA Ltd v Kelly* (1993) 8 WAR 480

*Rothmore Farms Pty Ltd v Belgravia Farms Pty Ltd* [1999] FCA 745  
*Southern Wine Corp Pty Ltd (in liq) v Frankland River Olive Co Ltd* [2005] WASCA 236

(ii) Singapore

*Investment Holdings v Ridout Residence Pty Ltd* [2013] SGHC 139

(iii) New Zealand

*Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 289

## Other materials

Chitty on *Contract* 33<sup>rd</sup> Ed, para 25-004.

Dicey, Morris & Collins: *The Conflict of Laws* 15<sup>th</sup> Ed, para 7-041]

Lewin on *Trusts* 19<sup>th</sup> Ed, paras 17-031 *et seq.*, 20-220 – 20-224, 22-047

Snell's *Equity* 33<sup>rd</sup> Ed, para 4.002

Underhill & Hayton: *The Law of Trusts and Trustees* 19<sup>th</sup> Ed, para 9.46.

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## JUDGMENT

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### The application

1. This is the substantive hearing of two significant issues of law arising in an application (“**the Application**”) launched in September 2018 by the First to Fourth Defendants, to determine competing claims of entitlement to the proceeds of certain assets (“**the Assets**”) currently held by Joint Receivers (Miss Helen Green and Mr Kelvin Hudson) (“**the Joint Receivers**”) pursuant to an order of the Court made in these proceedings on 23<sup>rd</sup> December 2013 and sealed on 24<sup>th</sup> January 2014, as subsequently varied.
2. In the event, the First to Fourth Defendants have taken no part in the hearing, for reasons which will appear. The Receivers have also taken no part in the hearing, having previously complied with directions of the court with regard to identifying the competing claims and reporting on the state of the Receivership and the value of the Assets in their hands. The arguments at the hearing have therefore principally been between the Plaintiffs and the Intervening Parties. The Fifth Defendants have been content, largely and economically, to adopt the arguments of others.
3. The Assets are assets which were and are assets of a trust known as the Tchenguiz Discretionary Trust (“**the TDT**” or “**the Trust**” where more natural). The Plaintiffs, the Fifth Defendants and the Intervening Parties have been the successive Trustees of the TDT since 2007. Litigation between the Trustees of the TDT from time to time and the First to Fourth Defendants (“**the BVI Companies**”), and also between the successive Trustees among themselves has been going on since 2010. The substantive claims in the proceedings were finally resolved in the Privy Council in April 2018. The Application is now a part of working out the consequences of that final decision.
4. However, in order to explain both the issues arising in the Application and the positions of the various contestant parties, it is necessary to outline the history of the action itself and its course up to final judgment and thereafter. The summary of the history below is

hugely simplified in the interests of brevity, but records all the points about the history which have materiality to the Application and my ultimate decision.

## Background

5. When the litigation commenced on 3<sup>rd</sup> March 2010, the Plaintiffs, (whom I will call “**I&B**”) were the Trustees of the TDT. The TDT had been set up by a Declaration of Trust dated 26 March 2007, as part of a division of the family assets of the very wealthy Tchenguiz family. These had previously been held in a trust constituted under the laws of the British Virgin Islands and known as the Tchenguiz Family Trust or “**TFT**”. The TDT was the new trust created for the benefit of the branch of the Tchenguiz family headed by Mr Robert Tchenguiz (“**Mr Tchenguiz**”). Mr Tchenguiz subsequently became the Protector of the TDT.
6. The proper law of the TDT is expressly stated to be Jersey law. However, I&B carried on business in Guernsey and the TDT was administered in this jurisdiction. This is presumably why these proceedings are in this Court.
7. The TDT’s business empire was considerable, and its underlying assets were spread amongst many individual “single purpose” companies, incorporated in several jurisdictions. The four BVI Companies (individually, “**Glenalla**”, “**Thorson**”, “**Eliza**” and “**Oscatello**”) were four such companies, incorporated in the British Virgin Islands. Beneficial ownership of them was transferred into the TDT as part of the division and restructuring referred to above. One other such company, Iver Resources Limited (“**Iver**”), held the long leasehold interest of a very high value residential property in London, known as the Royal College of Organists (“**the RCO**”), which was the London home of Mr Tchenguiz and his family.
8. Funding for Tchenguiz family enterprises had been obtained from banks and outside sources, on appropriate security, in the usual way, and in particular from the Icelandic Bank, Kaupthing HF. There was also, though, a widespread practice of intercompany borrowings, generally effected by funds being transferred up the company hierarchy from an appropriate cash rich company to the Trustees, and then loaned back down the hierarchy to the company requiring funds.
9. Hugely oversimplifying what happened in 2007 and 2008, arrangements made in 2007 in the course of the restructuring of the Tchenguiz family assets, and possibly also as a result of pressure from bankers regarding funds previously made available, resulted in the TDT, through I&B as its then Trustees, assuming or otherwise becoming liable for large sums claimed to be in the character of loans owed to Glenalla, Thorson and also Oscatello or, alternatively, Eliza.
10. In December 2008, as a result of mounting pressures arising from the global economic crisis, Kaupthing appointed Receivers over the shares of Glenalla, Thorson and Oscatello, as it was entitled to do under its security. This took those companies out of the effective control of the TDT Trustees. Not long afterwards, all four BVI Companies were placed in liquidation, and their common joint liquidators began to pursue those companies’ financial claims against the then Trustees of the TDT. This is what precipitated these proceedings, although formal demands for repayment were apparently not made until 22<sup>nd</sup> April 2010.

## Proceedings in the Royal Court

11. On 3 March 2010, I&B took the initiative by commencing this action against the BVI Companies to determine, *inter alia*, (i) whether the alleged loans from Glenalla, Thorson and Oscatello were valid and recoverable at all in all the circumstances of the case, but if they were (ii) claiming that I&B's liability for those sums was limited to the extent of the TDT trust estate, and could be enforced only as regards trust assets in their hands. I&B relied on Article 32(1)(a) of the Trusts (Jersey) Law 1984 ("the TJL") which provides that:

*"32 Trustee's liability to third parties*

*(1) Where a trustee is a party to any transaction or matter affecting the trust:-*

*(a) If the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property...".*

12. The BVI Companies defended and counterclaimed for judgment, or alternatively an account, in respect of monies claimed on behalf of Glenalla (£62,742,57), Thorson (£80,541,936) and Oscatello or alternatively Eliza, (£39,386,354.80).
13. On 2 July 2010, I&B were removed as Trustees of the TDT by Mr Tchenguiz (as was within his powers as Protector) and were replaced by the Fifth Defendant, then Rawlinson & Hunter Trustees SA, but now, through a change of name, Geneva Trust Company SA. I therefore refer to them as "GTC".
14. However, I&B declined to hand over the assets of the TDT in their hands or under their control. They relied on Article 26(2) of the TJL which provides that:

*"(2) A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust"*

and Article 43A(1) of the TJL which provides that:

*"(1) A trustee –*

*(a) who –*

*(i) resigns, retires, is removed or otherwise ceases to be a trustee...*

*i. may, before .... surrendering trust property .... require to be provided with reasonable security for liabilities whether existing future contingent or otherwise",*

as well as provisions included in the TDT Trust Deed. Clause 9.1 of this latter contained the usual indemnity/exoneration clause for trustees by providing that they should not be liable for any loss to the trust fund except where this arose by reason of that trustee's "fraud wilful misconduct or gross negligence".

15. The conflict between the interests of I&B and of the beneficiaries of the TDT was thus made very apparent.
16. GTC was joined in the action as Fifth Defendant to the original claim, and they made a third party counterclaim. On behalf of the TDT they naturally supported the allegations that the debts or other liabilities claimed by the BVI companies were invalid and

irrecoverable, but they went on to counterclaim that if these loans were valid and enforceable, then I&B were personally liable for them, and were not entitled to any right of indemnity out of the TDT assets owing to their gross negligence in assuming, or allowing the continued existence of, these liabilities, or alternatively that those liabilities had been unreasonably incurred and were therefore not recoverable by I&B. GTC also sought an order transferring the assets of the TDT from I&B to them, as the current Trustees.

17. The trial of the action took place in June 2012. Lt-Bailiff Sir John Chadwick eventually handed down his judgment on 6<sup>th</sup> December 2013, the delay having been occasioned, at least in part, by certain applications made after the hearing – all, I understand, made by GTC – with regard to further evidence, disclosure of documents, and suchlike. Sir John upheld the Glenalla and Thorson “loans” and whilst rejecting the Oscatello claim as an actual loan, held that there was an equivalent liability on I&B in restitution, the sums in question having been paid over to Kaupthing, in effect at the request of I&B. He also held, that I&B were personally liable for those loans to their full extent because Article 32(1)(a) was not applicable, but that the liabilities had not been unreasonably incurred, and I&B had not been guilty of gross negligence, and they were therefore entitled to an indemnity of exoneration out of the assets of the TDT in order to meet these liabilities at least *pro tanto*, and they were entitled to deal with the Trust assets accordingly, to give effect to this.
18. Obviously an appeal from this result was likely.

### **The Receivership Order**

19. The quantum of the liability now imposed on I&B and the assets of the TDT with interest from 22<sup>nd</sup> April 2010 attached, raised the prospect that the TDT assets might well be insufficient to meet it, and it would thus become what has now become conveniently (if not strictly correctly) termed an “insolvent trust”. Indeed it was recognised that there was even the possibility that the finding of personal liability might call into question the solvency of the two trustee companies, I&B, themselves.
20. There was therefore an immediate flurry of activity in December 2013 as steps were taken with regard to protecting the availability of the assets of the TDT. Initially, there was an immediate Freezing Order, but on 23<sup>rd</sup> December 2013, on an application made by the BVI Companies’ joint liquidators, Lt-Bailiff Chadwick made a Receivership Order, sealed on 24<sup>th</sup> January 2014, the terms of which have assumed some significance in this part of the proceedings. The Order provided as follows:

- “1     *Subject to the further provisions of this Order the BVI Companies are subrogated to the rights of the Former Trustees [I&B] to retain, get in and realise assets subject to the trusts of the Tchenguiz Discretionary Trust (“the TDT”) under the orders made in these proceedings.*
- 2     *Helen Foster Green and Kelvin Mark Hudson are appointed, without security and until further order, as Joint Receivers and Managers of the assets described in the schedule hereto (“the Assets”)*
- 3     *The Joint Receivers shall take such steps as they consider appropriate to obtain possession and control and to realise and upon written notice to the Joint Receivers the Former Trustees shall forthwith transfer to the Joint Receivers such of the Assets as are*

*requested the Joint Receivers. Pending such transfer, the Former Trustees shall hold the Assets to the order of the Joint Receivers.”*

The “Assets” comprised the Trust’s shareholdings in a list of 30 named companies and its cash.

21. Subsequent paragraphs of the Order conferred express and wide powers on the Joint Receivers to realise, control and otherwise deal with the Assets but not to make any distribution out of the Assets or their proceeds except as provided in the current order or by further Order of the Court (Paragraphs 4 and 5). Provision was made for the disclosure of information on appropriate terms by both I&B and GTC to the Joint Receivers and by the Joint Receivers to the BVI Companies (Paragraph 6). I&B and GTC were declared entitled to indemnity out of the assets of the TDT in respect of their own costs of complying with the Order (Paragraph 7) and the Joint Receivers were ordered to be entitled to their costs charges and expenses of their functions as a first charge on the TDT assets (Paragraph 9).

22. Specifically, by Paragraph 8 of the Order it was declared that:

*“8. The appointment of the Joint Receivers is without prejudice to such indemnity as the Former Trustees and the Present Trustee may be entitled [to] pursuant to Article 26 (2) of the Trusts (Jersey) Law 1984 in respect of expenses and liabilities reasonably incurred”.*

23. Finally, Iver was specifically not made subject to the Receivership, but was left subject to the pre-existing Freezing Order, apart from transactions carried out in the ordinary course of its business, as the holding company, of the family home (Paragraph 10).

## **The Appeals**

24. It is unnecessary to recite the detailed course of the appeals, through the Court of Appeal and up to the Privy Council, although it needs to be noted that these were far from simple, with several ancillary applications being made (mainly by GTC) and the Court of Appeal in fact delivering eight separate judgments. There were also other related proceedings commenced during the period, in Guernsey, in the UK and in Jersey.

25. Ultimately, on 23<sup>rd</sup> April 2018, the Privy Council gave judgment (see [2018] UKPC 7) in eight consequent appeals in which, after lamenting the fact that there is an unqualified right of appeal from the Guernsey Court of Appeal to the Privy Council when the value of the matter in dispute exceeds £500 (see s16 of the *Court of Appeal (Guernsey) Law 1961*), it held (1) that I&B were not personally liable to Glenalla and Thorson (whose claims had been upheld in the Court of Appeal, with Oscatello’s being overturned) in respect of their loans, and (2) that they were liable only to the extent of the Trust assets, which they had a right to call upon, in the hands of a successor Trustee, to be applied for the purpose of meeting such claims. I will refer to the judgment of the Privy Council in this case as “**the Privy Council Decision**” for convenience.

26. Lord Hodge gave the majority judgment of the Privy Council. En route to its conclusion, for the purpose of determining the effect of Article 32(1)(a) of the TJJL, he considered the nature of trustee liability in Jersey law and its consequences for the enforcement of liabilities incurred on behalf of the trustee, see [2018] UKPC 7 at [56] to [63]. I do not need to set out this entire passage in this judgment, but it is an expression

of the legal background to this dispute of the highest, and indeed direct, authority, and is the background to many of the submissions in this Application.

27. In summary, Lord Hodge observed that the basic law of Jersey is the Jersey common law. The concept of a trust had been statutorily imported into Jersey law from English law by the TJJL, although with some express modifications. Where there was a need to interpret the TJJL, some guidance as to the legislature's intention as to its effect could therefore be obtained from the copious English authorities on trust law, but this must always be considered against the background of the fundamental legal system being that of the Jersey common law.
28. He observed that in English law a trust has no legal personality; it is a relationship. All dealings affecting the trust estate are carried out by the trustees, in whom the trust assets are vested, and all liabilities are their direct responsibility. In English law the trustee's status is unitary; in principle (this can be modified by contract) he is personally liable, to the extent of his whole personal estate, for all obligations and liabilities contracted on behalf of the trust or imposed upon him because of it. His protection is, and is only, that he is entitled to reimburse himself out of the trust assets for obligations or liabilities properly incurred on behalf of the trust and paid by him, and he has a right of indemnity against the trust assets in respect of claims made against him for liabilities which should properly be borne by the trust assets.
29. Importantly, therefore, in English law a creditor of the "trust" has no direct right of recourse to the trust assets; the trustee is the only entity capable of being sued. The creditor's route to satisfaction *from the trust assets* is therefore through the trustee's right of indemnity/exoneration. He is subrogated to the trustee's own rights in this regard, in respect of his claim. The corollary of this is that the creditor's ability to recover out of the trust assets depends on the trustee's right and ability to do so, and it is therefore vulnerable. If the trustee loses his right of indemnity – typically through some form of misconduct or breach of trust – the creditor's right of recourse is taken down with it. This does not, of course, affect his rights against the trustee personally in English law. The effect, though, is that problems with regard to the insufficiency of funds to meet a trust creditor's claim in the basic situation under English law depend ultimately on the financial state of the trustee rather than that of the trust estate.
30. This onerous personal liability of a trustee, which can be dealt with only by contract or insurance under English law, has been found sufficiently unsatisfactory in other jurisdictions that it has been altered, generally with the aim of achieving a more satisfactory relationship between trustees and trust creditors, without unfairly prejudicing the position of beneficiaries. There are two possible routes for achieving such alteration. The first is to give trust creditors a right of direct recourse to trust assets. The second is to differentiate between the capacities in which a trustee acts, distinguishing between his personal capacity (incurring personal liability) and his trust capacity (incurring liability only from and to the extent of the trust estate).
31. On examination and consideration of the intention, wording, context and effects of Article 32 of the TJJL, the Board concluded that its effect was to take the second route. Article 32(1)(a) distinguished the extent of a trustee's liability where the other party to a transaction or matter affecting the trust knew that the trustee was acting as trustee, limiting it to the trust estate. Article 32(1)(b) applied the original position in English law (ie, personal liability but with a right of indemnity from the trust estate) where that other party did not know this.

32. The Board therefore rejected the contention that the effect of Article 32(1) was to give the trust creditor a right of direct recourse to the trust assets. Importantly for present purposes, at [63] Lord Hodge said:

*“.....the Board finds it impossible to discern from the terms of article 32 any intended change in the only method (of subrogation to the trustee’s indemnity) whereby the pre-existing law enabled creditors to have recourse to the assets of the trust for the enforcement of liabilities incurred by the trustees.”*

33. I record in passing that the Board indicated (see [57]) that the same considerations and conclusions would also apply to the trust law of Guernsey, which has enacted materially similar trust legislation to that of Jersey: see (now) Trusts (Guernsey) Law 2007 (“**the TGL**”), ss 35, 42 and 43, which correspond to Articles 26, 32 and 43A of the TJJL.

### **Further change of Trustee**

34. In either July or September 2017, during the period whilst the appeals were being progressed, GTC had themselves been removed as Trustee of the TDT by Mr Tchenguiz, and replaced by the Intervening Parties (“**F&B**”), who were then convened as such in the proceedings.
35. Thus, and importantly, there has been a succession of Trustees of the TDT over the relevant period, namely I&B as the first Trustees, GTC the second Trustees and F&B the third Trustees.

### **The Application – ambit and initial course**

36. With the liabilities in the action now finally determined and quantified, and held to be confined to being met out of the TDT trust assets, on 25<sup>th</sup> September 2018 the BVI Companies brought this application, seeking directions, first to authorise the Joint Receivers take possession of all of the assets of the TDT, and second to identify the liabilities which would now properly fall to be met from those assets, and ultimately to authorise and direct the Joint Receivers to make the appropriate distributions.
37. At the first hearing of the application, on 15<sup>th</sup> October 2018, the Court therefore gave practical directions with regard to this. The Joint Receivers were to determine whether, and if so what, further assets of the TDT they would now require to be brought into their Receivership, and conduct a procedure for obtaining as much information as possible regarding potential claims to be met out of trust assets. As part of this, all parties were directed to provide all information available to them as regards potential such claims, there was to be an advertisement, and notices of claims (which have been conveniently described as “proofs” of debt, although it is to be emphasised that this application is not a formal insolvency procedure) were to be submitted to the Joint Receivers by January 2019.
38. Some 15 proofs of debt were subsequently submitted, by both the parties to these proceedings and by third parties.
39. It will be appreciated that under the law as found by the Board only present and former Trustees of the TDT have a free-standing right to appear and make claims in this Application. Third party “trust creditors” would be required to join the Trustee against whom their cause of action arose into any claim which they wished to make.

40. Subsequent procedure in preparation for this hearing provided for notices of objection to various proofs to be submitted by other parties, and further evidence in support of such proofs to be filed, where this might be needed in order to examine their validity in principle, or their proper quantification. This process enabled the ultimate issues to be significantly narrowed, in the following main respects.
41. First, the procedure revealed a great deal of apparent duplication of claims. It has largely proved possible to eliminate this by the parties' agreement as to which is the appropriate party to be advancing the particular claim.
42. Second, claims advanced by certain third parties have been agreed to be considered on the basis that they are subsumed into the claim being advanced by the appropriate Trustee party.
43. Third, it has proved possible to identify and categorise the nature of matters in dispute, resulting in two main and significant issues of law being agreed to be appropriately dealt with initially, in the hearing which has just taken place. These two matters are:
  - (1) the issue of the priorities which will correctly apply to the satisfaction of any claims properly advanced in this Application (“**the Priorities Issue**”), and
  - (2) an issue as to the effect in law of certain assignments of claims ( in particular the BVI Companies' claim under their judgment) which have taken place (“**the Assignment Issue**”).

I will explain these further below.

44. Fourth, issues of detail have been identified as regards both the validity of certain claims being advanced (ie whether such claims are properly recoverable in principle, that is, whether they were reasonably incurred) or the quantum of the particular claim (ie whether the claims are reasonable in amount). Insofar as these latter claims raise points of legal principle or depend on a high level (ie broad) consideration of facts, it has been agreed that I will consider and determine those at a later hearing. I understand, for example, that several such claims relate to the recovery of legal costs, requiring consideration of the inter-action of costs orders made in these and other legal proceedings, both here and in other jurisdictions, as to which the issues are likely to be points of law. Insofar as any such further issues condescend to matters of detailed fact, particularly with regard to judgments as to reasonableness, I have indicated that I would propose to refer their determination to Lt-Bailiff Haworth or such other judicial officer as specialises in the taxation of costs and similar matters.

### **Background to the “Assignment” Issue**

45. Some explanation of this issue is helpful at the outset, and the background to this is the broad state of account relative to the estate of the TDT, as shown by the claims made in this application, and the assets revealed by the reports and evidence of the Joint Receivers.
46. The broad position can be gleaned from the latest progress report of the Joint Receivers from June 2019. It is that the Joint Receivers could realise about £30 - £35 Mn from the reliably realisable assets of the TDT other than the RCO, i.e. by way of net cash and

the clearly realisable value of certain shares. Shares in Safina Limited, included within this, are worth about £5.4Mn, but have been encumbered by a charge by way of security for a judgment debt or debts against Trustees of the TDT totalling about £3.4Mn in favour of Messrs Timothy Smalley, Aaron Brown and Mark Grunnell. Their value is thus apparently reduced to £2.1Mn. The RCO itself could realise a further net £25Mn or so. The remaining assets of the TDT have no realistic value on examination, and whilst the TDT might have further theoretical claims as a creditor, amounting to as much as about £250Mn, these are being made in the liquidations of insolvent companies. Any return from these is therefore highly unlikely, and certainly not imminent. Thus, the broad value of the Assets is around £55Mn - £60Mn.

47. The general position with regard to liabilities has, prior to this hearing, been far less clear, largely because of duplication in claims being advanced. Again dealing with a broad picture, it will have been apparent all along, and certainly from the date of the Privy Council Decision in April 2018, that by far the largest claim on the TDT assets was the judgment debts owed to Glenalla and Thorson. By the time of a case management conference in this Application in May 2019, these two debts, with accrued interest, totalled just short of £230Mn.
48. Other claims were relatively far more modest. I do not need to set them out accurately or in detail for the purposes of either this particular point, or this Application in general, and, as I have said, the position was certainly not clear until recently. The general picture which has emerged in the end, but the broad thrust of which will have been apparent earlier, is as follows:
49. I take first claims other than those advanced by the current Trustees, F&B, themselves:
- I&B claims some £26Mn, of which about £500,000 relates to its own remuneration and the remainder relates to legal costs claimed to be properly incurred in these and other proceedings arising out of its trusteeship;
  - GTC claims about £8Mn, comprising £4Mn, on account of it properly incurred legal expenses and remuneration in respect of its own trusteeship, and a further sum of just over £4Mn on behalf of the Tchenguiz Settlement, a different trust;
  - Mr Tchenguiz claims some £887,000 as Protector of the Trust;
  - R20 Advisory Ltd, an investment advisory company to the interests of Mr Tchenguiz, claims “about £9Mn” in respect of legal expenses claimed to have been paid by it on behalf of GTC or F&B as Trustees of the TDT at various times;
  - Messrs Smalley, Brown and Grunnell, mentioned above, claim in total about £3.4Mn, not allocated to any Trustee;
  - for completeness there is similarly an unallocated fee claim by Mr Mark Cunningham QC which, being only for £20,000 is *de minimis*.
50. The total of these claims is thus around £46 Mn. However, disregarding the claims of R20 Advisory Ltd (a company which has appeared to have connections or relations with Mr Tchenguiz and the TDT beneficiaries) and the claim of Mr Tchenguiz himself, it reduces to about £37Mn.

51. As to claims advanced by F&B in their own proof, as recently amended, these are, in approximate figures:

- £2.3Mn as trustees of the TDT in respect of legal costs and remuneration;
- £13.9Mn as trustees of the NS One Trust and The Tchenguiz Discretionary A Trust (“the **TDAT**”), which are separate and different Tchenguiz trusts;
- £14Mn as Trustee of the NS One Trust alone;
- £23,000 as Trustee of the Tchenguiz Discretionary C Trust (“the TDCT”);
- £1Mn as Trustee of the TDCT;
- £3.8Mn as Trustee of the TDAT alone;
- £3.8 Mn as Trustees of the TDT but in right of an assignment taken from the TFI, (which may be a duplication of the previous claim);

but lastly the highly controversial claims to

- about £2.3Mn (total) as trustees of the TDT as assignee of (now) claims made by Messrs Smalley, Brown and Grunnell in respect of a judgment debt or debts obtained by them against Trustees of the TDT in respect of work; and
- £231Mn as Trustees of the TDT as assignee of the BVI Companies’ judgment debt for its claims and costs orders granted in these proceedings (hereafter referred to for short as “**the BVI Debts**”).

52. It is these last claims which have given rise to the Assignment Issue. To understand how this came about, it is necessary to go back to the history.

### **The decision in *Re Z II Trusts* [2018] JRC 119**

53. As will be recalled, the Privy Council delivered its judgment in April 2018, putting an end to all possible further dispute about the liability of the TDT assets to meet the claimed loan debts of Glenalla and Thorson.

54. On 3 July 2018 the decision in *Re the Z Trusts; Equity Trust (Jersey) Limited v E (as Executor of the Estate of C)* [2018] JRC 119 was handed down by Commissioner Clyde-Smith. This case also concerned an “insolvent” trust. The facts were relatively simple. Equity Trust Limited (“**Equity Trust**”) had been the trustee of the ZII Trust, a Jersey Law trust established in 2004 of which the family of C had been the principal beneficiaries. It had retired in 2006 and been replaced by Volaw Trustees Limited (“**Volaw**”).

55. In 2012, the liquidators of Angelmist Properties Ltd launched proceedings in England claiming some £42 Mn damages for breach of duty against directors of Angelmist who had been employees of Equity Trust and put in place by them, with further consequent claims against Equity Trust itself. Equity Trust notified Volaw of its intention to rely upon the indemnities granted to it as former trustee by Volaw. By 2015 it was clear that the ZII Trust did not have sufficient assets to meet its apparent liabilities. Volaw were replaced by Rawlinson & Hunter Trustees SA (“**R&H**”) as trustee, and R&H continued to administer the trust under the direction of the Jersey court.

56. In December 2018 Equity Trust settled the English proceedings by paying £16.5Mn to the Angelmist liquidators. It sought to recover £18Mn (being this sum plus further costs and expenses incurred) from the assets of the Z II Trust, whose only actual asset was a loan from another Z Trust, written down in value to £6Mn. The other claimed liabilities of the ZII Trust estate amounted to £211Mn, and comprised loans from connected trusts and from C or his Estate.
57. Equity Trust claimed priority for its claim over these other claims against the assets of the ZII Trust. On the assumption that all claims were valid, the difference, for Equity Trust, was that if it were entitled to priority it would recover the whole of the available £6Mn whereas if it could not, and the proceeds of that asset had to be distributed on a *pari passu* basis, it would recover only £330,000. It was agreed between the disputing parties that the issue of law with regard to priorities should be decided as a preliminary point.
58. Commissioner Clyde-Smith heard the application in March 2018. The Privy Council Decision in this case was handed down before he had completed his judgment, and he invited submissions based upon it. He concluded that the effect of the Privy Council Decision was that Article 32(1)(a) of the TJJL was simply (and no more) to remove what would otherwise be the unlimited personal liability of a trustee to creditors who transact with it knowing that it is a trustee, and that neither the Privy Council Decision nor Article 32 spoke at all to the consequent potential issue of priorities between creditors, or between successor trustees. Having thus held that this issue was at large, and having considered authorities put to him, he concluded that authority tended to support a *pari passu* scheme for priority, certainly as between what one might term “co-trust-creditors”, and that there was neither authority nor principled reasoning for concluding that any different regime should apply between successor trustees; whilst the Privy Council Decision clearly laid down that a former trustee had an interest in the nature of an equitable lien as against assets of the trust in the hands of a successor trustee, that did not mean that, in the case of insufficiency of assets in the trust, the former trustee could claim any priority; it merely acknowledged the existence of his interest in the assets themselves, leaving the precise effects of this to be determined. He concluded, therefore that the claim of Equity Trust ranked *pari passu* with the claims of the other creditors of the ZII Trust.

## The Assignment

59. This Application by the BVI Companies, to obtain payment of their claims by enforcement against the TDT assets in the hands of the Joint Receivers, was launched on 25<sup>th</sup> September 2018. There was then a directions timetable, covering preparation for the intended ultimate hearing, stretching into the spring of 2019.
60. During this period, on 22<sup>nd</sup> March 2019, F&B, as Trustees of the TDT, took an assignment (“**the Assignment**”) of the BVI Debts, i.e. the BVI Companies’ judgments obtained in these proceedings, and the benefit of costs orders made in their favour. On 26<sup>th</sup> March 2019, the BVI Companies gave formal notice of the Assignment to I&B and to the Joint Receivers.
61. Initially, this event created a diversion, in that F&B were reluctant to disclose the entire terms of the Assignment to the other parties to this Application, and produced only a heavily redacted form, on the grounds that the redacted parts of the Assignment were commercially sensitive. Eventually, that issue was resolved by the production of a less

heavily redacted form, which F&B, through its Advocates declared to reveal all parts of the Assignment document which were material to its validity and material effect, and with there being an agreement that F&B could not seek to refer to, or rely on, any matter contained in the redacted parts of the Assignment document as evidence in the Application.

62. The reasons for the Assignment are rather obvious. The value of the total net Assets in the TDT Estate in the hands of the Joint Receivers is around £55-£60 Mn. The claims of “outside” creditors – ie those other than entities connected with or acting for the Tchenguiz family – would total about £272 Mn if the BVI Companies (and Messrs Smalley, Brown and Grunnell) were included, but reduce to around £37 Mn if they are taken off the potentially hostile side of the picture. *Prima facie* the Assignment would seem to put into the hands of F&B claims which would outvalue the claims of “outside” creditors many times over. If, therefore, the proper approach to priority of all claims against the TDT estate were to be that of *pari passu* distribution as found by Commissioner Clyde-Smith in the *Re ZII Trusts* case, this would vastly increase the share of the TDT Assets which F&B would receive from the Joint Receivers.
63. However, I&B, supported by GTC, take the point that this is not the effect of the Assignment, even apart from the second point about priority. They contend that, whether or not this was the intention, the true legal effect of the Assignment has been simply to extinguish or discharge the relevant debts. What has happened is that, in effect the creditor (the BVI Companies) has assigned its debt to its debtor (the Trustees of the TDT) and that the extinction of this debt is therefore, the inevitable legal effect of the Assignment, at law, whether or not (and it obviously was not) intended.
64. Naturally, F&B dispute this, claiming their entitlement to maintain a claim for this debt against the Assets in the Joint Receivers’ hands. This dispute is the essence of the Assignment Issue. I elaborate further later in this judgment.
65. I should add at this point that F&B have also taken similar assignments of claims under judgment debts given in English proceedings against former Trustees of the TDT first from Mr Timothy Smalley (a claim of some £1Mn) (“**the Smalley Debt**”) and, very much more recently, also from Messrs Aaron Brown and Mark Grunnell in the sum of £1.9Mn. It was common ground at the hearing that the same arguments apply in relation to Mr Smalley’s assignment, and I am not aware of any difference of principle which might apply in respect of Messrs Brown and Grunnell. For simplicity, though, I will refer only to the Assignment itself when considering the relevant legal arguments.

### **The ZII Trust case in the Jersey Court of Appeal**

66. Continuing the material history, the ZII Trust case went to the Jersey Court of Appeal, and the decision of that court was handed down on 28<sup>th</sup> June 2019: see [2019] JCA 106 “**the Re ZII Trust case**”) This created a new situation, because the Jersey Court of Appeal overturned Commissioner Clyde-Smith’s decision on priorities, and held that the effect of the (accepted) importation into Jersey law of a trustee’s equitable lien to support his right of indemnity, consonantly with implications from other provisions of the TJL, was that a “first in time” priority regime, similar to that which would apply to equitable charges in English law, applied to such liens in competition, notwithstanding the accepted fact that the Jersey common law does not recognise the concept of a non-possessory equitable lien over movables (personal property).

67. I will return to the details of this judgment later, as necessary, but I record here that on 23<sup>rd</sup> September 2019, (see [2019] JCA188) the Jersey Court of Appeal granted leave to appeal to the Privy Council to the unsuccessful Respondents to the appeal in the *Re ZII Trust* case, on the grounds that two matters of general public importance to Jersey law arose which the Privy Council ought to consider. It named these as (i) the correct method of dealing with the liabilities of a trust whose assets are insufficient to meet the claims upon it, and (ii) the status in Jersey law of a trustee's lien, having regard to the background that the customary law does not recognise the concept of a non-possessory equitable lien.

### The Transfer Application

68. During case management hearings in this Application, Advocate Robison for F&B had proposed that there be directions to implement a plan which, he said, would enable the early release of Assets in the hands of the Joint Receivers back to F&B, achieving this without prejudice to the claims of competing Trustees and creditors of the TDT even put at their highest, and which (he said) would operate to the benefit the beneficiaries of the TDT by enabling the TDT to function, at least to some extent, properly as a trust again, and enable the current Trustees to keep down the accrual of interest charges to the TDT estate. As to the latter, he was not prepared to give details, but invited the reasonable (he submitted) inference to be drawn that monies had been expended, in particular in connection with obtaining the Assignment(s), which monies had had to be borrowed.
69. Other parties to the Application objected that this proposal could and should await the actual hearing, scheduled for October. However, on the basis that if there were some potential advantage to beneficiaries – and that even saving a few days of interest running on possibly large borrowings would be such an advantage – and no real disadvantage to potential creditors, I declined to insist on this, and indicated that F&B were free to seek to bring on such an application independently, if so advised, under the usual process of the court.
70. F&B accordingly made such an application, dated 5<sup>th</sup> August 2019, in time to be noted at the Pre-Trial review on 9<sup>th</sup> August. This application has been referred to as “**the Transfer Application**”. It was first heard and adjourned on 18<sup>th</sup> September 2019 and was finally concluded on 3<sup>rd</sup> October 2019. I need to explain it at least in outline here, because it has changed the landscape with regard to the Receivership Assets somewhat, whilst also undoubtedly helping further to clarify and narrow the issues between the parties.
71. The essence of the relief sought by the Transfer Application was to identify the claims now being made against the Assets in the Receivers' hands which could be regarded as “hostile” in the sense that they were not being made either by F&B or by persons who were sufficiently connected with or kindly disposed to the TDT to be willing (for one reason or another) not to seek to pursue their claims against the assets of the TDT in competition with “outside” creditors, in this Application at least. It was then proposed to determine the amount of cash which would cover (i) the amount of those identified claims in full, (ii) the costs and potential costs of the Joint Receivers and (iii) insofar as the Court considered appropriate, further sums in respect of any potential future or contingent claims of all such persons against the Assets. The aggregate amount of such cash sum would then be raised and ring-fenced in the hands of the Joint Receivers by taking, first, the cash sums already held by them and, second, permitting either the shares

in Iver, or the RCO building itself, to be mortgaged to make up any shortfall. The total sum would then be paid into a blocked bank account to be opened by the Joint Receivers. This fund would then be available to pay the identified creditors the amount due to them, once ascertained, and the remaining Assets of the TDT in the hands of the Joint Receivers could be handed back to F&B as Trustees of the TDT, for them to deal with as appropriate, in respect of the remaining or other liabilities of the TDT and the running of its affairs, which had effectively been frozen since 2014.

72. Advocate Robison accepted that the appropriate approach to fixing the sum to be set aside for future or contingent liabilities should be a reasonably generous one, on a “fail safe” basis (except where the court was satisfied that the possibility of any such claim was obviously speculative). He also indicated that this plan was not intended to confine the claims of relevant creditors to the fixed sum in the unlikely (he submitted) event that the estimate of any future or contingent claim might prove insufficient in practice. He accepted that such creditors would still have the right to pursue any outstanding claims against the assets returned to F&B. The effect of implementing this scheme would be that insofar as the claims of the “outside” claimants were ultimately upheld, their recoverability was secured in full, so that if “first in time” were the correct priority for such claims, they were entirely protected. They would not be disadvantaged because they could not be worse off if the ultimate priority decision were in favour of *pari passu*, as their recovery in such a case could only be lower.
73. With the parties’ co-operation and agreement to various administrative directions designed to protect the position (such as for the Joint Receivers to enter into a formal security interest agreement with any relevant claimant who wanted the comfort of such an agreement, and directions for ensuring that the value of all the Assets was clearly recorded for future use if this were required in order to calculate a *pari passu* distribution), this scheme was implemented in the Order.
74. The potential claims and liabilities thus protected included the claims referred to at Paragraph 49 above, with, in addition, the estimated fees of the Joint Receivers at a fair maximum of £2Mn to date, with a further possible £800,000 to completion, and further sums in respect of (i) the possible further legal costs of concluding one remaining set of proceedings (“**the NS1 Proceedings**”) in Guernsey and in the UK and (ii) the possibility of further appeals in this Application, totalling an estimated £2.3Mn. With rounding up to provide a small amount of contingency, the total sum ordered to be preserved in this fund was £41.5Mn.
75. With that lengthy but necessary preamble I turn to consider the two main issues identified for determination in this first substantive hearing of this Application.

**The Issues: (1) Effect of the Assignment and**

**(2) Scheme of Priorities of Claims.**

76. The arguments on these two issues were effectively between Advocate Robison for F&B and Advocate Wessels for I&B. It will therefore be natural to refer to them as “the parties”. For GTC, Advocate Field aligned himself with Advocate Wessels on the Assignment Issue, (in fact some of the costs orders which are the subject of the Assignment are liabilities of GTC) and on the Priorities Issue he took what was to all intents and purposes a passive position. The effects of that argument impact principally on I&B and F&B.

77. As a matter of logic, I took the view that the Assignment Issue should be dealt with first, and prior to the Priorities Issue. However, in the event it emerged that the arguments were sufficiently interlinked for it to be convenient to hear all the arguments on both issues before making a decision on either.
78. During the course of arguments the Advocates each asked for time to consider points raised by the other, and so the presentation of argument became somewhat fragmented. This is not a criticism. The arguments on these two issues, as they developed, are intricate and the points themselves not easy. I thank all three Advocates for their hard work, but in particular Advocates Wessels and Robison who assumed most of the burden, and I pay tribute to the conspicuous ability with which they all presented their arguments.
79. The course of the hearing, which lasted five days, and extent of the arguments makes it necessary to explain and record that I have not referred, in this judgment, to every point raised by every party. This judgment is long enough and complex enough as it is. I have taken account of all the points made, however (I was supplied with transcripts of the hearings, which I was usefully subsequently able to read through and refer back to). The judgment which follows gives the main reasons for my decisions, sufficient (I trust) to enable anyone who may subsequently need to, to understand their basis.

### **The Assignment Issue**

80. First, I state the common ground.
81. Both parties agree that the Assignment is valid and effective *per se*. It does what it purports to do, namely to assign the benefit of the BVI Companies' "Judgment Debts" and "Costs Orders" (as defined) to F&B, expressly in their respective capacities as co-trustees of the TDT (see Clauses 2.1 and 3.1). Advocate Robison invited me to note, from unredacted text in the Assignment document, that £3.25Mn was also provided or procured by F&B to be placed in an Escrow Account to provide an indemnity to the BVI Companies against the future determination of any adverse costs liabilities against them.
82. Both parties are also agreed on the effects of the Privy Council Decision summarised above. In particular they agree:
- that the effect of Article 32 of the TJL is to create two separate capacities for trustees: their unlimited personal capacity, and their trust capacity under which their liability to outside claimants who know they are acting as trustee is limited to the assets in the trust estate;
  - that a trustee obtains a right of indemnity out of trust assets for trust liabilities properly incurred by or imposed upon him;
  - that this right of indemnity is supported where the assets are no longer in the relevant trustee's hands, by a right to a non-possessory equitable lien over those assets in the hands of subsequent trustees, and
  - that the only route for an external creditor to obtain satisfaction of "trust liabilities" to him from a trustee who no longer holds the trust assets is through subrogation to that trustee's right of indemnity against the trust assets – subject, therefore, to

whatever frailty might affect that right of indemnity in the hands of the relevant trustee.

### **I&B's submissions**

83. It is convenient to record I&B's submissions first. I&B have objected to the proof of claim in respect of the BVI Debts now advanced in this Application by F&B on three grounds. The last goes only to the inclusion of some £11Mn in respect of costs claimed by the BVI Companies which are subject to a particular point of objection and which will fall to be considered later. The first two grounds go to the broad issue here, namely the general effect of the Assignment itself.
84. Advocate Wessels, for I&B, submits that, whilst accepting the validity and operative effect of the Assignment for present purposes, its effect is to prevent F&B from advancing any claim to satisfaction of these liabilities against the Receivership Assets for two alternative reasons.
85. First, he argues that the effect of the Assignment in law was to discharge or extinguish the debts claimed by the BVI Companies from I&B as trustees of the TDT through the doctrine of merger. Discharge by merger of a contractual obligation arises where the correlative rights and obligations become vested in the same person in the same right: see Chitty on *Contract* 33<sup>rd</sup> Ed para 25-004. (Advocate Field observes that the same principle is recognised to apply to bills of exchange: see s. 61 of the *Bills of Exchange Act* 1882). Perhaps putting the same point another way, F&B, as Trustees of the TDT are already entitled to the assets of the TDT (subject to the claims of creditors) and they therefore cannot, as a matter of law and logic, pursue a claim against assets which they already hold.
86. In support of this argument, Advocate Wessels submits that there can be no doubt that if I&B had taken an assignment of the BVI Debts from the BVI Companies, those debts would have been extinguished. There is little or no modern authority, even on analogous circumstances, but Advocate Wessels submits that the rationale of the doctrine – the discharge of contractual obligations as a result of their vesting in the same person – is that a man cannot have a contract with himself, because he cannot sue himself. This basic principle extended even to the impossibility, in English law at any rate, of a person suing a partnership in which he was himself a partner: *Neale v Turton* (1827) 4 Bing 149. It is also the reason why, if a creditor dies and appoints the debtor as his executor, the debt is extinguished (*Wankford v Wankford* (1704) 1 Salk 299). This, he submits, is a point of substance and not mere antiquated civil procedure.
87. The situation created here, by the Assignment, was at least the equivalent of a party suing itself, because both the capacity in respect of which, and the estate in regard to which, F&B would both claim and satisfy the BVI Debts was one and the same.
88. Second, and alternatively, if the sums which are the subject of the Assignment are capable of enforcement, then F&B, who expressly took the Assignment as Trustees of the TDT, hold the benefit of these sums in trust for the creditors of the TDT assets as a whole. It is well established that where the assets of a trust are not sufficient to discharge the debts required to be satisfied from them the trustees hold the assets in trust for the creditors and not the beneficiaries, unless and until those debts have been discharged.

89. The consequence, he submits, is that even if F&B's Amended Proof, including the BVI Debts, is admitted and the Joint Receivers were directed to make payments to F&B in respect of these, the sums paid over would be held by F&B as assets of the TDT available to discharge the debts of all creditors with claims on the estate of the TDT, and they would have to be redistributed among any such creditors who remained unsatisfied, according to their entitlements. The effect is therefore entirely circular, and ultimately produces the same result as if the claims advanced by F&B in reliance on the Assignment of the BVI Debts had not been included in the first place. This shows either that, as a matter of practice, they should not be admitted, or that, as a matter of law, they have effectively been extinguished.

### **F&B's submissions**

90. Advocate Robison, for F&B, submits that the BVI Debts were the liabilities of I&B and of I&B alone, albeit in their capacity as Trustees of the TDT. The BVI Companies therefore had the right to recover their debts through subrogation to I&B's right of indemnity out of the trust assets. This is what has been assigned to F&B. The debts are not, and never were the liabilities of F&B; they have always been and remain the liabilities of I&B.

91. Therefore, he submits, the Assignment has not effected the extinction or discharge of those debts by merger. The passage in Chitty on *Contract*, 33<sup>rd</sup> Ed para 25-004, relied on by Advocate Wessels says:

*"A contract may ... be discharged where the rights and liabilities under it become vested, by assignment or otherwise, in the same person in the same right, for a man cannot maintain an action against himself."*

92. That, Advocate Robison argues, is not the case here, because the relevant rights and liabilities are just not vested in the same person; there is no identity between F&B on the one hand and I&B on the other. They are different legal entities. To vindicate the cause of action in respect of these debts, the right to which is now vested in F&B by the Assignment, will not, and indeed cannot ever, as a matter of process, require F&B to sue itself. It must sue I&B, who are "elemental" to the claim F&B must make. Therefore the conditions for merger of the debt and liability have not occurred, and the BVI Debts remain alive in F&B's hands.

93. He submitted that the authorities and analogies cited by Advocate Wessels should be dismissed for being of no assistance, partly because of their antiquity and partly because they dealt with quite dissimilar situations.

94. He submitted that it was also incorrect as a matter of analysis to argue that F&B were already entitled to the assets of the TDT subject to the creditors' claims because the correct analysis is that there remains a liability of I&B which gives rise to the Trust Assets being controlled by the Court, and only the surplus (if any) would be released to F&B. Therefore, the BVI Debts were a liability of I&B, which remained a liability of I&B, and qualified to be counted as a liability ranking for payment just as if the Assignment had not been made, or had been made to a third party.

95. Lastly, in an argument going to the merits, he submitted that I&B's argument could not be right because it would be circular, because it would give an unjust windfall to other creditors who would gain a windfall advantage from having the BVI Debts removed

from competition for the Assets, whereas allowing F&B's claim made them no worse off than before, and, lastly, because F&B had procured the Assignment in pursuit of their duty to protect the interests of the beneficiaries of the TDT and by utilising assets outside the Receivership and thus beyond the rights of the Receivership creditors. As to the last argument, he agreed that he had to accept that evidence on this point was limited, by the redaction of the Assignment document, to the fact of the Escrow Deposit and to such common sense inferences as the court ought to be prepared to draw from the mere fact of the Assignment itself.

### **The further development of the parties' submissions at the hearing**

96. Advocate Robison thus laid great stress on the proposition that the legal identities of the postulated plaintiff and postulated defendant in any action to enforce the BVI Debts were different – and inevitably different – as the foundation for his argument that the legal conditions creating a discharge of the BVI Debts had not occurred.
97. Advocate Wessels' riposte to this was that the crucial point for his purposes was not that the rights and obligations were held by the same legal person, but that they were held "in the same right", ie by some such person acting in the same capacity, or as to the same estate. Thus, the relevant legal personality was not "I&B" and "F&B", but the conceptual personage of "the Trustees of the TDT", and the relevant right was their capacity as such, necessarily defined by reference to the assets of the TDT as the property vested in them in that capacity.
98. There is an intuitive logic about Advocate Wessels' proposition, but it has not been possible to find any legal authority to support it clearly. The problem posed in this case is novel to Jersey and Guernsey law, and cannot arise in the trust context in English law. Resort to authority can therefore only provide possible analogies, and the parties' Advocates' researches have yielded little fruit.
99. I find force in Advocate Robison's submission that the authorities and examples cited by Advocate Wessels are of no real assistance. The situation in *Neale v Turton* would, I have no doubt, be dealt with in modern times simply by appropriate constitution of the action and formulation of the relief claimed. I also do not see any helpful analogy in the rigidities of the somewhat arcane English law of probate and administration from 300 years ago. This was not quite as simple as would appear from *Wankford v Wankford* (above). First, the doctrine of the forgiveness of the debt was held not to apply as against creditors of the deceased creditor; the debtor/executor would be obliged to account to them on the basis that the proceeds of his debt, forgiven by the deceased creditor, were available at least to pay them: *Bone v Stamp Duties Commissioner* (1974) 132 CLR 38 and see also Underhill & Hayton: *The Law of Trusts and Trustees* 19<sup>th</sup> Ed at 9.46. Second, the rationale of this doctrine was efforts under the constraints of rigid legal principle to enable the completion of legally incomplete gifts. It thus depended on the divined intention of the deceased creditor, which is why attempts to extend it to administrators rather than deliberately named executors were regarded as questionable. I therefore find analogies from this area of law to be well wide of any useful mark.
100. In view of the highly analytical nature of this argument, it seemed to me to be appropriate to examine the factual situation rather more closely and accurately than simply referring to "enforcing a judgment debt" or recovering "via" the rights of the trustees.

101. Since the merger argument was said to rest on the proposition that a man cannot sue himself, I asked for Advocate Robison's submissions as to the precise form of the legal proceedings which would have to take place if F&B sought to pursue their claims as assignees of BVI Debts. I suggested that, in view of the accepted legal means of enforcing a judgment debt against a trust estate, what had been assigned to F&B by the Assignment was not an actual judgment debt, as a *chose in action* itself, but, rather, the BVI Companies' rights to require I&B to compel the current holders of the trust estate to raise sums out of those assets to pay the relevant debts, and to pay these sums to I&B for the purpose of paying them on to F&B. As a matter of convenience, the payment might be made directly to F&B, but F&B would obviously not be permitted, as a matter of due process, to bring proceedings without convening I&B at all, because it was only through I&B's indemnity that a right of recourse to the trust estate in the hands of the current holder of that estate could be enforced. However, since the current holders of the trust estate were F&B themselves as the present Trustees of the TDT, this would therefore appear, in substance, to entail a court order that F&B "pay themselves" in the sense of requiring them to take monies out of the TDT estate to give effect to a process by which they would ultimately receive them back into the TDT estate. I asked, therefore, on what basis Advocate Robison contended that this did not amount to F&B "paying themselves" (by, metaphorically, taking out with one hand and receiving back with the other), or effectively suing themselves, through being the party with the same identity (F&B) and in the same right (Trustees of the TDT) who would both initiate the claim, and be the ultimate respondent to the consequent sequence of claims over in the action.
102. Advocate Robison responded that this was not the actual practical situation in this case because of the Receivership Order. F&B were not the current holders of the Trust Assets; the Joint Receivers were. He emphasised that F&B were not entitled to the TDT Assets at all, and never would be, because they would only ever be entitled to receive the surplus (if any) out of any such Assets after the Receivership had been concluded and all required payments made. F&B would therefore never be at the final end of any claim now initiated in respect of the BVI Debts, by whatever route; it was the Joint Receivers who would be, and indeed that was the very position in the present Application, launched originally by the BVI Companies. This all showed that the conditions for discharge by merger - that the relevant right and corresponding obligation must be vested in one and the same legal person in the same right - were not being met.
103. This put a rather different complexion on F&B's case from that which I had originally perceived, and I asked Advocate Robison whether, in view of his continual and emphatic reference to the Receivership, he was accepting that the existence of the Receivership Order was fundamental to his case. He would not, initially, go as far this, but submitted that it provided the most obvious and clear illustration of the basis for his submission that there had been no discharge of the BVI Debts by merger by the Assignment made in the current circumstances.
104. He referred to the breadth of the powers granted to the Joint Receivers. They had been given the widest powers, not just to take possession of the Assets, but also to realise them and to manage them, to appoint directors of the companies whose shares were comprised in the Assets, to use those companies' bank accounts and to pay proper expenses. Their very wide powers were limited only by their not being permitted to make distributions without a further court order. He submitted that these wide powers were, or were tantamount to, the conferral of an estate or interest in the Assets on the

Joint Receivers. Thus, both the separate and different personal identity of the Joint Receivers and the separate and distinct right and interest by which they held the Assets, meant that the doctrine of merger did not apply, and the BVI Companies' rights in respect of the BVI Debts remained alive and separate in the hands of another distinct legal person, namely F&B.

105. I pressed him, nonetheless, as to how he would put his argument in the absence of any Receivership. He submitted that, whilst his argument was stronger and clearer in the context of the Receivership, because it was apparent that in that case F&B would never receive the TDT Assets as such but only the surplus after the Receivership had been worked out, he would contend for the same result – no merger - because, he submitted, any recoveries made by F&B in respect of the claims being advanced by them in right of the BVI Debts would be held separately by them for the benefit of the beneficiaries. This point was, together with his point about the different legal personalities of the debtor, I&B, and F&B as claiming creditor, sufficient to support his proposition that there was no merger. However, the combination of these points with the actual fact of the Receivership hugely strengthened his case.
106. This brought the submissions back, therefore, to the argument relied upon by Advocate Robison in answer to Advocate Wessels' alternative argument that F&B's claim in regard to the BVI Debts should not be admitted in this Application because it was fatuous, as any recovery out of the Assets by F&B would simply become part of the pool of TDT assets which would fall to be distributed to other creditors of the TDT until it had been exhausted in payment of such creditors. Advocate Robison submitted that that analysis was just plain wrong. Recoveries by F&B would be held by them as Trustees of the TDT for the beneficiaries and would not "fall back" into the pool of assets available to satisfy the creditors in this Application.
107. Pressed as to the basis for this contention, Advocate Robison said, first, that these recoveries would not be caught by the Receivership Order, because the terms of that Order were specific as to the Assets which were its subject matter. The recoveries would therefore be outside the scope of the order and thus held on a different basis; F&B were under no obligation to account to the Joint Receivers in respect of them. Second, he argued generally that such recoveries as were made by F&B in respect of the BVI Debts would be in the position of fresh assets being settled into the TDT. Plainly (he argued) if the settlor settled further assets into a settlement after the departure of a trustee, those assets would be used for the benefit of the ongoing beneficiaries; they would not be available to be taken in payment of the liabilities of an earlier trustee who had never had control of them but only of the previous trust assets, and who had transacted only in relation to those previous trust assets. Recoveries made by F&B as Trustees of the TDT long after the departure of the Trustees concerned (I&B) and in respect of an asset (the right to the BVI Debts) acquired long after that departure, would be in exactly the same position.
108. The further explanations given by Advocate Robison as to the justification for this last proposition rested, it thus emerged, on an assumption about the operation of a trustee's equitable lien over trust assets after that trustee's retirement or removal, namely that the lien attached to the trust assets as they stood *at the time of the removal or retirement of the trustee*, and was fixed at that point, such that assets coming into the trust after that time were not affected by the lien and were unencumbered by it as trust assets.

109. It can be seen that the validity of this proposition is relevant, not only to the effects of the Assignment, but could also be relevant to the Priorities Issue. It is also contentious. I will return to the point later.
110. To complete an account of the arguments: Advocate Wessels responded that Advocate Robison's arguments based on the effects of the Receivership Order amounted to a submission that that Order had changed the pre-existing rights of the relevant parties, ie of the successive Trustees. This, he submitted, was wrong.
111. First, the Receivership Order itself had expressly preserved the indemnity rights of both his clients and GTC against the trust Assets handed to the Joint Receivers. By definition, therefore, it had not altered these.
112. Second, the Receivership Order was not in respect of the totality of the TDT assets but had initially, for example, excluded the shares in Iver/the RCO, and had been varied since. The function of the Receivers was not to pursue claims to get in assets, but simply to hold and manage what was specified, and no-one has acted on the assumption that the "Assets" comprised the only assets of the TDT. This showed that the Receivership was an administrative process and was not at all dispositive.
113. Third, the intention of the Receivership was obviously not to alter the interests or rights of any parties in or against the assets of the TDT, but simply to hold the ring and protect the underlying rights and interests of any person in respect of those Assets, pending their being finally determined through the appeals. This was necessary because the original judgment would quite obviously have made the TDT "insolvent". The Joint Receivers were put in place to be custodians for reward of the relevant Assets, but their position was only that of a custodian. This intention was clear, both from the wording of the Order and from its function. The powers of disposition or management given to the Joint Receivers were given to them to facilitate and support their function of preservation and protection of the value of the relevant Assets. Those powers were not an indication of any actual interest in the Assets being conferred on the Joint Receivers. The underlying entitlement to the Assets remained that of F&B in their capacity as Trustees of the TDT, albeit in the financial circumstances they would be obliged to discharge their duties as such Trustees by paying out claims of any creditors properly chargeable to the Trust Assets in priority to the beneficiaries (see the *Re ZII Trust* case at [38], second sentence, approving the Commissioner's decision without demur on this point).
114. Therefore, Advocate Wessels submitted, Advocate Robison's proposition that sums paid out to F&B in respect of the BVI Debts would be held on a different basis from that applying to the Assets in the Receivership could not be sustained. It could only work if F&B could identify some event which, in law, created a "new regime" in respect of the sums recovered, and which completely stripped away any residual operation of I&B's admitted rights of indemnity. Advocate Robison tried to suggest that the Receivership Order had done this, but it did not, for the reasons above. Indeed, it had been accepted or admitted in the course of the Transfer Application that parties claiming through proofs submitted in the Receivership would not lose their rights if they were not fully paid through the Receivership, but could continue to follow any Assets released to F&B and enforce their rights accordingly. This had been one of the points which had been used to persuade the court to allow the scheme proposed by the Transfer Application, at all. No other legal event which could have the necessary effect had been identified by Advocate Robison.

115. Insofar as Advocate Robison's submission in this regard could be seen to have developed, in effect, into an argument that a trustee's lien operated as a fixed charge over only the assets in the trust at the time of his departure, this was contrary to authority. In *Re ZII Trust* the concept that the equitable lien operated in the nature of a floating charge was expressly endorsed at [190]. This was also (he submitted) clearly the underlying understanding of the Guernsey Court of Appeal in this case itself: see *Investec Trust (Guernsey) Ltd and others v Glenalla Properties Ltd and others*, Guernsey Judgment 41/2014 at [38]:

*"The trustee will also have access to such other trust assets as may be held by a subsequent trustee as a result of the equitable entitlement which we have described"* (emphasis added),

and it is to be inferred from the Privy Council Decision, for example at [59 (v)], that this analysis was endorsed, even though there was no requirement for an actual pronouncement upon it.

116. Lastly, any arguments from "fairness" did not detract from the position advanced by I&B, because the trust law recognised that the inherent justice in the trust situation was that where the trust estate was apparently "insolvent", creditors should be paid before beneficiaries, whose interests the current trustees would of course be championing insofar as permissible, had any entitlement.

## Discussion and decision

117. I prefer Advocate Wessels' arguments on this issue.

118. In my judgment Advocate Wessels is correct that the key principle behind the doctrine of discharge or extinguishment of a liability by merger is the single and unitary identity of the "right" by which, and against which, the relevant claim is made. Advocate Wessels describes this as identity of capacity. In this instance this is correct and sufficient, but that is because "capacity" in this context is identified by reference to the estate of the TDT, the control and vesting of which defines that capacity (see the analysis in the Privy Council Decision). In other words the relevant capacity is that of "Trustee of the TDT" as signifying the entity which holds the assets comprising the TDT upon the trusts of the TDT.

119. In my judgment, the effect of the Assignment of the BVI Debts (owed out of the assets of the TDT) to F&B as the Trustees of the TDT was to extinguish the independent existence of those Debts because the ultimate right to receive and the ultimate obligation to pay simply became coincident. When a negative comes into coincidence with the equivalent positive, the result is nothing, or zero. They are opposite sides of the self-same coin; they simply cancel each other out, and, in my judgment, they do so quite automatically when such coincident vesting occurs. Extinguishment, or cancellation, by merger of right and obligation, is thus the best description.

120. Viewed from the angle of practicalities the result is the same. For F&B to advance a claim as Assignees of the BVI Debts they would be in a position at least equivalent to that of "suing themselves", because they would both have to institute the necessary action as Plaintiff and also respond to that action as the ultimate Defendant to the consequent claims over which would be made, and this would all be in the same unitary capacity, namely that of their being Trustees of the TDT.

121. As to Advocate Robison's case, I consider first his argument on the position apart from the Receivership Order. He explained that, leaving that aside, he relied (in support of his analysis that there had been no merger of claim and liability in respect of the BVI Debts) on the fact - although this was really a proposition - that if F&B made recoveries in respect of their assigned rights to the benefit of the BVI Debts, those recoveries would be held by them for the beneficiaries of the TDT, and would not fall back into the pool of assets affected by this Application.
122. Insofar as that argument rested on the proposition that it would be necessary for a separate and further application to be made by any continuing claimants if they were to seek to claim further against such recoveries, even if that were correct as a matter of procedure (and I am not convinced that it would be), it does not, in my judgment, affect the rights of such parties to pursue such claims. That is a procedural point only, which would not, therefore, alter the legal position.
123. Advocate Robison's other point on this aspect has more substance. As it emerged in the course of argument, it relied on the analysis that such recoveries would be outside the ambit of the I&B lien under which the assigned BVI Debts were being pursued, and that this assertion depended in turn on the proposition that the equitable charge conferred by such lien did not operate as a floating charge over assets of the TDT from time to time in the hands of successor Trustees until payment had been made in full, but operated as a fixed charge confined to the TDT assets at some earlier time. As will appear later in this judgment (see "Consequential Matters"), I reject that proposition.
124. However, I need to record one consequence of this. In my judgment, insofar as the TDT is "insolvent", ie has insufficient assets to satisfy valid claims being made against those assets, any distributions made to F&B out of the Assets *in their capacity as Trustees of the TDT* (but not in any other capacity) would be an asset of the TDT. It would inevitably, then, be an asset which became available to make further distribution to any other claiming creditors of the TDT insofar as they had not been satisfied. If F&B shared in any such further distribution, then the same result would apply. By this regression, so long as other creditors had not been paid in full, the eventual result would become, in effect, a distribution as if the claims of F&B which had originally been made and included had never been made or included at all.
125. During the course of argument I asked Advocate Robison whether, if I were against him on this point and were to hold that distributions received by F&B in respect of the BVI Debts would remain assets of the TDT, this would mean that his argument as to the effects of the Receivership Order became crucial to his case on the effects of the Assignment. He agreed that it did. I therefore turn now to that argument.
126. I reject Advocate Robison's submission that the Receivership Order precludes the analysis that there has been an extinction or discharge, by merger, of the BVI Debts, or indeed, that the Receivership Order has any effect on the rights of I&B, F&B or any other party. In my judgment Advocate Wessels is correct that the Receivership Order has made no change to the material rights of the parties, which are their underlying respective rights, disregarding the Receivership. It is not a "disruptor" of those rights. The Receivership Order was intended to do, and did, nothing more than install a neutral entity as controller of the material Assets for the purpose of protecting and preserving those Assets pending the definitive determination of the liabilities to which those Assets were exposed, where they were likely to be insufficient to satisfy all such liabilities. The

Order neither intended to, nor did, effect any change in any underlying rights or entitlement to those Assets.

127. I do not accept the argument that there is some “unfairness” about this result, and still less an unfairness sufficient to be invoked as a basis for avoiding it. The fact is that the TDT assets, including the Assets, were and are liable for the payment of the BVI Debts. If there had been sufficient assets in the TDT to pay the BVI Debts, then this would have been done, and the TDT assets then in the Trustees’ hands depleted accordingly. By definition there is nothing unfair about that and, on one view, that is effectively what has happened; a debtor’s taking an assignment (back) of the right to receive the debt due from him is the same, in effect, as paying it.
128. If F&B had borrowed funds on behalf of the TDT to pay off the BVI Debts, then those Debts would have been discharged and extinguished in the same way, but a replacement liability of the TDT, to the lender of the funds, would have arisen. The net result (apart from any extraneous matter such as an element of gift, or an unbalanced bargain) would be the same in financial terms. This is not surprising given the basic position that cannot be avoided, namely that the TDT assets are liable to be used in paying the BVI Debts. Once again it shows nothing unfair.
129. The only aspect of the situation which would or could be affected by treating the Assignment as discharging the BVI Debts is that of the priorities of competing claims. The BVI Debts, being recoverable through I&B’s right of indemnity, carry the benefit of any priority accorded to that indemnity. If they are extinguished, any replacement liability imposed on the assets, e.g. as suggested above, would be being made through F&B and their right of indemnity. If this carried a lower priority, then this could increase the recoveries which might otherwise have been obtained by I&B and creditors claiming through I&B by reducing competing claims. That, says Advocate Robison, would not be fair, as it would be a “windfall” to I&B and such fortunate other claimants.
130. In my judgment that is neither unfair, nor the kind of unfairness which should cause me to question the result of reasoned analysis of applicable legal principles, and strive to reach a different interpretation and result. First, the court is here concerned simply with the legal effects of a dispositive instrument as a matter of law. The consequential effects on third parties are of little or no relevance to this exercise. Second, the unfairness alleged arises, not from a disadvantage imposed on F&B, but from its now finding that a perceived advantage which it believed it had secured, arising out of being able to assert that the BVI Debts were still alive, was mistaken. That, however, is not a disadvantage so much as an absence of advantage, which is not the same thing. In addition, this situation has been the result of F&B’s own actions in procuring the Assignment, in the terms and with the structure which it did. F&B is, in effect, asking the court to make good misplaced expectations of the Assignment. That is not the court’s function.
131. In my judgment, therefore, the effect of the Assignment is that the BVI Debts (as there defined) have been discharged and/or (amounting to the same thing) extinguished by merger. This result is simply the necessary effect, in law and in all the circumstances, of the Assignment which has been executed. The claimed “proofs” of debt put forward by F&B in this Application based on its claimed ownership of the BVI Debts are therefore bad in law and must be disallowed.

132. The same applies to the Smalley assignment. Subject to any further submissions, I believe it also applies to any similar assignments effected in regard to the judgment debts of Messrs Brown and Grunnell.

### **Consequential matters - The nature of the trustee's equitable lien**

133. Given my decision above, the question of the status, or the necessary application, of any monies received by F&B pursuant to their claims in this application as assignee of the BVI Debts do not arise. However I will give my decision on it for three reasons. First, it was fully argued. Second, in case I am wrong in my decision about the effect of the Assignment itself. Third, because it has materiality to later arguments in relation to the Priorities Issue.

134. I reject Advocate Robison's submission that any such payments would be held by F&B on behalf of the beneficiaries of the TDT and would not be liable to be brought back into the pool of assets available to satisfy any remaining unpaid creditors claiming against the TDT estate for the following reasons.

135. First, in my judgment, the effect of a departing trustee's non-possessory lien over trust assets to support his right of indemnity from the trust assets is equivalent to a floating charge over the trust assets in the hands of a subsequent trustee from time to time. I agree with Advocate Wessels that this is both explicit in Jersey law at the level of the Court of Appeal: see the *Re ZII Trust* case (above), and also implicitly as found in the Guernsey Court of Appeal in this case (above). I am not certain that clear endorsement of this point by the Privy Council in this case can be derived from the Privy Council Decision, but endorsement at that level is not necessary for my decision.

136. Whilst there is no very local authority for this, Advocate Robison cited the Australian case of *Rothmore Farms Pty Ltd v Belgravia Farms Pty Ltd* [1999] FCA 745, considering the rights of a former trustee who had been removed to recover indemnity from the trust estate after further transactions had been carried out in which the trust property had been removed. Mansfield J there stated the firm conclusion that the interest of the outgoing trustee pursuant to its right of indemnity extended to the assets of the trust for the time being and was not confined to the assets at the date of its removal, and that the right of indemnity covered not only the trust debt owed at the date of its removal but interest accrued on that debt subsequently. This is clear support (with which I unhesitatingly agree) for the view that the trustee's continuing equitable lien operates as a floating charge.

137. Quite apart from authority, I would have come to the same conclusion in any event. I would have considered that the better view was that a trustee's lien operated as such a floating charge, and not as a fixed charge biting only on the assets in his hands as trust property at the time of his ceasing to be trustee (or at the time when some subsequent claim was sought to be made, or otherwise). Advocate Wessels described the floating charge analysis as the more "elegant" solution. I agree with this, but it seems to me that such a description is an understatement when the practical effects of a trustee's lien operating as a charge which is fixed in some way are considered.

138. It would be necessary to identify, and record, all the assets actually comprised in the trust at the time of the trustee's departure. Whilst it might be hoped that this would be relatively easy in a well-administered trust, there would then be the need to keep track of changes in the trust estate, and what assets were retained so as to be identified as the

subject of the lien, continually with time, presumably until it could be seen that there were no longer any of the affected assets remaining in the trust. Leaving aside the point that this would mean that thereafter, the former trustee's right to a lien would effectively have been extinguished, which would seem to be contrary to its purpose, the process of such continued identification would cause problems in itself. With regard to any cash assets, the usual difficulties with regard to the principles for identifying cash passing through bank accounts would arise. With regard to other forms of asset, it was not entirely clear at the hearing whether Advocate Robison accepted that the proceeds of such assets would, if traceable, remain subject to the lien, or whether he contended that any disposition of such asset would destroy the lien. If the latter, then the keeping of records for the purpose of giving effect to any later claim of lien would be cumbersome. If not, then the effect of the lien becomes more akin to a floating charge in any event, and the difference between the general concept of a floating charge and the concept of fixing at the time of the trustee's departure, contended for by Advocate Robison would be confined to identifying new or fresh assets received into the trust fund after the trustee's departure, so as to be claimed to be outside the scope of his lien. Once again, maintaining the effects of this distinction would require careful and comprehensive record keeping, could give rise to arguments as to the correct identification of encumbered and non-encumbered assets, and would generally be unwieldy and cumbersome.

139. The very point of conferring a lien over trust property on a departing trustee at all is to enable possession of the trust funds to be transmitted to the new trustee to take charge of, whilst protecting both former trustees' and unpaid trust creditors' rights consistently with their respective entitlements under the regime of Articles 26 and 32 of the TJJL (or the Guernsey equivalents in the TGL). Given this, and the intricate and cumbersome rights, records and enquiries which would be required if the nature of the trustee's lien were anything short of a general floating charge over the trust assets, I am quite satisfied that the better view, and likely to have been the intended operation of the relevant Articles of the TJJL (or the Guernsey equivalents in the TGL) is that the trustee's lien operates in the manner of a floating charge over the assets of the trust from time to time.

## **(2) The Priorities Issue**

140. I turn, therefore, to the second major issue, namely the Priorities Issue.

141. I observe first, though, that, on the basis of the proofs of debt which have been submitted to the Joint Receivers in this Application, the effect of the elimination of the BVI Debts from among such claims produces the result that the TDT may well not be "insolvent" after all. If so, any question of competing priorities for the payment of the remaining claims then would not arise. However, the issue of the correct priorities, if these had to be determined, was fully argued. I will therefore consider and determine it in case I am wrong on the Assignment Issue, or in case this is otherwise helpful for the parties.

### **Preamble**

142. The Priorities Issue has two distinct aspects, which have come to be labeled the "**Global Priorities Issue**" and the "**Creditor Priorities Issue**" for convenience. They arise as follows.

143. The only means of recourse to trust assets is by claims which can be made by trustees. They can be made directly only by the present trustees, who have possession of the assets and can therefore satisfy their entitlements directly. They must be made indirectly by creditors of present trustees, by requiring the present trustees to use their rights of exoneration or indemnity to satisfy those creditors' claims. Former trustees can make claims in respect of their own entitlements by asserting their trustee's lien. Creditors of former trustees, pursuing claims contracted or incurred by such former trustees, must make their claims by requiring the former trustees to exercise their lien over the trust property to obtain the necessary satisfaction of those claims. The creditors are granted a right of subrogation to the rights of the relevant former trustee to achieve this.
144. The first stage of determining priorities is therefore the application of priority between the rights of successive trustees *inter se*, in respect of the total of the claims advanced by or under the banner of each of successive trustees. That is the Global Priorities Issue.
145. Next, the claims of any individual trustee, whether direct or being pursued through a former trustee's lien, will cover three different types of claim, namely:
- the trustee's own claim for trustee remuneration (see Article 26 of the TJL),
  - any claim by the trustee for recoupment of costs, expenses or liabilities incurred and already paid by it from its own resources, and
  - any claim by the trustee for indemnity in respect of thus far unpaid costs, expenses or liabilities incurred by it, and of which it is obliged to procure payment from the trust assets. This would also include claims by the relevant trust creditor made through subrogation to the particular trustee's rights.
146. The satisfaction of these claims, at any rate in the context of an Article 32(1)(a) situation, will always be subject to the availability of trust assets.
147. (For the avoidance of doubt and for brevity, where I refer to "costs expenses or liabilities incurred by" a trustee I mean "costs expenses or liabilities properly and reasonably incurred by" that trustee. Any question as to the propriety in general terms, or the reasonableness in quantum, of a particular claim of cost, expense or liability goes to what have been termed, in this case "quantification issues". These will be decided later. I am here concerned with the general overarching principles governing the priority of recoveries between claimants of different identifiable classes of claim.)
148. The second issue of priority is therefore the question of priority between these classes of claim within the claims being made in right of any particular trustee. It is broadly one of the priority, if any, between that trustee itself and the external creditor(s) claiming through it. This issue is the Creditor Priorities Issue.

**(i) Nature of the Global Priorities Issue**

149. In this case the first trustee is I&B. Its successor, the second trustee, is GTC. F&B is the next successor, ie the third trustee.
150. Advocate Wessels for I&B argues that the priority principle between all trustees is "first in time", and all claims being made by or advanced through I&B therefore require to be satisfied in advance of those made by or through GTC which in turn, again, require to be

satisfied in advance of those made by or through F&B. His argument is that the rights of I&B under their trustees' lien, to which any outside creditor claiming through them is also subrogated, arose upon and date back to the time of their appointment as trustees. They therefore prevail over the rights and claims of GTC and those claiming through them, which date only from the time of GTC's appointment and also the rights of F&B and those who claim through them, which date only from the time of F&B's appointment. Likewise, GTC's rights prevail over those of F&B.

151. Advocate Robison for F&B argues that the correct principle is a *pari passu* distribution between rights claimed through any and all trustees. He does so on the basis of the old maxim that "equality is equity" and a plea to fairness, that where there are claimants to a limited fund whose claims exceed its value, a proportionate distribution to everyone has the clear merit and attraction of fairness and even-handedness.
152. Advocate Field for GTC took no particular position save to submit that the law appeared to favour I&B.

## **(ii) Nature of the Creditor Priorities Issue**

153. This issue is independent of the first issue, as it deals with priorities between the trustee himself as to claims made on his own account (for remuneration or expenses previously discharged from his own pocket) and outside creditors of the trust, with whom he has contracted or to whom he has been held liable in respect of the trust assets, but who have not been paid and are claiming through his right of indemnity.
154. Advocate Wessels again argues that priority must be accorded to the actual trustee in all respects, with trust creditors subordinated to the trustee but *prima facie* (as I understood it) on equal terms between themselves (although he did not rule out the possibility that this could be varied in the court's discretion with regard to the merits of individual cases).
155. Advocate Robison argued, once again, that the priority should be *pari passu* across the board, as between the trustee and any creditors in respect of all their respective claims; a trustee should not be accorded any preference over creditors who were obliged to claim through him, and who, indeed, the trustee might not have paid whilst paying other, similar, creditors whose claims would therefore be unfairly elevated to claims for recoupment by the trustee himself if he were given priority. Advocate Robison was also inclined to argue that it would be appropriate to subordinate a trustee's claim for remuneration to the claims of unpaid third party creditors, since this was a trustee's claim to profits for himself.
156. Advocate Field made no independent submissions on this topic, largely (I think) because GTC were no longer submitting any claims against the estate other than in their own right, the preparatory stages of the Application having removed duplication of outside creditor claims as between themselves and F&B.

## **The applicable law**

157. The first question is the applicable law, and in particular whether this is Jersey law or Guernsey law.
158. For F&B, Advocate Robison submitted that:

- (i) The applicable law governing issues of priority is Guernsey law, as the *lex fori*; it is not Jersey law.
- (ii) If Guernsey law applies, then the *Re ZII Trust* decision in the JCA is not binding on this Guernsey Court, is wrong, and ought not to be followed as a matter of public policy.
- (iii) If Jersey law applies then
  - a. the *Re ZII Trust* decision is wrong and ought not to be followed as a matter of public policy, but
  - b. it is in any event *obiter dictum* on the Creditor Priorities Issue. It is consequently not binding in respect of that sub-issue, and need not and ought not to be followed.

159. Advocate Robison’s submission at (iii)a. was clearly rather ambitious, and in the course of argument, he realistically accepted that if the applicable law is Jersey law, then he is precluded by the authority of the *Re ZII Trust* case from arguing that priority as between successive trustees is anything other than “first in time”. The Jersey Court of Appeal has expressly held this to be so in the *Re ZII Trust* case and, in Guernsey, that holding is a matter of incontrovertible fact.

160. In that situation, though, Advocate Robison said that he wished to reserve his position in case the matter may go higher. He took me to the reservations expressed by the learned Bailiff of Jersey in the judgment in *Re ZII Trust* as to whether the existence of a trustee’s non-possessory lien operating in the same manner as it would in English law was in fact both a necessary and fully considered consequence of the Privy Council Decision, given the context that Jersey law did not recognise the concept of a non-possessory lien over personalty as part of its common law. He also took me to the decision of the Jersey Court of Appeal in granting leave to the Respondent in *Re ZII Trust* to appeal to the Privy Council in that case ([2019] JCA 166).

161. He initially submitted that, in all the circumstances, I should adjourn any decision on this point until after the Privy Council had considered the *Re Z II Trust* case appeal. I refused this application. The law of Jersey is, at present, clear and decided upon this point and, in my judgment, it is therefore incumbent on me to apply it. I therefore simply recognise and note that F&B wished to reserve their rights in case a future decision in *Re ZII Trust* should change the law. If so, then any future application (it would in practice be an appeal) which F&B might come to make in this regard in this case can be done against the background that the material decision was not available to them at the time of this application being heard before me.

### **Discussion and decision on the Global Priorities Issue**

162. The above decision disposes of the Global Priorities Issue if the applicable law is Jersey law. However, Advocate Robison’s next argument was that, as a matter of the proper application of conflict of law principles here in Guernsey, the applicable law for the purposes of this Application was not Jersey law, but Guernsey law.

163. The basis of this argument is a submission that priorities in this application are properly governed by the *lex fori*. Advocate Robison submits that matters of procedure are

governed by the *lex fori*, the law of the local court, which is Guernsey law. He then submits that priorities are treated as a matter of procedure in English law (said to be persuasive in this context). He relies on Dicey Morris & Collins, *The Conflict of Laws* 15<sup>th</sup> Ed at 7-041:

*“The priorities as between Claimants to a limited fund which is being distributed by a court are governed by the lex fori. The existence and quantification of each creditor’s claim is of course a matter for the lex causae of the claim but once the claims are established the lex fori determines priorities”*

and refers to *Bankers Trust International Limited v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221, from which the first sentence is a quotation. This was a case in which the House of Lords was concerned with competing claims in an admiralty action *in rem* in respect of a ship as to which there were creditor claims and the assertion of a maritime lien. He submits that the present case, in which creditors with claims of varying natures are competing, both in novel circumstances and in respect of distribution from a limited fund, fall squarely within this principle.

164. Consequently, he submits, Guernsey law as the *lex fori*, is the applicable law applying to the Priorities Issues because they are a matter of procedure. I should therefore hold that it is Guernsey law and not Jersey law which is applicable, and it is open to me, therefore, to depart from the (in his submission, wrong,) decision of *Re ZII Trust* and to determine priorities other than on a “first in time” and “trustee takes first” approach.
165. Advocate Wessels argues, first, that the issue of priorities, in this case at any rate, is not simply a matter of procedure but a matter of substance. The incidence of priority which has to be determined is a matter of substance with regard to proper trust administration, according to the proper legal rights of persons interested in trust property. It is not simply a case of appropriate directions in a court case for the purpose of case management or administering a claim *in rem* to a fund.
166. He argues that the *Todd Shipyards* case is simply not in point. It was a case where the competing claims were not only of a variety of natures, but had originated in different national jurisdictions. The process of administration of the fund comprising (in effect) the value of the vessel arose simply because the fund had come under the jurisdiction of the UK Admiralty Court. The competing claims had no relationship with each other under the principles of any common legal system which would accord them priorities and could be looked to as a guide to the reasonable expectations of the competing claimant parties between themselves. In those circumstances the considerations as to doing substantial justice between such varied and disparate claimants were very different, and it was perfectly reasonable to have resort to the *lex fori* as an overarching system to provide a solution to the problems from a neutral base.
167. The situation here is completely different, first because the Receivership process was not that of an enforcement process in a situation of internationally competing claims, but was, in effect, carrying on the administration of a Jersey law trust, albeit in difficult circumstances which had required the intervention of the court. The competing claims to the fund therefore did have a relationship with each other under a single common legal system, arising out of their relations constituted by their dealings with the TDT. That legal system did provide, therefore, a guide to the system of priorities which they would reasonably have expected to govern those relationships. The proper law of the TDT itself was and always had been Jersey law. It was therefore quite clear that the

relevant jurisdiction to be applied, and indeed the jurisdiction with which the principles of distribution had their closest and most real connection, was Jersey law. As a matter of conflict of laws, Guernsey law would hold Jersey law to be the properly applicable law to govern the issue of priorities.

168. Once again, my conclusion is that Advocate Wessels is correct, and that if I were to consider, from the point of view of conflict of laws, which legal system should govern the question of priorities between the competing claimants to the funds in the Joint Receivers' hands in this Application, it is Jersey Law.
169. Advocate Robison's argument that these issues are a matter of procedure, though ingenious, founds too much on the submission of his which I have already rejected, that the Receivership Order itself effected some kind of substantive change in the rights and relations between the various parties claiming entitlement to the – potentially insufficient – trust assets. His argument would have more force if that court order could be viewed in that way but, as I have already said, in my judgment that simply is not so. It was itself a mode of properly administering the TDT.
170. Although these administration proceedings – and indeed most of the “Tchenguiz” trust litigation - may have taken place in the forum of a Guernsey Court, that does not make this Application a matter merely of “procedure”. In my judgment, in this context “procedure”, must refer primarily to events taking place as part of a court or tribunal process, for the purpose of better furthering the due process of law. This Application is not of that nature, but is a process in aid of the proper administration of a Jersey Trust. Whilst issues as to how the Receivership itself should be administered or enforced would be matters of procedure, issues as to the underlying objectives of such administration or enforcement as a matter of substantive rights between parties would clearly, in my judgment, not be correctly viewed as “procedure”. It is those such rights with which I am here concerned.
171. In those circumstances it is strictly unnecessary for me to go on to indicate what my decision would be if I had been persuaded that I should apply Guernsey law, rather than Jersey law to the issue of priorities, but I will do so briefly, for completeness. The short answer is that I would have come to the same conclusion.
172. My first reason for this is that the decision in *Re ZII Trust* whilst being a decision on Jersey Law and therefore technically not binding as to Guernsey law, is highly persuasive of Guernsey law on the point. Though not a decision on Guernsey law directly, it is a decision on a topic upon which the court of the highest authority here (namely the Privy Council in this very case) has said that the position in Guernsey law is likely to be the same. The similarities of the provisions of the TGL at ss 35, 42 and 43, and of the TJL, at Articles 26, 32 and 43A, are obvious. The *Re ZII Trust* decision is also a very full and carefully reasoned judgment. This makes it hugely persuasive. I would not feel free to depart from it unless the argument that it was wrong and ought not to be followed was so strong as to be virtually overwhelming. Despite Advocate Robison's arguments, and even having seen the reasons for the Jersey Court of Appeal granting leave to appeal to the Privy Council in the *Re ZII Trust* case itself, I do not feel that the strength of any contrary arguments is anywhere near sufficient to make me feel it would be possible, let alone appropriate, to do so.

173. In fact, and my second reason, in my judgment (and with great respect) the reasoning of the Jersey Court of Appeal in *Re ZII Trust* is correct. If I were to make my decision in this case without reference to that authority, I would come to the same conclusion as that reached by the Jersey Court of Appeal, and for the same broad reasons. I find myself respectfully in full agreement with the main judgment of Logan-Martin JA in the case. However, out of deference to the work and the extensive arguments of the Advocates in this case, I will add a few comments.

174. Advocate Robison’s argument from first principles on the Global Priorities Issue (ie that of priorities as between successive trustees) starts from the proposition in Lewin on *Trusts* 19<sup>th</sup> Ed at 22-047, considering the position of competing trust creditors, (thus, in England in regard to the estate of an insolvent trustee rather than an insolvent trust estate). Lewin states:

*“Between the trust creditors, therefore, there appear to be only two possible bases of priority; one is ranking pari passu and the other is ranking in order of time. There is no authority on this point in England but competing equities do not always rank in order of time and a distribution would on occasion avoid difficult and cumbersome enquiries”*

and cites three cases from overseas jurisdictions as some support for this proposition: *Investment Holdings v Ridout Residence Pty Ltd* [2013] SGHC 139 (Singapore), *Re Suco Gold Pty Ltd* (1983) SASR 99 (South Australia) and *Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 289 (New Zealand).

175. Relying on this support, Advocate Robison argues that, apart from Article 32 of the TJJL (or, similarly, the equivalent s. 42 of the TGL), trust creditors should and would rank *pari passu* between themselves. Since the Privy Council Decision in this case determined that the effect of Article 32(1)(a) was no more than to limit a trustee’s liability to the trust estate assets, it did not disturb that principle. He then argues that if the trust creditors all rank equally among themselves, and the trustee has a single lien to which they are subrogated, if necessary, to pursue their claims, it follows that the trustee must rank equally with those creditors in the same right as itself. If that is the case there is then, he submits, no principled reason for applying any different rule between successive trustees, *inter se*.

176. He submits that counter-arguments, supporting “first in time” as the “basic” rule for priority are erroneous, first because they place too much weight on the statement in Snell’s *Equity* 33<sup>rd</sup> Edition at para 4.002, that

*“At law, as in equity, the basic rule is that estates and interests primarily rank in the order in which they are created”*

and second, and more fundamentally, because they rest on importing principles of English security law into a Jersey (or Guernsey) trust law context. This is inappropriate because the two areas of law are different, in contrast with the case of *Re Esteem Settlement* [2003] JLR 188, which approved the importation of English trust law principles, but into a Jersey trust law context. It is not necessary to import those additional principles from a different area of law, and it is inappropriate, because doing so pays insufficient regard to the fact that Jersey law does not recognise the concept of an equitable charge over movable property, which is the feature of English law to which those security priority principles are attached.

177. Indeed, Advocate Robison suggested that the inclusion of Article 43A (1) (formerly Article 34 (2)) of the TJJL 1984, to the effect that a departing trustee can

*“require to be provided with reasonable security for liabilities...”*

would be otiose if the trustee’s equitable lien gave him security with a priority to the extent contended for by Advocate Wessels.

178. Whilst accepting that the purpose of conferring an “equitable lien” on a trustee is that of protecting the trustee’s interests in not being out of pocket against beneficiaries, Advocate Robison submits that the objective of rules governing priorities must be to achieve fairness and substantial justice between competing claimants to a limited fund. The unfairness of the “first in time” approach is to enable the first trustee to “scoop the pool” gaining full satisfaction for itself and those claiming through it before any subsequent trustee could obtain anything at all in satisfaction of its own claims or for those claiming through it. This, Advocate Robison submitted, was grossly unfair on later claimants, who might stand to recover nothing through a situation which had been no fault of theirs. A *pari passu* approach to distribution would at least impose the fairness of equality on everyone.

179. Even if the basic presumptive rule were not held to be *pari passu*, he submitted, further, that the rules were not immutable, but were rules of convenience aimed at fairness, so that, the court would have a discretion to apply a different approach if the justice of the case called for it. He submitted that this was the case here, and all the more so because the approach as to priorities was having to be applied in a novel and developing area of law, against background law apparently unique to Jersey and Guernsey.

180. Advocate Wessels countered these arguments with, in effect, the arguments which were preferred in *Re ZII Trust* in the Jersey Court of Appeal. He submitted that the competing interests of trustee and trust creditor in the insufficient funds were simply not equal, because of the primacy of the trustee’s right, which was an incident of his office, to be held harmless and indemnified (in the absence of gross negligence, fraud, etc) from all costs, charges and liabilities which he incurred in that office. This right of indemnity arose upon his taking up his appointment, and applied with regard to any liability, current, future or contingent. The trustee’s non-possessory equitable lien over the assets of the trust was conferred upon him to support this right of indemnity. To achieve this it had, in effect, to create an interest in the trust property sufficient to give effect to the trustee’s rights. This was why the lien had to attach to the trust assets in the hands of successor trustees.

181. This was also why the rules of priority with regard to successive trustees had to be “first in time” and not *pari passu*; if the trustee’s lien were down-graded to a right ranking only *pari passu* with those of subsequent trustees then if there were insufficient trust assets to satisfy all such trustee claims, that would immediately breach the principle of indemnity from which the first trustee benefited and to which he was entitled, because he would not receive full recovery and would suffer personal loss.

182. With regard to the argument that Article 43A (1) is pointless if a trustee is automatically entitled to such a non-possesory lien anyway, he pointed out that this point had been raised and dismissed in the *Re ZII Trust* case (see [284]). There were other situations in which the express provision of other, alternative, security might reasonably be put in place, and in all the circumstances the inclusion of this provision was no indication that

this was intended to be the only method by which a trustee might gain security in support of his rights of indemnity

183. The argument of unfairness arising from the first trustee's possible ability, to "scoop the pool" entirely missed the point that there was no equivalence between the positions of successive trustees - in contradistinction to the position of all unsecured creditors of a company in an insolvent liquidation, or co-depositors in an insolvent bank, or co-investors in an insolvent trust investment company. A successor trustee has a choice whether or not to take on the trusteeship. It can conduct appropriate due diligence, and decide whether he is willing to take up the post, knowing that its call on trust assets for its own indemnity will rank behind the calls of any former trustee. The former trustee, by contrast, does not have such freedom. Once appointed, it is embroiled in the trust affairs, with the risks of potential liabilities which may not be within its control. Liabilities may be visited on the trustee, or he may become placed in a situation where he has no real choice but to incur expenses, such as legal expenses, reasonably to protect his position.
184. I find Advocate Wessels' arguments the more convincing, both as a matter of broad impression and as a matter of legal analysis.
185. Advocate Robison's argument on this point (trustee priorities as between themselves) in fact, as Advocate Wessels emphasised, argues by analogy from a text book quotation (Lewin at 22-047) with regard to a different situation (creditor priorities). I did not find the three cases relied upon as support for *pari passu* being the preferred starting point to be of much assistance, as their situations were a very long way from the present. In *Ridout* the *pari passu* entitlement of creditors who were allowed subrogation to the insolvent trustee's right of indemnity over funds held by a receiver was agreed between them. *Re Suco Gold* was concerned with the right (or priority) of a liquidator to take his remuneration out of trust assets when winding up an insolvent company whose only assets were trust assets. In *Finnigan* the creditors were all investors in an insolvent investment trust company, and were more in the nature of co-beneficiaries than competing creditors. These situations were all very far from the present. Their support even for the proposition that *pari passu* is the presumptive scheme in the case of creditor priorities in this case is therefore not strong and much of Advocate Robison's argument from this position by supposed analogy really consisted of assertion of what was claimed to be obvious.
186. In my judgment, "first in time" is the correct basic principle of priority between successive trustees where the insufficiency of trust assets may make it necessary to consider priorities at all, because this is the principle which flows as an inevitable consequence of upholding the rights of a trustee to indemnity out of the assets in the hands of successor trustees. The trust estate passes to a successor trustee subject to the obligation to satisfy any indemnity to which an earlier trustee is entitled. Their rights arise upon their taking up office and thus are plainly and clearly created in order of time.
187. I would add that I also have the impression that the effects of a "first in time" approach are actually quite consistent with Jersey (or Guernsey) law principles, despite Advocate Robison's suggestion that they would tend to work injustice. He argued that a "first in time" approach would mean that an early, unsatisfied, creditor could keep on coming back to the trust for more and more payments on an indefinite basis until he was satisfied, and this uncertainty could not be right. Apart from the riposte of "why not?" so long as such a creditor has still not been paid, this indefinite operation seems to me to

be perfectly consonant with the original philosophy of “*désastre*” under Jersey and Guernsey law, which operated on just such an indeterminate timescale. However, I accept that this is a point on which I was not addressed, and my decision does not depend upon it.

188. A trustee’s right to indemnity out of trust assets was originally conferred in the context of English law trusts, where a trustee was obliged to act gratuitously (in the absence of a contractual entitlement to remuneration in the trust deed), and ought fairly, therefore, to have protection from actually being out of pocket. He had a right to a lien over the trust property to protect this reasonable interest of his, and after some legal uncertainty as to whether it was necessary for the trustee to retain possession of trust property to sustain his lien – which would, of course, be a huge impediment to the efficient administration of the trust by a successor trustee – it was established that the lien was non-possessory, could therefore survive a change of trustee, and was in the nature of an equitable charge over the assets of the trust. This protection for trustees was originally a protection against the beneficiaries, although it also benefited trust beneficiaries generally, since otherwise people would be reluctant to risk taking on the office of trustee. In Jersey (and similarly Guernsey) law, the introduction of the distinction between personal capacity and trustee capacity, and hence liability, contained in Article 32(1) of the TJJL, did not alter the position with regard to the trustee’s indemnity, and the lien in support of this, except to make it more likely that a trust creditor would need to resort to claiming subrogation to the trustee’s lien against the trust property, because that creditor was no longer able to sue the trustee personally and recover against him, leaving it to the trustee to pursue an indemnity if he could.
189. There is one other matter which also inclines me to the view that “first in time” is the better and correct approach to priority in a case such as this. That is the difficulty of clearly identifying the event or situation, and therefore the time, at which the application of a scheme of priority is required to commence. In an insolvency context there will be an event which fixes the commencement of a winding up, be it the institution of a winding up action or a resolution of the Company. From that time the assets of the company are frozen, and any unauthorised disposition of them is void, and a statutory process for collecting in the company’s assets, realising them and distributing the proceeds in accordance with statutory priorities (*pari passu* as regards the main body of unsecured creditors) then comes into effect. Similarly, in bankruptcy proceedings in England, the commencement of the bankruptcy is the presentation of the relevant petition, which has the effect of transferring title to the bankrupt’s assets (apart from exemptions for necessities needed for basic living purposes) to the trustee in bankruptcy, with the petition even being time stamped on presentation to ensure that issues of priority of transactions over the bankruptcy itself can be determined.
190. By contrast, a trust has no separate legal identity, and there is no purposely designed process or form, for conducting its affairs and distributing assets, if they apparently become inadequate to meet proper claims on them. Indeed, there is no clear test for establishing with certainty that this is the case, and no recognisable trigger to change the trust’s situation from that of a “going concern” to a state analogous to a winding up or process akin to administration. It might well require “*difficult and cumbersome enquiries*” first to establish whether such a state of affairs existed, but then, even more, to obtain the necessary information and to organise the practicalities of a scheme to distribute trust assets *pari passu* between claims of successive trustees and those claiming subrogation to their rights of lien, all at the same time. A “first in time” approach to realisations is

likely to be clearer and simpler and, to be more appropriate to a situation where there is no change of status of the trust itself, the difference being simply that once the trust funds appear to be potentially insufficient to meet known or anticipated trustee or creditor claims, those in charge of the trust will be obliged to recognise the interests of former trustees and creditors, and the need to administer the trust so as to satisfy these before they can turn to the interests of the beneficiaries.

191. In summary, therefore, I hold that as between claims against trust assets pursued either by a trustee, or by an outside creditor claiming by way of subrogation to that trustee's equitable lien over the trust assets, first, the lien operates, in effect, as a floating charge over the assets from time to time of the trust and, second, the lien operates so as to confer priority as regards the aggregate claims advanced by or through successive trustees on the basis of priority for the "first in time" by reference to the date of appointment as trustee of the trustee in question.

192. Although I decide this point as a matter of the application of Jersey law principles, which are what are required to be applied in this case, my decision and the principles would operate in exactly the same way in Guernsey law, as well.

### **Creditor Priorities Issue**

193. The Creditor Priorities Issue is that of priority as between different claimants all claiming pursuant to the right of equitable lien held by the same trustee. The competition, therefore, is between that trustee, making its own claims for (possibly) remuneration and otherwise for recoupment in respect of its having expended its own money on trust debts or liabilities, and other third party creditors claiming against that trustee in respect of debts or liabilities claimed to be owed to them, but payable out of trust assets, as to which they claim subrogation to the trustee's rights under its equitable lien.

### **The parties' positions**

194. For F&B, Advocate Robison's submission is that a trustee does not have priority over other creditors claiming by way of subrogation to that same trustee's lien; the correct result, on grounds of principle and overall fairness and justice, is a *pari passu* regime as between them all, and in respect of all types of their claim, with the exception of any claim for trustee remuneration. This, it is submitted, should be treated as subordinate to all other general trustee and creditor claims.

195. Advocate Robison submitted that giving a trustee priority was not a necessary result or corollary of the Privy Council Decision in this case, either on reading the case itself, or by looking for any implications arising from the limited effect which the Privy Council had attributed to Article 32(1)(a) of the TJJL. A *pari passu* distribution as between a trustee and trust creditors did not infringe the limitation of Article 32(1)(a) and it also recognised the fact that recovery was being effected through the self-same right of indemnity by both the trustee and the relevant trust creditors. It would be unprincipled to allow a trustee priority over a creditor when both were claiming through the very same right.

196. Advocate Robison criticised the countervailing argument that creditors could take security over trust assets when contracting with trustees as being both wrong and impractical. I am inclined to agree, but this argument did not figure largely and does not affect my decision.

197. Advocate Robison's only suggested departure from this principle of *pari passu* among trust creditors *inter se* was in respect of a trustee's own claim to remuneration. That, he submitted fell into a different category, because it was, in effect, a trustee's claim to profits. Whilst Article 26 of the TJJL entitled a trustee to pay himself out of trust assets for his remuneration, it did not (he submitted) confer any lien on him in this respect. It certainly did not do so expressly. He submitted, therefore, that a trustee could not claim the advantages of a lien in respect of any claim to outstanding remuneration. This was at best a claim in which the trustee could stand in no better position than any other third party creditor claiming a contractual entitlement against the trusts. He went further than this, however, to argue that any such claim to remuneration should in fact be subordinated to, and rank behind, claims made by other creditors, or claimed by the trustee as reimbursement for proper expenditure. This applied whether the general scheme of priority for such competing claims was held to be "first in time" or *pari passu*. The reason was because this claim was in the nature of a reward or profit to the trustee, and in principle this should rank behind the claims of persons based on their otherwise suffering actual loss.
198. Advocate Wessels suggested that there were three ways of looking at a *pari passu* argument on the Creditor Priorities Issue, with respect to claims being made under the same trustee lien. The first was to assert that it was a rule applying to all such claims without discretion. The second, slightly different was to suggest that it was a rule which would apply generically to different classes of claim (eg distinguishing between recoupment and indemnity), and the third was to submit that the question was always one of the facts, on a case by case basis, as to what was "fair and reasonable". He understood Advocate Robison to be pursuing the third, or possibly the second approach, but not the first, and that the upshot was that, leaving aside the special case of trustee remuneration claims, Advocate Robison was contending, based on cases such as *Finnigan* (above), that *pari passu* was the preferred approach, certainly on the facts of this case, for being the most fair and just approach.
199. Advocate Wessels' submission was that, on the contrary, the correct principle was that the trustee should have priority as against trust creditors competing with its own claims through subrogation to its right of indemnity. The proper analysis was the same as the principle which underpinned his argument on the Global Priorities Issue, namely that having regard to the purpose of the trustee's right of indemnity and supporting lien, the effects of the lien must be to give the trustee a complete indemnity, so far as could be made possible, in respect of his proper costs, expenses and liabilities incurred through being or having been trustee. A form of distribution which reduced the trustee's right to recover in respect of such matters merely to a dividend out of the trust assets offended against the principle of indemnity out of the trust assets, to which the trustee was entitled to have full recourse.
200. Put another, more graphic way, the competition was between on the one hand, a trustee, who was never personally liable but had paid something and was claiming recoupment out of trust assets which he was entitled to use for such expenditure, and, on the other hand, creditors who had not yet been paid, who were seeking to get at trust assets through subrogation to the trustee's right of indemnity, but who had never had any right to benefit from the trustee's expending his own money. Expressed in this fashion, the trustee's superior claim to priority for his claims could easily be seen. (I observe that this argument appears to apply to Article 32(1)(a) creditors, but not to Article 32(1)(b) creditors, for whom, therefore the considerations could well be different.)

201. Advocate Wessels invited my attention to a careful reading of the analysis of Logan Martin JA of this point in *Re ZII Trust* (above) at [222] to [235]. This pointed out that the particular issue of a competition between the claims of a trustee to (inadequate) trust assets and the claims of creditors claiming under his right of subrogation to the same (inadequate) trust assets could not arise in other jurisdictions, because they were the peculiar product of the introduction of Article 32(1)(a) into Jersey Law (and the situation would be the same in Guernsey). The conclusion was, therefore that the answer to the questions raised had to be derived from the decision of the Privy Council in this case, as the only available, but obviously very material, authority. The conclusion then drawn in the judgment was that the trustee did, consequently, obtain priority over competing creditors in respect of his own personal claims (leaving aside remuneration, which required different considerations). Advocate Wessels therefore invited me to follow that decision.

### **Discussion - The Applicable law**

202. Before coming to my substantive decision I must again consider the applicable law.

203. The arguments with regard to the applicable law upon this issue are no different from those in respect of the Global Priorities Issue, and I come to the same conclusion. I hold that the law applicable to this priorities law is Jersey law, as the *lex causae*, being the proper law of the TDT which I am, in effect, administering or supervising.

204. Jersey law is a matter of fact in this court. Insofar as I have no direct evidence of Jersey law, I would, as a matter of principle, proceed on the assumption that it was the same as Guernsey law. I was not, in practice, addressed on the basis that there was any material difference between the two. Given Advocate Robison's position that *Re ZII Trust* is wrong, and may well be reversed in the Privy Council in due course, his arguments as to why I should not follow the approach of the *Re ZII Trust* case on this issue are the same as previously advanced, but with the additional point that on this issue the pronouncements in *Re ZII Trust* are merely *obiter dicta*.

205. The *Re ZII Trust* case concerned the question of the correct scheme of priority between a former trustee of the trust (Equity Trust (Jersey) Ltd) and later creditors claiming inter-trust loan repayments made through a successor trustee. As a matter of *ratio*, it therefore dealt only with the Global Priorities Issue as it is known in this case. Whilst certain views were expressed in the judgment with regard to matters arising as part of the Creditor Priorities Issue in this case, as Advocate Robison pointed out, these comments are therefore only *obiter dicta* (see *Re ZII Trust* at [221]), and they are not binding authority in this court. As a result also, any persuasive force they may have is also reduced, and I would be correspondingly more ready to depart for any such dicta if I thought it appropriate to do so.

206. In the event, I do not think this makes a sufficiently material difference.

207. I proceed on the basis, therefore, that the correctly applicable law is Jersey law, but if that is wrong and it is Guernsey law then I am satisfied that Guernsey law on this aspect will be the same as Jersey law, and that in either case the *Re ZII Trust* case is persuasive. Even apart from the *Re ZII Trust* decision, logic and proper analysis of the situation supports the approach enunciated in the *Re ZII Trust* case.

## Creditor Priorities Issue - Discussion

208. As to this issue, I again prefer the submissions of Advocate Wessels. In my judgment the proper scheme of priority between, on the one hand, a trustee making claims against trust assets in the exercise of his equitable lien for the proper costs, expenses and liabilities incurred by him as trustee, and, on the other hand, unpaid creditors of the trust claiming by virtue of their right of subrogation to such trustee's lien, is that the former take priority over the latter.
209. As between competing creditors, it seems to me, and I so hold, that the correct basic principle would, then, be that of *pari passu* distribution between such creditors themselves, as I can see no general grounds for potentially distinguishing their respective equities, and according any one priority over any other. I make this point for completeness, as it has not really been argued in this precise context, and I do not know if it actually arises on the facts of this case.
210. I reach this conclusion on the basis that it is necessary in order to respect and implement the trustees' rights to indemnity for proper costs expenses and liabilities incurred by them as, and in consequence of being or having been, a trustee of the TDT, according to their respective entitlements, and also giving appropriate – and I think the only correct – legal effect to the principle that creditors under trust transactions have no right to payment out of the trust assets except by claiming to be subrogated to the rights of the trustee with whom they contracted the relevant obligation.
211. In reaching this conclusion I have not overlooked the fact that this principle of priority accords some advantage to creditors whose debts the trustee is willing or able to pay and does pay, as against those who remain entirely unpaid. I also realise that this difference of treatment might afford the trustee a means of exercising preference or conferring an advantage as between different trust creditors claiming through him. Whilst this is not a desirable result of my conclusion as to priority, it appears to me to be the inevitable consequence of the correct analysis of the parties' respective rights. I cannot see any way of avoiding this result, and it is not so grave as to cause me to doubt my conclusion.
212. Lastly, it is convenient to refer to Advocate Wessels' final “fall back” argument, in case he failed to convince me (i) that the proper approach to this issue was that Jersey law and the *ZII Trust* analysis applied, or alternatively – and in any event if Guernsey law applied – (ii) that the *ZII Trust* case was persuasive and/or that its logic was independently correct, such that I were therefore minded to hold that a basic scheme of distribution *pari passu*, was the only alternative candidate, at least *prima facie*.
213. In such a case, he submitted, the court would in fact be exercising a discretion (to direct a *pari passu* distribution), rather than applying a legally founded “rule”. It would thus have discretion to order distribution based on principles such as considering the parties' relative merits with regard to the causes of the “misfortune” which had resulted in there being insufficient assets to meet all competing claims.
214. He hastened to say that he was not advocating descending into the detail of claimants' personal circumstances (a proposition which I would, in any event, have roundly rejected both for tending towards arbitrariness and inviting “*difficult and cumbersome enquiries*”), nor even the merits of the “intrinsic behaviour” of the claiming parties but rather, as I understood it, that it could be appropriate to resort to an objective, but overarching, view of the parties' relative contributions to the causes of the “misfortune” that there were

insufficient funds to pay all claims. In the end, and reminding me that this argument really only needed to be considered if I were not only unconvinced about his arguments as to the applicable law, but also that I was unconvinced as to his arguments that the BVI Debts had been extinguished and were incapable of founding a claim competing with the claims of I&B (as to which it will be recalled that the former were valued at £230 Mn and the latter at £26 Mn), his proposition seemed to me to boil down to an argument that it was only the misplaced resistance of, first, GTC and, latterly, F&B to his clients' claim to indemnity in respect of the BVI Companies' claims that had caused his clients (I&B) to have to spend as much as £26Mn on legal costs. This expenditure had thus been effectively wasted; it would not have been incurred if GTC and F&B had recognised the validity of I&B's case, which had ultimately been vindicated. The court could and should, therefore, look at this factual cause of there being this claim for reimbursement by I&B, which would not be met if it were only accorded parity with a claim, now in the hands of F&B, which was actually the claim to the debts which had been so fiercely, expensively and ultimately unsuccessfully sought to throw on to I&B rather than meet out of the TDT assets.

215. I do not need to decide this point, because I have found that neither of the conditions which would make it applicable exists. I am also unwilling to do so because it is so far removed from the situation as I have determined it to be that I find it difficult to do so. I have to say that I am not attracted to it as a broad principle on its own. The approach to a proper scheme of distribution at this level has to be to identify classes of claim and decide whether, as a matter of objective categorisation according to principle, they attract a particular order of priority. If, objectively viewed, they are claims for costs, expenses or liabilities properly and reasonably incurred on trust business, then they qualify for payment, and the merits, or efficiency, or motives, or other individual circumstances which might be attached to the fact of their being incurred are, in my judgment, *nihil ad rem*, at any rate at this stage.

216. However, I would not rule out any possibility of the court deciding, despite the background of a *pari passu* scheme of distribution being thought *prima facie* appropriate, to give effect to the kind of distinguishing treatment which Advocate Wessels suggests. It seems to me that where a court finds that the general broad basis for distribution among claimants to an inadequate fund is appropriately that of *pari passu*, that decision will have come about as a matter of fixing a principle which does broad objective justice to those claimants in the face of a common misfortune. As such, it is the application of a broad discretionary judgment. It may be that there could be individual instances which make the effects of that broad principle apparently inequitable and in those cases I see no reason why a court should not exercise its discretion on a more refined basis and make a form of order which distinguished between some claimants and others, if it seemed appropriate. I think, though, that such cases would have to be egregious, going so far, in the old phrase, as to "shock the conscience of the court", and being immediately discernible on an objective basis, without involving any difficult or cumbersome enquiries. I observe for instance, and as a warning, that where, as here, there have been assignments of liabilities, consideration of the objective merits of the position of any individual claimant are likely to become muddled, such that it could become quite impossible and inappropriate to try to distinguish between particular merits or demerits. It would in any event seem to me that any such distinctions as it might be fair to draw, emphasising that these would have to be based on dispassionate objective criteria, are more likely to involve penalising particular claimants because of a lack of objective merit in their position and subordinating their entitlements, rather than rewarding particular

claimants for some perceived virtue in their position and preferring them. That, however, would depend on the facts of the case.

217. Thus, whilst not rejecting any possibility of such an approach, I do not have to rule upon it or apply it here, as it does not arise in the present circumstances. It may be that similar arguments emerge in the context of the later stages of this application, namely consideration of objections to the validity of particular claims being advanced, for not being “proper and reasonable” trust costs or claims. That, though, is a different point, and a matter for another day.

### **Special case – trustee’s remuneration**

218. This leaves only the treatment of the particular matter of a trustee’s claim to remuneration.

219. First, I observe that any such claim can, it seems to me, apply only to remuneration earned performing the functions of trustee, according to whatever remuneration arrangements the trustee is entitled to. In principle, rights to remuneration can be earned only from actual employment in the relevant office, and thus cease upon termination of that office, (and this appears to have been decided pertinently in this particular case by Lt Bailiff Talbot QC in *Re the Tchenguiz Discretionary Trust* Royal Court 18<sup>th</sup> December 2015), although, of course, remuneration previously earned may then be unpaid.

220. It is conceivable - I am speaking of general principle and not about the facts of this case - that situations may arise where a trustee carries out acts in relation to trust property after termination of his office, for example if he retains possession of those assets. He can undoubtedly claim his proper expenses in respect of such actions. He cannot, at any rate without more, claim remuneration or payments which could classify as trustee’s remuneration. It may be that a court would find, depending on the facts of the case and what the trustee actually did, that the trustee was entitled to be reasonably remunerated for his actions – compare the treatment of those who inadvertently meddle in trust assets, but to the benefit of the trust/those assets, as in *Re Berkeley Applegate Ltd (in liquidation)* [1989] 1 Ch 32 - but the basis of any such claim is likely to be in quasi-contract, say upon a *quantum meruit* or an equity in the nature of salvage. It would not be under the trustee’s remuneration provisions as such, even though any quantum to be found in such provisions might provide evidence as to a reasonable award of remuneration, or, more accurately perhaps, compensation if found appropriate in principle.

221. These days, for obvious commercial reasons, and the benefit of the trusts industry, it is the norm for trustees, certainly professional trustees, to be remunerated, even though in its original and pure form a trustee should act gratuitously, because “*a trustee may not profit from his trust*”: *Re Llewellyn’s Will Trusts* [1949] Ch 225 at 227. That position, namely that a trustee is not entitled to remuneration unless authorised by the terms of the trust, the written consent of all beneficiaries, or an order of the court, is recognised in Article 26(1) of the TJJL.

222. Clause 12 of the TDT Deed provides for trustees to receive remuneration in accordance with either contractual terms agreed between them and the Protector, or, in default, their usual published fee rates or such rates as they reasonably determine from time to time. That clause says nothing about the Trustees’ entitlement to take payment of their

remuneration from any particular source, nor any entitlement to security for unpaid remuneration.

223. Article 26(2) of the TJJL provides that

*“A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust”.*

It is this article and entitlement which provides the basis for the trustee’s lien over the trust assets. It will be noted that it does not refer to remuneration.

224. The first issue here, since that will influence the question of appropriate priority between any claim of the trustee to remuneration properly so called and other competing claims, in particular those of third party trust creditors, is therefore: what is the basis of the trustee’s right to unpaid remuneration against the assets of the estate in the hands of a subsequent trustee?

225. Lewin, on *Trusts* 19<sup>th</sup> Ed, considers this question at paragraphs 20-220 – 20-224. It concludes that the legal categorisation of a trustee’s right to remuneration is not clear. It is not simply a contractual right as it derives from the terms of the trust instrument. Similarly, it differs from a trustee’s right of indemnity because it derives from the trust instrument and not from the general law as confirmed by statute.

226. It has been held in Australia – which seems to have many quasi-commercial trust cases arising out of the circumstance that it is advantageous to run farms through the medium of a trust company – that the trustee’s right to remuneration cannot be held to equate to a proprietary right to indemnity under the general law. In *Perpetual Trustees W.A. Ltd v Kelly* (1993) 8 WAR 480 at 486, Anderson J held that a right to remuneration, even coupled with the right to retain trust property to discharge that entitlement, did not create any charge or lien on the trust fund as a matter of general law. Lewin suggests that this was also held in England as long ago as 1912: *Re Salmen*, (but reported only in the Law Times: see (1912) 107 LT 108). However, in *Southern Wine Corp Pty Ltd (in liq) v Frankland River Olive Co Ltd* [2005] WASCA 236 the Supreme Court of Western Australia distinguished *Kelly* (above) and held it arguable, noting Fox LJ’s comments in *Re Duke of Norfolk’s Settlement Trusts* [1982] Ch 61 at 77-78, that the right of a trustee to remuneration gave rise to some type of equitable interest short of a vested and defeasible beneficial interest, with the comment that the type of interest envisaged by Fox LJ might

*“be the same as the nature of the equitable interest a trustee has in the trust assets pursuant to its right of indemnity.... The Trustee’s equitable interest is not a beneficial interest nor an encumbrance.”*

227. It is therefore acknowledged by Lewin that, in England, the right to remuneration may be an equitable charge or interest falling short of a beneficial interest, suggesting that the effects may turn on the terms of the trust deed, and whether this apparently creates such security.

228. Bearing in mind that the precise situation in Jersey/Guernsey law is different from that in English law, where the separate trust capacity of a trustee has no recognition, it might be hoped that local authority could provide assistance, at least as a starting point for further inference. However, the only such case revealed by counsel’s researches is the Jersey case of *Re The Carafe Trust* [2015] JLR 159. This, though, concerned a trustee’s

right to disputed fees claimed at the time and in connection with the transfer of the trust to new trustees following a breakdown of confidence between the old trustees and the settlor. It did not consider, and was not required to consider, the nature of a trustee's right to remuneration and any attendant rights thereby conferred upon it after its appointment had terminated.

229. In my judgment, therefore, this particular issue falls to be decided from first principles.

230. Basically, Advocate Robison seeks to rely on the distinctions between the trustee's right to remuneration on the one hand, and the right to an indemnity and equitable lien or charge in respect thereof on the other, noted particularly in Australia, whilst Advocate Wessels submits that, deriving from the English law origins of Jersey and Guernsey trust law, in the absence of clear authority, the inclination of Lewin would be to equate the right to recover unpaid remuneration with the trustee's right of indemnity in respect of proper costs, charges and expenses. Other authors such as Snell's *Equity* 33<sup>rd</sup> Ed, and Underhill and Hayton *Law of Trusts and Trustees* 19<sup>th</sup> Ed. do not examine the point, and Lewin's inclination is the better view.

231. On balance, I have come to the conclusion that Advocate Wessels' argument is to be preferred. First, it seems to me that the argument from the absence of provision or principle entitling a trustee to a right of recoupment and therefore indemnity out of the trust assets in respect of unpaid remuneration, as contrasted with proper costs, charges and expenses, is somewhat unreal and over formalistic.

232. Second, the trustee's claim even if it relates to a term of the trust deed, has an obvious similarity to contractual claims for services provided by third parties, who could claim subrogation to the trustee's right of indemnity to meet their own claims. The trustee's claim must, to my mind, rank at least equally with such external claims, their means of enforcement, ie direct claim rather than subrogated claim, being a matter of form rather than substance. This point, to my mind, rules out the argument, advanced by Advocate Robison, that a trustee's claim for unpaid remuneration should actually be subordinated to the claims of outside trust creditors. I can see no justification for that at all. The only question is then whether the trustee's office as trustee should entitle it to priority over such equivalent claims.

233. As regards allowing priority to a trustee's claim for remuneration over competing claims from third party trust creditors, the following points, to my mind, tend to favour doing so.

234. First, there is lingering, if somewhat uncertain, recognition of a trustee's right upon retirement/removal, to claim retention of physical control of trust assets sufficient to protect him from liabilities – in other words a possessory application of his lien: see Lewin (ibid) at 17-031 *et seq.* Lewin appears to acknowledge that this could also apply to create, in effect, physical security for the trustee's right of remuneration: see the final sentence of paragraph 20-222, advising a trustee to

*“... be cautious in parting with trust property without having his charges paid or otherwise reasonably secured.....”*

This position is implicitly recognised, I think, in *Re Carafe Trust* (above). The effect of such a right would seem to elevate the status of the trustee's right to his fees above that of mere competing trust creditors to some extent, at least.

235. Second, and arising from this, it is plainly unsatisfactory, as a matter of trust administration, for a departing trustee to retain control over trust assets, or part of them, even to protect his reasonable personal interests. It seems to me that, albeit in the differing context of English law principles, the gradual and increasing willingness of courts of equity to recognise the rights of an outgoing trustee to indemnity and priority in respect of their claims in the form of a non-possessory lien in the nature of an equitable floating charge over the trust assets owes a great deal to the practical consideration of reconciling a trustee's need and right to protection with the need to vest control of trust assets fully and effectively in the currently properly appointed trustee. In my judgment, therefore, according an outgoing trustee similar protection in respect of unpaid trustee remuneration furthers this desirable objective.
236. Third, it is a continuing theme of trust law that it is necessary to enable those who administer trust assets to be fairly and effectively remunerated, in order to ensure sufficient entities willing to take up the office of trustee. It seems to me that this consideration, in fact for the benefit of the local trust industry, militates in favour of according trustee remuneration a similar priority and security, in principle, to the remuneration of others placed in similar positions, such as liquidators, administrators and receivers. Those persons are invariably entitled to receive their fees as a first charge on the funds they administer, and whilst I am not suggesting that this analogy can be carried too far (liquidators, administrators and receivers are generally carrying out duties with more of a public service angle than are private trustees) nonetheless, it seems to me that the comparison tends to militate in favour of conferring some degree of protected rights on trustees in respect of unpaid remuneration.
237. Fourth, by definition, as the trustee will have already earned his (proper) remuneration at the time of his departure, whilst it is true to say that he is not directly out of pocket if he is not paid, he will have suffered indirect loss in the shape of the time spent on his trust functions which it is likely that he could otherwise have spent remuneratively on other matters.
238. Lastly, although only a minor consideration, treating an outgoing trustee's claims in respect of recoupment, and of remuneration, as having different priorities as a matter of principle seems to me to be undesirably untidy, in context. If there is obviously good and sound reason for doing so, then such complexity would have to be accepted, but it does not seem to me that there is. It would be in the interests of all concerned in such matters for the regime governing distribution of assets in the context of an "insolvent" trust situation to be as simple as possible.
239. For the above reasons, therefore, I come down on the side of Advocate Wessels' submissions, and I hold that a former trustee's claim in respect of his proper remuneration as trustee should be accorded the same priority, as between himself and other competing trust creditors, entitled to claim under the aegis of his equitable lien and right of indemnity, as the trustees' own claims for indemnification, ie they will rank ahead of such competing trust creditor claims.
240. Finally, it is necessary to observe that my decision on this point is, once again, on the basis that I am applying Jersey law as the correctly applicable law. However in this instance there has been no material from Jersey law sources for me to base my decision on. In consequence, the route by which I reach this decision is the conflict of laws presumption – in fact amply justified as overwhelmingly likely in the present case – that Jersey law in this respect would be the same as the law of Guernsey as the applicable *lex*

*fori.* I merely draw attention to this point for the purposes of anyone who may subsequently examine this decision.

## Miscellaneous

241. I should here record one further point that arose and was canvassed to some degree in the course of argument. This was as to the principles which will be applicable to the recovery of legal costs, and in particular in respect of adverse costs orders which may have been made in the course of this or other related proceedings.
242. At the level of general principle, liabilities for legal costs and in respect of costs orders may be incurred by trustees in respect of trust proceedings or disputes, and insofar as they are properly and reasonably incurred by the trustees in their capacity as such trustees, they will be a cost or liability against which the trustee is entitled to be indemnified, under the general principles pertaining to a trustee's right of indemnity already discussed. The likely issue, in respect of costs liabilities or costs orders, is therefore likely to turn on the question whether any particular such costs or liabilities have, in fact, been properly and reasonably incurred, rather than as a matter of principle.
243. It was therefore agreed at this hearing that any issues arising in this context are more appropriately dealt with as part of the later stage of considering objections to the propriety or the quantum of particular claims being made. Their resolution is likely to depend on the particular circumstances of any liabilities or adverse costs orders individually, and I will say no more about them at this stage.

## Conclusions

244. It is now appropriate to summarise my conclusions and decisions on the issues arising at this hearing of the Application.
- (1) I hold that the effect of the Assignment of the BVI Debts, and of the Smalley Debt, respectively by the liquidators of the BVI Companies and by Mr Smalley to (in each case) F&B in their capacities as trustees of the TDT was to effect the discharge or extinguishment of the BVI Debts and the Smalley Debt, respectively. No claim in respect of such debts can therefore be advanced in this Application.
  - (2) Insofar as there has been an assignment in similar form and effect of the debts owed to Messrs Brown and Grunnell, the same result will apply.
  - (3) If and insofar as my conclusion at (1) were wrong and F&B were able to make recoveries from the Assets held by the Joint Receivers in respect of such debts, then, and whatever the basis of priorities which applied, those recoveries would become assets of the TDT available to be applied in satisfaction of any further liabilities imposed on the TDT trust estate then still outstanding. In the event that such recoveries were then made in consequence of a distribution *pari passu* of assets among competing claimants, such recoveries would, accordingly, fall to be redistributed on the same *pari passu* basis to all unsatisfied creditors of equal priority, and so on, in respect of further recoveries by F&B on behalf of the TDT.

- (4) Each of I&B, GTC and F&B is entitled to a right of indemnity out of the assets of the TDT in respect of their proper costs, charges, expenses and liabilities incurred as successive Trustees of the TDT. In support of such right of indemnity each of I&B, GTC and F&B, has a non-possessory equitable lien over the assets of the TDT, which lien takes effect in a manner akin to a floating charge over the assets of the TDT from time to time.
- (5) Creditors of each of I&B, GTC and F&B in respect of their several claimed liabilities with regard to transactions or matters affecting the TDT have a right to be subrogated to the lien of I&B, GTC and F&B (as the case may be) in order to pursue their entitlement to satisfaction of their debts or other such liabilities from the TDT estate.
- (6) The priority accorded to claims made against the assets of the TDT by reference to the respective liens of I&B, GTC and F&B (whether on the part of I&B or GTC or F&B or on the part of trust creditors claiming through them) ranks according to the order of the creation of their respective liens. This creation occurred at the time of such Trustee taking up office.
- (7) The priority *inter se* of claims made under one and the same right of indemnity or equitable lien is that all claims advanced by the relevant Trustee, including any claim by that trustee to unpaid remuneration, rank ahead of claims made by trust creditors, claiming through their right of subrogation, but rank *pari passu* between themselves. All claims of creditors claiming under their right of subrogation rank *pari passu* between themselves.
- (8) The possibility of arguments as between claims held to rank *pari passu* as between themselves in principle, under (7) above, is expressly reserved for further consideration if so advised.

245. Lastly, it appeared in the course of argument that the range of claims advanced in this Application by F&B may have been advanced or limited on the basis that, contrary to my findings at (3) above, any recoveries made in this Application by F&B on behalf of the TDT would be separately preserved, free of the other current claims being proved in this Application. I have expressly held that this will not be the case. I therefore record this point in case it may give rise to further applications by F&B or others, if so advised. I make clear that I am neither giving leave, nor encouragement, for any such applications being made, but merely recording the situation in case this may become a material matter in any future application which is made.

**Lt Bailiff Hazel Marshall QC.**

**9<sup>th</sup> December, 2019**