

Pre-trial review concerning the rights of trustees, former trustees and their respective creditors to recover costs, charges and remuneration from the available assets of the Tchenguiz Discretionary Trust.

**[2020]GRC020**

**IN THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION)**

**Court File 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 COMPANY SA (formerly Rawlinson & Hunter Trustees SA)**

**Defendants and Third Parties**

**-and-**

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

**Intervening Parties**

**Before:**

**HER HONOUR HAZEL ELEANOR MARSHALL QC  
LIEUTENANT BAILIFF  
Sitting alone**

**Hearing dates: 27th, 28th 29th and 30th April 2020  
Judgment given: 30th April 2020**

Counsel for the Plaintiffs Advocate J M Wessels  
Counsel for the Intervening Parties Advocate N Robison  
Fifth Third Party Claimants In person by Mr R Hodges  
The remaining Defendants/Third Parties did not appear and were not represented.

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**Legislation, Cases and materials referred to:**

**Legislation:**

Guernsey:

*Royal Court Civil Rules rr 1, 73, 74, 76, 79*

Jersey:

*Trusts (Jersey) Law 1984*

**Cases:**

Jersey:

*Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527

*Re Bird Charitable Trust* [2012] (1) JLR62

England and Wales:

*Talbot v Marshfield* [1865] 2 Dr & Sm 549,

*Re Londonderry* [1965] Ch 918 *Goldman v Hesper* [1998] 1 WLR 1238

*X v B* (Chancery Division, Arden J: Unreported: 13<sup>th</sup> July 1999)

*Bourns Inc v Raychem Group* [1999] 3 All ER 154

*South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779

*Blades v Isaac & Anor* [2016] EWHC 601 (Ch)

*National Crime Agency v Abacha* [2016] 1 WLR 1375

*Eurasian Natural Resources Corporation Ltd v Dechert LLP* [2016] 1 WLR 5027

*Lewis & Anor v Tamplin & Ors* [2018] EWHC 777 (Ch)

*KMG International NV v Chen & Anor* [2019] EWHC 2634 (Commercial)

Australia:

*Gray v BNY Trust Company of Australia Ltd* [2009] NSWSC 789

**Text Books:**

*Lewin on Trusts 20<sup>th</sup> Edition* at 21-59

*Friston on Costs, 3<sup>rd</sup> Edition* at 46-14, 46-15, 46-54

*Matthews and Malek on Disclosure, 5<sup>th</sup> Edition* at 16-23

**J U D G M E N T (approved)**

**Introduction**

1. This is what has been described as a PTR in the latest and last phase, hopefully, of this litigation. It has been previously compositely referred to, I think, as “the Priorities Application”. It concerns the rights of trustees, former trustees and their respective creditors to recover costs, charges and remuneration from the available assets of the Tchenguiz Discretionary Trust (“**the TDT**”) in the hands of Joint Receivers (“**the Receivers**”) after the conclusion of the eight years of litigation in which those entities and various others have been embroiled.
2. The present parties effective for this Application are the Former Trustees who were the initial Trustees of the TDT, namely, Investec Trust (Guernsey) Ltd and Bayeux Trustees Ltd (“**I&B**”), the subsequent Trustees and the actual Former Trustees of the TDT, now Geneva Trust Company Ltd (“**GTC**”) who were in office as Trustees during the conduct of the greater part of the substantive litigation, and Fort Trustees Ltd and Balchan Management Ltd (“**F&B**”) who are the Current Trustees of the Trust.
3. This hearing has been held remotely using Microsoft Teams software. Advocates Robison and Wessels, as counsel on behalf of F&B and I&B respectively, have appeared remotely and so has Mr Hodges on behalf of GTC from Switzerland, effectively acting in person as GTC did not instruct lawyers for the purpose of this Application. The Greffier has remained in attendance throughout. Others have joined the conference remotely, being therefore, as it were, virtually either on the benches behind counsel or in the public gallery.
4. The previous phase of this litigation had dealt with collecting the assets into the hands of Receivers, the determination of the legal effect of an assignment on the current affairs of the TDT being an assignment in respect of a major liability of the TDT assets and the determination of the general order of priorities governing the rights of successive Trustees and creditors in relation to the TDT assets in the hands of the Receivers at the moment. My decision in relation to the latter two issues, namely the question of the effect of the assignment and the determination of the order of priorities, is to be found at Guernsey Judgment [2019] GRC064. It is currently under appeal.
5. I there decided that the effect of the assignment was to extinguish the very substantial debt as a liability of the TDT assets, and also that insofar as the TDT might have insufficient assets to discharge all the liabilities with a call on those assets, then those liabilities would be satisfied with priority in order of time, by reference to the succession in time of the respective Trustees, with outside creditors taking their priority from the priority of the respective Trustee through whose lien they would be entitled to pursue their claim.
6. This last phase is the further phase of dealing with disputes about the propriety of individual claims advanced, to be satisfied according to the priorities above. The claims have been put forward in what have been called “proofs of debt”, which have previously been filed by the three Trustees and any other interested parties, having regard to the rule that a trustee is entitled to indemnity out of the relevant trust fund in respect of costs reasonably incurred and reasonable in amount, and that an unpaid creditor of any such trustee is entitled to recover in respect of his debt or established

claim through subrogation to the lien over the trust assets held by the trustee who incurred such liability to him.

### **The material exercise**

7. This Trust is governed by Jersey law albeit it is administered in Guernsey. The Trustees' right to indemnity arises under Jersey law, namely Art 26(2) of the *Trusts (Jersey) Law 1984* which reads:

*“26 Remuneration and expenses of trustee:*

...

*(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”.*

8. Such an enquiry leads to what has been described for present purposes as an “*Alhamrani* taxation”. It might be better if it were called an “*Alhamrani* quantification” but the terminology which has been conveniently and frequently used in respect of the exercise to ascertain the sums that are property recoverable by a trustee against trust assets is “*Alhamrani* taxation”, and I will continue to adopt it.
9. The case in question is *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 527. An “*Alhamrani* taxation” is the exercise by which costs and charges claimed by a trustee are scrutinised by the Court for their propriety. That case was a far simpler case than this one, and also concerned very different circumstances. In *Alhamrani* it was a contest between a beneficiary and the current trustee of the trust. The costs were claimed by the trustee under a court order which entitled the trustee to its costs out of the fund as a neutral trustee in litigation. It was held that a beneficiary was not automatically entitled to a taxation (in the strict legal sense) of those costs, even as trustees' litigation costs. A beneficiary wishing to challenge any aspect of a trustee's claimed costs is entitled to do so, but is, in strict effect, raising a claim of breach of trust; he is alleging a breach committed by incurring unreasonable charges, unreasonable either in principle, or in amount.
10. The threshold test for where the Court will intervene in such a situation is (it was held in *Alhamrani*) merely whether there is shown to be an arguable case made out that the costs in issue were unreasonably incurred, in whatever respect. The suggestion that the threshold was “real grounds for concern” that costs were unreasonably incurred was held to put the bar too high.
11. There is no particular procedural requirement or mechanism for invoking or conducting such an enquiry, and the *Alhamrani* case also held that the appropriate mechanism in Jersey was a form of “taxation” conducted by the Greffier. The principles to be applied, though, would be those relating to trustees' duties to incur only proper and reasonable costs, so that no legal taxation scales or principles would actually be applied even though the costs in that particular case were themselves legal costs. The “taxation” was to be conducted against the background that a trustee is entitled to a full indemnity, and so actual costs should be disallowed only if incurred

unreasonably or in an unreasonable amount, judged by reference to the trustee's own position and judgment, and with any doubts resolved in favour of the trustee. This, it seems to me, is tantamount to saying that costs will be disallowed only where they are costs which no reasonable trustee in the position of the actual trustee could have thought were proper or reasonable to incur in general terms, or to pay for as to the actual claimed amount if reasonably incurred in principle.

12. It is also necessary, the Court said in *Alhamrani*, to ensure that one does not cut across the provisions of the relevant trust deed in making any such determination, although the example given in the case was only by reference to procedure. It is not suggested in this case that the precise terms of the Trust Deed have any particular effect, although no instance where this might be a material point has emerged in practice - at least not yet.
13. The description "PTR" suggests that there is going to be a single trial, or at least a significant substantive hearing, at a later date, for which preparation is being made. It seems to me this is likely to be overly optimistic here, although it might have been hoped for. The process by which the various issues arising in the working out of the various parties' claims to recover sums out of the assets of the TDT appear to be quite likely to be what Advocate Wessels described as "iterative", with particular issues being decided and/or hived off in series, as it appears to be convenient or appropriate to do so in order to make progress. On this occasion, therefore, the overall idea has been to decide or to narrow issues, and for me to give directions with a view to the efficient future conduct and disposal of this final phase in all the circumstances, whether an individual hearing or a series of them.

### **Procedural history**

14. I&B, GTC, F&B and others have, as I have said, served on the Receivers, and later filed with the Court, proofs of their respective claims made on the TDT assets in the hands of the Receivers. These have been considered already in order to eliminate duplication. Also, in the course of previous hearings certain clearly discrete points of principle have been decided. The last substantive order in this process was made by me on 10<sup>th</sup> December 2019 and included directions that I&B and GTC should file evidence substantiating, in effect, their proofs by 31<sup>st</sup> January 2020 and that F&B should file their list of objections sought to be made to those proofs by 31<sup>st</sup> March 2020.
15. I should mention here, that I have not focused on the question of F&B's filing their own evidence in support of their claims, nor of others filing objections to those claims, first because they really have not, so far, appeared to be much in issue. More importantly for present purposes, they are less important than the matters I have just mentioned, because they will only assume significance if the outstanding appeal against my Order of 10th December 2019 succeeds in some respect. This may have to be taken into account with regard to any general future conduct of this matter, but for the present it is issues relating to the claims of I&B, and to a lesser extent GTC, as the Trustee claimants with priority, which require to be dealt with and which can conveniently be progressed because they will have to be decided in any event.

16. The timetable which I set was not quite adhered to. I&B and GTC served their documents late, on 4<sup>th</sup> February and 5<sup>th</sup> February (2<sup>nd</sup> and 3<sup>rd</sup> February being a weekend), but this was because of a dispute which raised its head at the last minute about the validity and effect of claims to legal professional privilege in respect of the materials proposed to be filed which were made by I&B but no doubt maintained also by GTC, who tend to follow the lead of I&B in these matters. I dealt with these disputes on the papers, so as to provide a regime which would enable the present hearing to take place on time, as intended, and not be delayed. I&B filed some further materials on 12<sup>th</sup> February 2020, because it had only recently discovered those.
17. Later, there was a further short skirmish between I&B and F&B when there was another application, made by I&B, seeking to exclude certain matters from the requirement for the filing of substantiating evidence. This was a brief diversion, which I did not allow. I will have to deal with it later. It took place in about the middle of March. Some further documentation, although I do not think it was very much, was also filed then.
18. Unfortunately, shortly after this in late March there came the restrictions of the Covid-19 pandemic and the lockdown in Guernsey, in Jersey, in the UK and also, relevantly for GTC, in Switzerland. This has contributed further to the disruption of the timetable.

#### **Matters in issue**

19. Against that background, the actual Applications and other matters which arise for determination at this time - and I hope I have managed to list all of them - are as follows:-
20. First, there is an Application by F&B dated 4<sup>th</sup> February 2020 for permission to serve and rely on an amended proof of debt.
21. Second, there is an Application by F&B for an extension of time for the filing of their objections to I&Bs' proof of debt to 1<sup>st</sup> June 2020. This Application was actually made on 20<sup>th</sup> March 2020, but as I was then absent abroad but returning to Guernsey on 28<sup>th</sup> March, I decided it was more conveniently determined at this PTR hearing, given all the upset that had been caused by the impact of the Covid-19 pandemic.
22. Third, there is an Application by I&B, made just before this hearing, for an interim payment to be made to it out of funds comprising the TDT "Preserved Assets" still held by the Receivers pursuant to an order previously made by me, in the sum of about £1.6 million (I will not recite the precise amounts of sums in this judgment), being the amount of taxed litigation costs obtained under a court order made by Lieutenant-Bailiff Talbot QC on 18<sup>th</sup> January 2018 in proceedings known as the "Guernsey 2" proceedings. These have been parallel proceedings which have related to *Beddoes* relief and other trust administration applications, which proceedings were concluded some time in 2017.
23. Fourth, there is an application by I&B ("the Privilege Application") which was made on 28<sup>th</sup> January 2020, for resolution of a dispute between I&B and F&B (and once again this will apply equally in principle to GTC) regarding the existence of and

effects of claims to legal privilege (meaning legal advice and litigation privilege) in relation to materials already produced by I&B under the 10<sup>th</sup> December 2019 order, these being principally invoices from lawyers, with supporting narratives and time-sheets.

24. There are then further issues which, though not all the subject of formal applications, have been identified in correspondence or argument as requiring determination as a matter of directions.
25. Fifth, therefore, there is an application by F&B that I&B (and GTC) should produce further information or materials in relation to the bundles of invoices, etc, which they have already produced in support of their respective claims.
26. Sixth, there is a specific demand by F&B for production by I&B of what are described as “draft invoices” referred to in the Affidavit of Mr Simon Day of Macfarlanes, explaining the invoices which have been produced by Macfarlanes who have been I&B’s English solicitors.
27. Seventh, there is a general request, by F&B in particular, for guidance from the Court with regard to the nature of the exercise of the *Alhamrani* taxation which is being carried on.
28. Lastly, there is an application by F&B made at this hearing, for its costs of dealing with the Application (referred to at Paragraph 17 above) that was made by I&B seeking to vary the 10<sup>th</sup> December 2019 order to exclude the requirement to serve information in relation to costs of certain proceedings, when this Application was not proceeded with by I&B in view of the initial intimation by the Court that the Court was not terribly sympathetic to it. In the circumstances, F&B are asking for their costs of dealing with that Application, against I&B.
29. I am going to deal with the above in what seems to me to be the most convenient order.

#### **Application to amend F&B’s proof.**

30. This Application is separate and discrete. Four amendments are sought by F&B as Trustees of the TDT, arising from my judgment with regard to the extinction of the BVI debts, totalling, I think, around £238 million, to which they had claimed entitlement against the TDT assets in the same priority as I&B through an assignment from the BVI Companies’ liquidators, and the effect of this.
31. The first amendment is to add a claim by each of Mr Robert Tchenguiz (“RT”) and by themselves as Trustees for the TDAT, which is another Tchenguiz Trust, to a one third share each of the value of the BVI debts, ie some £79,551.
32. The second item is a costs claim, being the costs of F&B as Trustees of the TDT, F&B as trustees of the TDAT and Mr Tchenguiz (compositely described as “**the RT Parties**”) which, it is said, were incurred in English proceedings which were settled as part of a global settlement deal with the BVI Companies and with the Kaupthing Bank who had been the lender to the companies, and in respect of whose debts the main

litigation had largely been concerned. These, it is said, are claims for the costs of securing the settlement agreement, because those English claims were withdrawn, and consequently the costs that have actually been incurred in them by the RT Parties have not been recovered or satisfied and have been lost. This item is said to be an alternative to the first claim that I have mentioned.

33. The third proposed amendment to F&B's proof of debt is the costs incurred by F&B as Trustees of the TDT in obtaining the assignment by Messrs Smalley, Brown and Grunnell of certain debts of theirs being claimed against the TDT. By parity of reasoning with my judgment regarding the assignment of the BVI Companies' debts, those debts are, I imagine, now also to be regarded as extinguished, but the costs incurred in achieving them are claimed separately.
34. Fourth, and lastly, there is the "finance claim" as it is described, which comprises the costs claimed to have been incurred by the three "RT Parties", in financing the money that had to be borrowed in order to make the above acquisitions.
35. As far as the application to amend F&B's proof of debt, which is advanced in their capacity as Current Trustee of the TDT, is concerned, I will dismiss all except the third claim, the Smalley, Brown and Grunnell costs claim. In fact, I did so at the beginning of the hearing as it was an easily considered and discrete point.
36. I allowed the third claim because that item has been accepted by I&B as being a claim which can be inserted with at least arguable justification into the proof of debt of F&B. I take it that means that it is accepted that it is a valid claim to go forward for further scrutiny. It is not necessarily accepted that at the end of the day the claim itself should actually succeed as against challenges that may be raised, but at this point one is only concerned with what form the amended proof should take, and what should be allowed to go into it as possibly being a proper and recoverable claim or debt. That particular item of the proposed amendment is not objected to, as I have said.
37. However, objection is taken to the other three items. This is largely, as I understood it, on the grounds that they simply do not disclose any sufficiently clear or obvious basis of a claim which could be raised and which would pass what would effectively be a "strike out" test.
38. As I have said, this is an application for leave to make amendments and there is therefore, in my judgment, effectively a strike out test which needs to be applied. When the Court is asked to allow a document to be amended to include an additional claim of some sort, the first question is: does the amendment disclose a reasonably arguable case, ie if the facts asserted are true, do they make out the ingredients of a valid claim which can be advanced against the TDT assets? Where the trustee is advancing claims which are being made against it by third parties, this question will have two aspects. The first is the simple one of the validity of the Trustee's own claim against the assets, but there is also the validity of the third party's claim against the Trustee, which the Trustee is apparently minded to accept as a proper claim against the assets. That is the basis on which the claims by RT and F&B as trustees of the TDT would have to be advanced here.

39. As these claims are formulated in this case, I do not find they pass this “reasonably arguable” test, on their face.
40. First, as regards the claims to the two individual shares of the value of the BVI Companies’ debt allegedly held by RT and the TDAT, respectively, and asserted to be claimable by them against the TDT assets, I have already held that the BVI Companies debt in the hands of F&B as Trustees of the TDT was extinguished. Moreover, I did so on the basis of sworn evidence that F&B took the assignment and were in effect the beneficial owner of the assigned debt as Trustees of the TDT, and also of documentation showing the purported assignment to them of the debt without qualification which would naturally suggest (following authorities) that this would be intended to be an accretion to the assets of the TDT. It would seem that it is only as an afterthought that these claims on behalf of RT and the TDAT, which are said to be on the basis of a resulting or constructive trust, have now been advanced.
41. Second, even taking the assertion of such a structure at face value, it is difficult to see how this claim could be mounted on the facts disclosed. There is no indication or suggestion of the legal basis on which an argument in support of a resulting or constructive trust could be advanced in this situation. One has to remember that such trust claims are actually a form of proprietary interest claimed to exist in, or to be imposed upon, an asset. It is suggested that this claim can be made here because RT and TDAT somehow gave consideration for the acquisition of this asset (the debt), with the asserted consequence being that this therefore gave them a share in it. Quite apart from the fact that the asset itself, in my judgment, has disappeared, ie, even assuming that the beneficial interest in it had somehow survived separately, this is not a situation which discloses the advancing of a purchase price which might give rise to a resulting trust, nor does it seem to me to disclose any set of circumstances which could be argued to impose, willy nilly, some kind of “constructive trust” in favour of RT or the TDAT on the Trust assets of the TDT in the hands of the current Trustees of the TDT.
42. It is asserted that consideration for the purchase of the debt is to be found in RT’s and the TDAT’s involvement in the broad settlement with Kaupthing and the BVI Companies under which they (RT and the TDAT Trustees) gave up their claims and thus forewent the costs incurred in the relevant litigation, thereby enabling the BVI assignment to be procured. But this was a global settlement of a complex set of claims, debts, alleged debts, and so forth, and I cannot, at present, see how the situation could ever be analysed to give RT or the TDAT trustees any enforceable claims against the TDT assets for a sum equal to one third of the face value of the BVI Companies’ combined debts.
43. Lastly, F&B as the TDT Trustees are fairly obviously part of the RT “camp” in this matter. They have even described themselves as one of the “RT parties”, and it generally appears that they tend to act in accordance with the wishes of RT. The fact, therefore, that F&B as the TDT Trustees are prepared to say that they accept these claims does not seem to me to be enough to mean that they should be admitted for potential argument as provable debts of the TDT assets at this stage, potentially to the detriment of other parties who would be prejudiced by their being included in, and inflating, F&B’s claim as TDT Trustees.

44. Of course, it is only in certain circumstances that this would arise, as I have already mentioned. The inclusion of such claims will only matter in practice if the priorities regime as between successive Trustees is held to be *pari passu* rather than first in time, and so as things presently stand the inclusion of these claims would not have any practical consequences or detriment to other parties. Nonetheless, in principle, and even though the alleged claims of RT and TDAT are being made, as they must be, through subrogation to F&B's lien on the trust funds, it seems to me that I ought not to allow the F&B as Trustees of the TDT to include such claims on behalf of RT and themselves as trustees of the TDAT by amendment, simply because they are willing to accept such claims against the trust fund rather than challenge them. This is because the claims seem to me to be of such doubtful conception on the face of it. If those outside parties choose to advance any such claim against the TDT, then in my judgment, they should be required to do so directly themselves, and make out the case for the validity of these claims directly, so that the persons with the potential real objection to them (who would be I&B and possibly GTC) will have the opportunity of dealing directly with the matter before the court. I repeat, however, that this would only need to be decided for practical purposes if the F&B appeal against my previous judgment succeeds.
45. As regards the claim for the costs of acquisition of the BVI debts as litigation costs, and for the costs of the financing of the acquisition by borrowing, first, these claims are, in my judgment, bad on their face because they are made compositely by "the RT Parties" as if they were some kind of joint claim, but with no justification for this beyond the mere assertion that RT and/or TDAT do have a claim in respect of (i) the costs which they have expended in the litigation and (ii) the financing costs of any borrowings they may have actually made, each being then claimed to be rechargeable to the TDT assets.
46. Even taking these as separate claims, however, no justification for this assertion is given as a matter of legal analysis. Of course there is no problem in principle with the TDT Trustees themselves seeking to include in their proof their legitimate expenses of administering the TDT's affairs in such regard, being sums actually expended by the Trustees, or incurred to third parties but not yet paid. However, it again seems to me that in the circumstances where the TDAT and RT are really part of the same group and under similar control, a simple "mirror" assertion by F&B with their TDT hat on, that they accept a liability to make payments to RT and to the TDAT, on behalf of the TDT, would not be enough. Once again therefore, unless and until a properly arguable claim is formulated on behalf of the actual recipient parties then, in my judgment, it should not be allowed into the proofs in this matter at this stage, to muddy the waters and complicate things on such an insubstantial basis. F&B can pursue their own individual claims, but in my judgment it should be left to Mr Tchenguiz and the TDAT Trustees, if they can, to make any claim individually on their own behalf and demonstrate its legal justification. Of course, they will only be able to recover against the TDT assets in respect of such items through subrogation to the lien of F&B *qua* Trustees of the TDT, but that is not, in my judgment, sufficient in itself to justify allowing F&B to introduce into their own proof, by amendment, claims by others which do not disclose a sufficient arguable basis in law.

47. To sum up, therefore, to allow F&B to introduce these claims here, there would, in my judgment, have to be disclosed a clearly arguable case that F&B had incurred the liabilities alleged in their capacity as Trustees of the TDT; F&B would need to show at least an arguable case that they have expended this money or that they are claiming the wherewithal to meet, claims for which there is a clearly arguable case that they are liable. As to the first item, the “one third shares of the BVI debts” for which permission to amend is requested, I cannot see any arguable case that any such liability or claim even really exists. As to the third and fourth items, I cannot see, and there is not even mounted, any clear case, that any such expenditure or claim is recoverable against the TDT assets by the relevant third parties. If the third parties can make out a case for recovery of their own identified expenditure or loss as a liability of the TDT incurred through the Trusteeship of F&B as Trustees, that would be a necessary step, but they have not done that, and in the situation where the basis for F&B accepting the TDT’s liability for the claims being advanced by third parties is not made clear on the face of the proof, it is, in my judgment, appropriate to require the third party to make out his/its claim as to how such liability arises, so that it can be examined by those with a direct interest in challenging it.
48. This may well become material later, as regards any general conclusions about the procedural progress of this whole matter. This is because, until the appeal is determined there is no point dealing with disputes about claims which will only have any material effect if the appeal succeeds. Adjudicating on challenges to the claims of I&B, and possibly those of GTC, all of which take a degree of priority over those of F&B and those claiming through them as matters stand, can be usefully progressed because they will need to be determined in any event, but disputes with regard to the validity or extent of claims made by or through F&B at present have no practical consequence - at least not directly. This will need to be taken into account in future directions.

### **Privilege**

49. It is convenient to deal next with the issue of privilege. Paragraph 14 of my December order stated that

*“In support of the remaining claims in their respective proofs of debts as to legal costs and remuneration, and subject to Paragraph 15 below [which disappplied Paragraph 14 to three specified sets of proceedings] I&B and GTC shall each file and serve evidence exhibiting invoices, accompanied by narratives or evidence supporting those invoices sufficient to indicate which employee did the work and what s/he did,(which document may be redacted if so advised but without prejudice to possible argument as to the permissibility of such redaction) by 4 pm on 31 January2020.”*

I indicated then that any issues about privilege could, as I saw them, be dealt with later; I envisaged that this would probably be achieved by appropriate redactions which would allow identification of issues which could be argued about at an appropriate time.

50. Compliance with my Order, however, disclosed a more fundamental dispute between F&B and I&B in particular with regard to the effects of I&B asserting that the various

invoices and supporting narratives to the legal bills in respect of which they were claiming payment were subject to the operation of legal professional privilege for the entire documents as a class. Both the basis for this assertion, and its effects in any event are disputed by F&B, but really with an eye to the future. F&B, as Trustees of the TDT, wishes to have, and claims entitlement to be able to effect “collateral use” of those disclosed documents in any way it wishes.

51. Initially, therefore, this depends on whether any privilege in the “costs materials”, as they have been called for convenience, belongs to I&B as they assert, or does not, as F&B asserts.
52. Accepting that privilege is a ground for withholding production of documents in principle, Advocate Robison for F&B argued as follows. The first question is whether I&B can enjoy privilege over a document and its contents at all where they seek to be indemnified from the TDT for the costs of obtaining the advice or the preparation of the documents in question; he submits that the answer to this question is “no”. He submits that the consequence of this is that the privilege then vests in the TDT Trustees (namely F&B) so that F&B are entitled to these documents as of right. This is because, being paid for by the Trust (or claimed to be obligatorily paid for by the Trust), they become, in effect, Trust documents, and, that being so, the TDT Trustees must be entitled to deploy those documents without any restriction for whatever they perceive to be the proper administration of the TDT Trust itself.
53. Advocate Robison appears to argue this on two bases although it seems to me at times these are conflated. He first says that if I&B are claiming indemnification from TDT funds, then they cannot at the same time claim any privilege which restricts their use by the TDT Trustees, because privilege depends on payment, ie who paid for the advice or work? He goes so far as to suggest that payment is in fact “determinative” of who owns the privilege. He relies on various cases (as I shall mention) where trustees have sought legal advice and it has been said that where they have paid for it themselves it is their advice and it is privileged from production, but where they seek or get indemnity from the trust fund, it is the trust’s advice and the former trustees have no privilege.
54. The second point is slightly different. It is an argument that where documents come into being as part of the due administration of the trust, successor trustees are entitled to have the documents as part of the trust records (This argument is deployed more strongly in relation to the specific dispute about production of draft invoices which I refer to later.) The argument here runs that if the document was paid for by the trust, it is a trust document and must be handed over, therefore, firstly as a matter (in effect) of property but, secondly, in support of a successor trustee’s right and obligation to scrutinise the performance by former trustees of their duties, which requires that the successor must have all the information which was available to the former trustees. Either argument must mean that the documents in question will be available to the current trustees and, consequently, this leads to the point that they can be collaterally deployed by such trustees as they see fit.
55. I pause here to observe that in respect of the second limb of Advocate Robison’s argument, the final conclusion is a *non sequitur*. It would only follow inevitably from the first argument which really concerned the matter of property, ie who owns the

document? It does not follow from the lesser issue of whether a document needs to be available to a successor trustee to enable it to consider the performance of a predecessor. Nonetheless, the point that is made by Advocate Robison is clear.

56. With regard to his main argument on this point, ie that the privilege is not that of I&B but vests in F&B as the current TDT Trustees, Advocate Robison relies in particular on *Lewin on Trusts 20<sup>th</sup> Edition* at paragraphs 21-59. This, (although I think I am reading from the equivalent passage in the 19th Edition), says that:

*“Trustees who are sued for breach of trust or other relief in contentious trust proceedings are not liable to disclose the legal advice obtained and paid for by them for the purpose of their defence. They may assert privilege of such advice in the normal way and the beneficiary’s right to disclosure under trust law makes no difference. Similar considerations apply to communications with their lawyers for the purpose of their defence after commencement of proceedings and in our view communication with their lawyers paid for by themselves before the commencement of proceedings in relation to their liability for breach of trust though not communication before commencement of proceedings in relation to the Trust property”.*

57. He relies on the clear reference there to the requirement for payment being made by the trustees themselves. He relies in addition on *Lewis & Anor v Tamplin & Ors* [2018] EWHC 777 (Ch) at [59]:

*“Originally, the trustees sought to claim legal professional privilege for all the communications with their lawyers. This untenable position has wisely been abandoned. There is a clear distinction to make. In general, where trustees seek legal advice for the benefit of themselves personally, eg in relation to possible breach of trust liability, or of another trust of which they are trustees, and pay for it themselves, or out of the funds of that other trust, without recourse to the funds of the Tamplin Trust, that advice may well be privileged in favour of those trustees as against these beneficiaries. But, where the advice is sought for the benefit of the Tamplin Trust as a whole, and the trustees pay for that advice out of Tamplin Trust funds, then such advice, even though it may be privileged as against third parties, is not privileged as against the beneficiaries, and is liable to be ordered to be produced”.*

Advocate Robison submits that although this was a case where the reference was to beneficiaries, the position of a subsequent trustee, who in effect represents the current beneficiaries of the trust, can really be no different.

58. He referred also to *Talbot v Marshfield* [1865] 2 Dr & Sm 549, a rather older case, differentiating again between the benefit of the trust and the benefit of the trustee and also to *Blades v Isaac & Anor* [2016] EWHC 601 (Ch) at [51] where it was said:

*“The opinion had been obtained by the defendants as trustees, for the benefit of the trust rather than for their benefit personally, and therefore it was proper for them to pay for it from trust funds. But the*

*corollary of this was that it was a trust document, and therefore in the same category as other trust documents, that is, available to the beneficiaries if the court so considered. In relation to such documents, there can be no legal professional privilege as between trustee and beneficiary. Arguments about privilege in the present case were therefore simply irrelevant. Indeed, they made things worse, by diverting attention and resources to non-points.”*

Once again, the emphasis is on the question of payment out of a trust fund being determinative and Advocate Robison again referred to *Re Londonderry* [1965] Ch 918 and the emphasis there that if you want to claim privilege you must pay yourself. His argument comes down, therefore, in the end more or less to this simple proposition.

59. Advocate Wessels says that payment is not determinative. It is something that may be initial *prima facie* evidence of whose privilege it is, but no more. He points out first that the scope of the statutory indemnity to which I&B are entitled under the Jersey Trusts Law is in respect of costs incurred “in connection with” the TDT and not merely “for the benefit of” the TDT. That is an important distinction and is one that may, indeed, have governed the decisions in earlier cases, where the question was “benefit”. He, therefore, says that it does not follow that if I&B seek an indemnity they are automatically accepting that the advice was for the benefit of the TDT. He submits that that is a self-evidently absurd position where advice is with regard to claims being made against trustees for breach of trust (certainly if indemnity depends on the trustees being exonerated from any such claims, as has happened in this case).
60. I&B were seeking legal advice which they were entitled to have as Trustees or one-time Trustees of the TDT, but for which they have paid themselves. It would be remarkable, he submits, if their privilege was somehow transferred to the current Trustees of the TDT at the point in time when I&B sought an indemnity against their expenses, to which they are, in fact, entitled, and simply because of that. As things stand at present, privilege in the documents would plainly be privilege owned by I&B, there is no reason why this should change now, or even because of an indemnity payment made in the future.
61. Advocate Wessels submits that the cases relied on by Advocate Robison are of no help because they are in fact concerned with different situations, such as cases between trustee and beneficiary. They do not deal with or provide assistance in this case. References to payment show only that the Court was finding that as a fact the legal advice was taken for the benefit of the trust. In other words, payment out of trust funds was an evidential point. These cases therefore do not preclude the correct analysis in this case, which is to be found, he submits, in a case which he says is effectively on all fours with this case, namely *Gray v BNY Trust Company of Australia Ltd* [2009] NSWSC 789 Equity Division. At [54], Bergin CJ says:

*“The real issue for determination in this Application is whether the privilege claim made by the Defendant [sc the trustee] is unsustainable by reason of the Court’s Order that the Plaintiff pay part of the Defendant’s costs and the Defendant was entitled to indemnification out of the estate for its costs of the previous litigation. The cases referred to above do not address this particular issue. However, the*

*SA Bank case points out the character of the relationship between the Plaintiff and the Defendant in this case. In aspects of the previous litigation the Plaintiff was an adversary of the Defendant. His present purpose in seeking the documents is in part to support his claims in the accounts motion in which he is attempting to allege, inappropriately in my view, that the Defendant was not justified in recovering indemnity from the estate for the costs that he was awarded by Austin CJ. Austin CJ has already decided that matter adversely to the Plaintiff.*

*Be that as it may, it is necessary to focus on the relationship at the time the documents were created. There is no doubt at the time the documents were created in relation to the main proceedings in which the Plaintiff was suing the Defendant the communications were privileged. The Plaintiff's claim against the Defendant for revocation is unjustified and he was ordered to pay the Defendant's costs. The Defendant was also entitled to be indemnified out of the assets of the estate for its costs. That does not in my view mean that the Plaintiff has a proprietary interest in the documents in the sense that the cases recognise beneficiaries' entitlement to access trust documents. These documents were not for the benefit of the Plaintiff. They were documents created for the purpose of the Defendant defending itself against unjustified litigation against it by the Plaintiff. The fact that an order was made that the Plaintiff pay the Defendant's costs coupled with an order of its entitlement to indemnification does not in my view convert the privileged advice received by the Defendant to defend itself into an advice for the benefit of the Plaintiff and, thus, a trust document to which the Plaintiff is entitled to access".*

62. That, Advocate Wessels says, is not only a case which is apparently on very similar facts to the present case but also it encapsulates exactly the analysis which he says is the correct analysis in this case, and shows that privilege in these documents remains with I&B, and is not in any way to be claimed by F&B as Trustees of the TDT on the grounds of reliance on the indemnity that is sought by I&B with respect to their costs of obtaining this advice and litigation activity.
63. Advocate Wessels submits, also, that this is supported to a degree by an unreported decision of Arden J in the English High Court in *X v B* (13<sup>th</sup> July 1999) which shows that a trustee is not precluded from taking its own interests into account in a proper, ie balanced, way when deciding how to administer the trust. In that case it was the trustee's interest in his lien, and how this might affect decisions on the investment of trust property. This, Advocate Wessels says, shows that there is no bright line between trust interests and the trustee's interest dependent on whether advice is paid for out of the trust assets or not. An appropriate degree of regard for the trustee's own interests, where permitted, does not preclude his recovery of the costs incurred if he is otherwise entitled to such indemnity. That is a decision which is, in a sense, the other way from this case, but it illustrates the point that a trustee may be entitled to indemnity even in relation to advice on a matter which is partly obtained in his own interest, or as to which his own interests have influenced a part.

64. Advocate Wessels goes on to submit that the costs materials are the history of the conduct of I&B's defence in this protracted litigation. That is the basis on which they are privileged, and it has in fact been accepted in other cases that they are obviously privileged in principle. Advocate Robison's proposition would, he points out, have the effect that any trustee or former trustee sued by beneficiaries or by the subsequent trustee must either pay for advice in his own defence himself, contrary to the principle of indemnity, or must accept that the advice which he obtains must be made available to the very people who are suing him. This, he submits, cannot be right. The only alternative for giving effect to Advocate Robison's submission would be to change the answer to the question of whose privilege the documents are subject to at the point where the trustee either seeks, or obtains, reimbursement of his expenditure which, he has previously submitted, has no logic to justify it and is, in fact, unprincipled.
65. I unhesitatingly prefer Advocate Wessels' arguments on this point. I am quite satisfied that it is the obligation of the Trust to indemnify the Trustee for his costs incurred in connection with the Trust. That must include costs - proper costs of course - incurred in defending himself for claims of breach of duty, certainly when, as here, he ultimately proves to be successful. The question, as Mr Wessels says, is did he (the trustee) act reasonably? The answer is: Yes, because he succeeded. The next question is: are his costs "in connection with" the Trust and the answer seems obviously to be that they are.
66. I am also satisfied that the reasoning in the *Gray* case (above) is exactly parallel, even though that case concerned a beneficiary rather than a subsequent trustee. Whilst the case itself may not be directly persuasive - Advocate Robison points out, quite correctly, that it is a decision of the New South Wales Supreme Court, and a level which is only parallel with the High Court of England and Wales - it is nonetheless an example of relevant principles being applied to a set of facts very similar to this case, in a jurisdiction which operates in a similar way in relation to trusts. To that extent I find it helpful as an articulation of what seemed to me, in any event, to be the correct analysis.
67. Therefore, I hold that *prima facie* the costs materials, namely the advocates' and solicitors' invoices and the supporting narratives and worksheets which have been produced and which run to something around 5,000 pages, are items that are privileged by reason of legal professional privilege, and that the privilege belongs to I&B. This is subject to one qualification.
68. This principle must apply to invoices for work which was instructed by I&B after their removal as Trustees which took place on a date in July 2010, shortly after the commencement of the original proceedings. I&B cannot have been taking advice on behalf of the Trust on any basis after that time; it had to be for their own benefit despite the fact that, as I have said, s 26 (2) of the Jersey Trusts Law would entitle them to an indemnity for the costs of doing so (their costs being "in connection with" the Trust) insofar as their costs were reasonable.
69. However, before that time - and the bills go back to 2009 - it is theoretically possible that advice taken was in some instances for the purpose of Trust administration matters properly so called, and partly with regard to their own position either in separate matters or with regard to different aspects of the same matter. I simply do

not know. The issue with regard to privilege is always particular, and fact specific and facts have to be analysed in order to decide whether privilege applies in any particular case, which may even come down to individual documents. The facts have not been analysed in that degree of detail here with regard to that earlier period. Therefore, it appears to me that there may be a sub-issue with regard to privilege in relation to some such early materials to which Advocate Robison's principle could apply, ie that advice taken for the benefit of the Trust and paid for by the Trust belongs to the Trust and must be delivered up to the present Trustees.

70. My ruling is given as a point of principle and the possibility that the principle does not apply to a particular set of facts must be preserved for investigation and possible argument on the issue of privilege in relation to such documents at a later time. If there appears to be a case that any particular item or items of advice could fall within that category, there must be a mechanism for identifying these and considering them separately if needs be.

### **Waiver of privilege**

71. Following on from the general issue of privilege, there then comes that of waiver of privilege. As to this, Advocate Robison argues that if I hold in favour of I&B (and by parity of reasoning, GTC as well, I assume), that they do have privilege in respect of the costs materials, the fact of production of the documents, for the purpose of this *Alhamrani* exercise, has waived, or will waive, the privilege and those documents. They become just like ordinary documents and will come into the public domain by being used in the proceedings. These proceedings are at the moment public proceedings and are not *in camera* and there has as yet been no move to bring them into *camera*, consequently the general rule, that a document that is deployed in proceedings becomes part of the open public court record, applies. That is what is meant, as I understand it, by the documents "coming into the public domain".
72. Advocate Wessels says that the privilege which I have so far held has been made out, has not been waived and will not be waived, and he has maintained that position on behalf of his clients at all times. Both sides have assumed, and it seems to me that it is accepted as being correct (see *Friston on Costs*, 3<sup>rd</sup> Edition at paragraphs 46-14 and 46-15), that legal bills and invoices, at any rate containing narratives, are subject to legal professional privilege on the grounds that they effectively show the history of the transactions between the lawyer and client. Advocate Wessels submits that it has always been asserted by I&B that these documents are privileged notwithstanding that they did dutifully comply with Paragraph 14 of my Order of 10th December 2019 and produced them, even though he had argued before me that, as they were privileged documents, I&B ought not to be ordered to do so and my ordering their production was, he respectfully says, not necessarily correct as a matter of law.
73. He submits further that there is a well-understood principle that privilege can be waived for limited purposes only. In fact, he points out, it is commonplace that this occurs in a situation where the problem is acute, namely the taxation of legal costs bills. It may well be necessary, in order to demonstrate the reasonableness of a bill, to look at the receiving party's privileged legal materials. If that party discloses and produces those materials, that production can be regarded as being for that limited purpose only, and the privilege will re-vest in effect otherwise, and apply generally as

regards any other purpose. Indeed, he says, this is so common that disclosure of such materials in costs taxations would automatically be assumed to be intended to be waiver of privilege for such limited purposes only, even if that is not stated expressly: see, for example, *Goldman v Hesper* [1998] 1 WLR 1238. The rationale, he submits, is that loss of privilege is only required so far as the justice of the case requires, and the justice of the case does not, it is said, require that loss to go beyond disclosure and losing the privilege for the limited purpose of justifying the legal costs which a party is rightfully claiming: see also *Bourns Inc v Raychem Group* [1999] 3 All ER 154 at [162] -[163]).

74. Advocate Wessels says that *Alhamrani* taxation, as it has been called, may not be an actual legal costs taxation but its function and process are so similar and so nearly akin to a costs taxation that similar principles with regard to procedure must apply. Alternatively, they should be applied by the Court as a matter of the Court's discretion. On that basis, he submits that I&B were entitled to and did produce these documents for the purpose only of the exercise which is this *Alhamrani* taxation, and it follows that they are entitled to assert privilege otherwise, and therefore to insist on no collateral use of the documents, even if the documents are used in the *Alhamrani* exercise itself. To support the above point, the Court can, and should if necessary, order the proceedings to be heard in private: see *Eurasian Natural Resources Corporation Ltd v Dechert LLP* [2016] 1 WLR 5027.
75. Alternatively, if the above is wrong then the Court can and should in any event make an order under the Royal Court Civil Rules, Rule 79(2) prohibiting the public use of the costs materials even if they have been read or used in Court. It would be reasonable to do so because their origin is undoubtedly that of privilege and it would be just that such privilege should not be further lost than required by the justice of the case, so that collateral use should be prevented. That, I think he submits, is particularly in the context of this case where there is obviously what might be described as a good deal of *animus* and suspicion between the parties after eight years of fiercely fought and highly expensive litigation.
76. Advocate Robison counters that. He submits that the rule or practice about limited purpose disclosure only applies to taxations properly so called and the *Alhamrani* process is not a taxation and, therefore, he submits should be treated no differently from ordinary actions in the Court.
77. He also argues that the disclosure made by I&B has been voluntary. He says it is not the same as an order for discovery of documents where it is compulsory under Rules of Court to produce documents. I&B have adduced this material voluntarily in the sense of wanting to produce it to support their case. Where materials are deployed under a Court order or Court procedures, a party chooses what to deploy. Such materials are, therefore, voluntarily disclosed and the usual general rules apply; where such materials are used they come into the public domain and they can subsequently be deployed by opponents as such, without restriction. That, he therefore submits, is the position in this case.
78. Therefore, he submits, the Court should find that there is no reason to impose the implied undertaking by the other party in the case of voluntary discovery, not to use disclosed materials except for the purpose of the case in question, at least once the

materials are used in the case itself. This would be when the documents would come into the public domain. There is no restriction on collateral use which then applies and the Court should not introduce one; there is no reason to do so. Now that the documents are disclosed and intended to be deployed, there is no reason for not treating them the same as any other material.

79. I have already held that these documents are subject to privilege and I am satisfied that they have in fact been disclosed without the intention to waive that privilege save for the limited purpose of use in this *Alhamrani* exercise. I am satisfied that I&B are entitled to act in this way.
80. Starting from first principles, it is clear that privilege can, these days at any rate, be waived expressly for limited purposes only, and the Courts have indeed tended to be in favour of permitting limited or qualified waiver of privilege so as to preserve both the principles of privilege and to do justice and fairness in a particular context. That is a flexibility which is plainly highly desirable provided it is exercised on the basis of clear rules that can be understood by everybody.
81. In my judgment, also, the procedure with which I am concerned here, the *Alhamrani* taxation, is so close in quality and character to a taxation of legal costs that there is an equal rationale for applying principles similar to those which have been established in regard to legal taxation cases properly so-called. This reinforces the point, therefore, that privilege can be waived *pro tanto* or to a limited degree.
82. Even if that was incorrect and the disclosure and/or the actual use of the documents in this case might be held *prima facie* to waive privilege, I would, in my discretion and in the circumstances of this particular case, think it perfectly appropriate to impose a prohibition on any collateral use of the documents by those to whom they had been disclosed. While Advocate Robison says there is no reason to do so, in my view the obvious justification is the origin of the documents as privileged documents as I have found them to be. There is good reason to take the view that the justice of the case and the presumption in favour of justice being administered in public does not extend so far as to preclude my making any such order. Although these are hostile proceedings in many senses, the actual detail of the material which is disclosed in these bills, narratives and time records is really not a matter of any true public interest. The exercise itself, determining a dispute about where liability for a former trustee's expenses should lie, is quite close to matters of administration of the trust itself, which are frequently dealt with in private. In saying this, I have not overlooked the point that disputing a trustee's claim to costs and expenses might well be correctly analysed as asserting a breach of trust, in that the basis for such challenge has to be that the relevant costs and expenses were not reasonably, and therefore not properly, incurred, either as to substance or as to amount. However, such disputes as these are not really anyone else's business except to the limited degree of public interest in the way these things are actually handled in Court, in other words as a form of public education. Mere prurience is not enough.
83. For all those reasons, making an order that there should be no further collateral use seems to me to fit the justice of the case perfectly well and, if necessary, I would do so. Whether this is characterised as putting the privilege cat back in the bag or the

privilege cat never having got out of the bag in the first place does not seem to me to matter.

84. For completeness, I also reject Advocate Robison's argument that these materials were not produced out of compulsion of a Court order but should be viewed as having been disclosed voluntarily, thus depriving them of any claim to protection from collateral use if deployed in the case in court. It is correct that where a Court Order says that something general has to be done, such as that a party must produce his evidence or the documents he relies on by a particular date, the Court is making an order as to which a party has a choice as to *how* he chooses to comply. He is compelled to comply with the principle but not in regard to any particular material. What he chooses to refer to and produce in that situation is, therefore, voluntary. The cases on lack of compulsion seem to me to deal with this kind of situation.
85. The situation here, however, was that my order was specific as to exactly what had to be produced (namely the supporting invoices and narratives) and this was, in fact, privileged material. Arguments that its privileged nature did not prevent my ordering its production at all did not find favour with me, and the reason for that was my view that the justice of the case effectively required the material to be produced so that it could be examined in the context of the justification required. This is in fact just the same rationale as leads to the need to produce privileged documents in costs taxation cases, in particular. Being also of the view that any issues of privilege or its effect could be adequately dealt with by subsequent order at the time, I took the matter no further and I did not put Advocate Wessels to any election on behalf of I&B either to produce the material which I thought ought to be produced and waive privilege or to elect not to produce the material at all and not rely on it. That, though, does not seem to me to make any difference.
86. In those circumstances I find that it is perfectly clear that this material should be regarded as having been produced under compulsion of a Court order with such protection as a party is entitled to expect for his interest in such a situation. I reject Advocate Robison's argument that because Advocate Wessels did not take issue with my order when I made it (presumably by appealing it) his clients were not acting under compulsion in complying with it and cannot, therefore, claim to have retained any of the benefits of privilege.
87. Advocate Robison says that if I come to the conclusion which I have done, it follows that I will be obliged to hold the actual hearing itself in private, because otherwise the contents of these privileged documents will come into the public domain willy nilly. He points to the number of people who have tuned into this hearing on the Microsoft Teams software who then naturally, as part of the public, become aware of any document contents used in the hearing such that the very purpose of a limited waiver of privilege would be rendered nugatory. If so, then so be it. There may be many ways of practically preventing further dissemination of privileged material, or it may be that the Court will readily be persuaded upon an application to hold the hearing in private. That, though, is a matter for the future. It does not seem to me to affect the present.
88. For the present, I hold that I&B have effected only a limited waiver of their privilege of these documents, limited to their use in these proceedings. I hold this whilst also

making it clear that I would, in the exercise of my discretion, if I had to, impose limitations on any further or collateral use of these documents by others under RCCR Rule 79, if that were necessary in order to achieve the same result. In the circumstances, it seems to me this amounts to affirming of the terms of my order of 29<sup>th</sup> January 2020 at paragraph 2 after, in effect, hearing full argument from F&B as they were given permission to make, if they wished to vary or discharge the effect of my order, by in paragraph 3 of that order.

## Election

89. Before leaving this topic, I need to say a word about election. When making the Order of 29<sup>th</sup> January 2020, which was designed to enable this process to proceed as far as possible in accordance with what I regarded as quite a generous timetable that I had allowed, and at a suitably brisk pace to enable it to proceed towards some kind of finality in the foreseeable future, I also, upon subsequent representations from I&B added a proviso to that Order by a further Order of 31<sup>st</sup> January 2020. This was to the effect that if I&B (or GTC) produced materials in reliance on my earlier Order expecting to assert privilege otherwise than for the purpose of this exercise, but it were later held that their claims to privilege were invalid, then I&B (or GTC) should have the right to withdraw the materials in question, whereupon matters would proceed as if those materials had never been produced in the first place and F&B would not be entitled to make any use of the fact that they had been.
90. The purpose of this proviso was to hold the ring and put I&B and also GTC in the same position as if it had been possible to determine any dispute about the application of privilege, or the effects of possible waiver of privilege, before I&B (or GTC) had actually disclosed the relevant materials to F&B. F&B would of course then have seen the material, and to that extent the position would be imperfect, but it was the nearest that could be achieved without a huge delay in the timetable effectively until the beginning of April, and I considered this to be undesirable.
91. Though I was not aware of this specifically at the time, this proviso was in effect attempting to apply the principle of election as it applies in cases where there is a waiver of privilege, a situation which occurs most frequently in cost cases, for obvious reasons. Where the receiving party wishes to justify its costs bill by reference to privileged materials and the costs judge considers it important to see those materials in order to make a decision about the validity of the claim, the materials can be shown to the costs judge, and, *so long as the paying party agrees*, the judge can make a decision simply by reference to them and without them being shown to the paying party.
92. However, where there is a serious dispute, ie where the paying party alleges that it absolutely must see the documents in order to be able to argue its case, then the principle of election will apply in deference to the fundamental rule that where there is a contentious matter a party is entitled to receive the material being deployed against his interests so that he can deal with it. The position is a “both or neither” position, in order to keep a level playing field. Either both parties must have the material or it cannot be used at all. This doctrine therefore enables the recovering party to elect either to show the material to the opposite party or not to use it at all. In other words, it applies at the point of disclosure of the materials to the opposition and protects the

interests of a party who is not prepared to show such materials to the opposition at all, even if protected by prohibition on their collateral use subsequently.

93. That is not the case here in relation to these costs materials. They have already been disclosed. I&B was apparently willing to do so, relying simply on the effect of the proviso that I have referred to. Neither the doctrine of election nor, except for one point, does the semi-replicatory effect of my proviso in fact apply.
94. The materials were disclosed in reliance on my Orders, and this does not in my judgment in any way affect what I intended (and if I may say, obviously intended) to be the ring-holding position. I&B took the view that so long as they could assert privilege and therefore control the position by limiting the purpose of waiving it, and thus retain entitlement to prohibit collateral use of the documents, they were prepared for F&B to see them. That is all that has happened, it seems to me. They did not elect to prevent F&B seeing them at all. That result, though, leaves open one particular point for further consideration, which is the position with regard to any materials possibly not being held to be subject to privilege in the hands of I&B because they are in fact Trust documents, ie, as I have mentioned above, any early advices which on proper examination may be found to be advices to the Trust and not to I&B personally, but are being paid for by the Trust as a matter of I&B's right to indemnity generally.
95. Again, I do not know if that position is actually going to arise at all in practice, but if it does, the proviso to my Order would entitle I&B, it seems to me, to elect to withdraw any materials which are found to fall in that category. I actually have difficulty seeing why they might want to do so, but that is a matter for them, and anything along that line seems to be possible in this litigation. Once again, therefore, that possibility needs to be recognised and its possible application preserved for the sake of good form even though it may well be that it does not arise in the event. That seems to me to be the only potential scope for the application of a principle akin to election as provided by the proviso to my 29th January Order

### **Draft Invoices**

96. I turn now to draft invoices. This point is different from the foregoing in that it concerns production of specific further materials which F&B say I should order.
97. I&B's bills relate to work in Guernsey carried out by Mourant, (then Mourant Ozannes) and work in the UK carried out by Macfarlanes. Bills were rendered by both firms. In producing Macfarlanes' bills, narratives and timesheets, Mr Simon Day of Macfarlanes explains in his Affidavit that invoices were rendered generally monthly, but the procedure adopted involved sending draft invoices to I&B, and I think also to their insurers because these were examined by I&B and their insurers, and the draft bills were the subject of question and possible revision before leading to a final bill which is what has been recorded and paid and for which reimbursement is now claimed. It is those final bills which actually appear as the material supporting the proof that is now being put forward.

98. Mr Day deals with this in his Affidavit at paragraphs 24 to 26. He says:

*“24 .....the Macfarlane Invoices themselves were issued only following scrutiny of the figures themselves by I&B and their insurers. Although I am not able to confirm from my own knowledge the process in respect of Macfarlanes’ involvement, I am aware that for many years Macfarlanes have sent monthly draft invoices to I&B/their insurers for review prior to finalising the Macfarlanes Invoices. Those draft invoices contain the time and disbursement details of the relevant month broken down by matter for reference. The fee notes issued by counsel in respect of that invoice are also provided.*

*25. The draft invoices themselves are sent out only after the time and disbursement detail has been reviewed by a fee earner at Macfarlanes who would ensure that the time and disbursement detail has been properly allocated. Macfarlanes have maintained a dedicated matter number (time in respect of which was not charged to I&B) for dealing with billing allocations for I&B.*

*26. Following receipt of the draft invoices by I&B/their insurers, questions would regularly be asked as to the time and disbursement detail recorded. The drafts would be revised if necessary and final invoices were generally only issued and paid once those revisions were agreed”.*

99. Advocate Robison submits that F&B are entitled as a matter virtually of right to see these draft invoices but that in any event, if it is a matter of the Court’s discretion, that should favour making an order. His argument has four main threads.

100. First, being matters mentioned in an Affidavit, then on principle they are required to be produced for inspection (see the RCCR Rule 73(c) and 74).

101. Second, they are materials which are required in order for F&B to review the propriety of the costs claim, firstly as a matter (he submits) of obvious common sense on any basis but, secondly, they are required because the Trustees are under a duty to scrutinise Former Trustees’ actions and hold them to account and they require the materials for that purpose.

102. Third, they are materials which were available to I&B at the time and, therefore, they must be made available to F&B in the interests of their having “*the same degree of visibility*” available to them as the Former Trustees had. Later trustees are entitled to be placed in just as good a position in all respects as to the availability of information as were the former trustees: see *Re Bird Charitable Trust* [2012] (1) JLR62). In that case, legal advice obtained by former trustees and paid for by the trust was ordered to be disclosed to a later trustee, not because of its contents regarding a specific and non-recurring matter, but because doing so was necessary to enable the later trustee to satisfy itself that the trust had been properly administered. It was a very large sum of money and it was irrelevant that the former trustee did not wish to disclose for fear that this might provoke action against it.

103. Fourth Advocate Robison says that, insofar as the Court has any discretion, there is a presumption in favour of ordering production of documents in this context and it is for the former Trustee to satisfy the Court that there is a good reason not to do so, and not the other way round. He says there is none here.
104. Advocate Wessels for I&B resists this argument as follows. He says first that RCCR Rules 73(c) and 74 do not apply because this is not the process of ordinary litigation, but a peculiar *sui generis* process akin to a taxation of costs conducted by the Court, and Rules 73 and 74, therefore, have no application. The Court must resort to other principles if Advocate Robison's argument is to succeed.
105. Second, he repeats that the draft invoices are undoubtedly privileged. In any event, therefore, he says, that Rule 76(3), which provides an exception to an obligation to allow inspection, is properly construed to cover a right to withhold inspection (ie production) on the grounds of legal professional privilege.
106. Third, and in any event, he says that having complied with the terms of Paragraph 14 of the order of 10<sup>th</sup> December 2019, I&B are now entitled to decide voluntarily what else to disclose. The draft invoices are not within the terms of Paragraph 14 and I&B elect not to disclose or produce this further privileged material at all. They do not choose to rely on the contents of these draft invoices. These drafts are referred to only as to their existence. This is their "effect" in the terminology of cases which draw the distinction between a reference to the contents of documents which does demand that they be disclosed, and a reference to the "effect" of documents, which does not have that consequence. He cites Matthews and Malek on *Disclosure*, 5<sup>th</sup> Edition at 16-23 and the proposition that merely referring to the effect as contrasted with the contents of a document does not waive privilege and he points out that this principle was approved in cases such as *KMG International NV v Chen & Anor* [2019] EWHC 2634 (Commercial) at [21]. This concerned a document referred to in a witness statement. Referring in a witness statement to taking Dutch law advice but not quoting it was held to be referring to the effect of such advice and not to its contents, and did not mean that the advice itself must be produced. Advocate Wessels submits, and I think rightly, that this is a pretty strong case, since the document was obviously being referred to in a way in which the contents could, at least to some degree, be inferred. This becomes pretty close to referring to the contents themselves. However, that was the effect of the decision. It seems to me that the principle to be discerned is, at least, whether the document is being referred to for its actual contents, or merely for the fact of its existence.
107. Advocate Wessels submits that Mr Day's First Affidavit clearly refers only to the effect of the draft invoices when it is viewed in context, ie it is describing the part those invoices played in the process of arriving at the ultimate final invoice. He does not quote the contents and he only refers to letters containing details of time or disbursements, for the relevant month broken down by matter. Is this, Advocate Wessels asks rhetorically, referring to contents? By analogy to the *Chen* case he replies "Clearly not". I&B therefore cannot be compelled to produce them.
108. Even if the Court took the view that considering their contents was necessary in order fairly to scrutinise I&B's claim, I&B would be entitled, in this case, he submits, to exercise their election not to produce these documents and not to rely on their

contents, because entitlement to privilege trumps any other consideration which might otherwise justify compelling their production. It does so, however, in a way which holds the balance between the parties, that is, the level playing field as previously mentioned.

109. As I&B have referred to the fact of the existence of these invoices, he submits that the failure by I&B to disclose the documents themselves could always be relied on by F&B to make submissions as to any inferences that could therefore, be drawn. Although this was said in his Skeleton Argument at the end of paragraph 67, I have to say I am not quite sure how this would apply in practice, as it does seem to me rather to negate the very privilege which is being asserted. That point, though, is not particularly material at present.
110. Even if all the above is wrong and I&B cannot rely on privilege to refuse disclosure, Advocate Wessels says that the Court should not order disclosure on the grounds of proportionality, and he cites *National Crime Agency v Abacha* [2016] 1 WLR 1375 where it was held that, under the English CPR regime, the mere mention of a document does not entitle the other party absolutely to inspect it. The right to inspect is qualified by CPR-based limits which includes proportionality. “CPR-based limits” means matters such as the “overriding objective”, which is also part of the Royal Court Civil Rules in Guernsey: see r 1. Proportionality in this context would include the degree of necessity for the fair disposal of the action in question. As to proportionality, Advocate Wessels submits that the exercise being conducted in this context is only to scrutinise whether the relevant Trustee (I&B) was or was not reasonable in accepting the invoice which it ultimately did accept to pay; it is not a taxation of the actual bills themselves. A line-by-line examination of invoices, and (a fortiori draft invoices) is not necessary for such an exercise.
111. The material, he says, moving on from this, is really irrelevant in any event. The draft invoices were revised after questions and discussions, also involving insurers. What the original proposed invoices might have been is, therefore, not material because the question is whether it was unreasonable, such that no reasonable trustee or former trustee could have accepted them, to accept the final invoices. If you add to that the fact that the draft invoices, unlike the final ones were not stored in archives, his clients or their advisers would probably have to sort back through ten years of emails to find them even if they were preserved on the server. This will be a major exercise and in the context of the nature of the enquiry and the small and unlikely degree of assistance which they might give to a mere initial consideration of costs and objections, that exercise will be disproportionate.
112. Lastly, he says that, in any event Mr Day can withdraw references to the Draft Invoices by making suitable amendments to the wording of his affidavit, and still retain the effects of the material assertions he makes. He could, for example, say only that the final invoices were subject to prior scrutiny and challenge by not only I&B but also their insurers, who were actually paying on their own account at a time when there could be no certainty as to whether they would be able to recover indemnity from the Trust at all, relying simply on the value of that assertion. I&B would take that course if they were obliged to do so, and they must be allowed to as the objections on the grounds of privilege, which would trump any question of possible materiality, would entitle them to decline any advantage by not producing these

materials at all. This means that implicitly, therefore, it would be futile in fact to order production. I&B would make the election if ordered to produce such invoices, and that would delay proceedings considerably.

113. In response, Advocate Robison disputes that finding these documents would be a major exercise. He points out that there is no evidence and the point is mere assertion by Advocate Wessels, and it is a point which has only recently been made. He relies in the end, though, on the fundamental proposition that sight of these invoices is required in order to give F&B the “same degree of visibility”, when considering I&B’s conduct and its reasonableness, as was available to I&B when making the decisions which they claim were reasonable, ie the decision to pay. He puts this really on the grounds simply of fairness. Also, he says, there is the question of why I&B are being so coy. This suggests, he points out, that there must be something to hide in the draft invoices.
114. Having considered all the arguments made to me, my decision is that I am not going to order inspection of the draft invoices. As a general matter, I prefer Advocate Wessels’ arguments to those of Advocate Robison. The high point of Advocate Robison’s argument is fairness, and reliance on the principle of the *Bird* case (above). *Bird*, I note, was a case of production to a later trustee of documents which were indisputably trust advice and were not privileged. In any event, though, the Bailiff of Jersey, Sir Michael Birt, noted in *Bird* that whilst there was a general rule that an outgoing trustees owed duties to incoming trustees to co-operate fully, to hand over all relevant documents and to place the incoming trustees in as good a position in all respects as it had been itself, this was only a presumption, and the Court has a discretion as to whether specific documents should be supplied in any particular case: see [25].
115. In any event, the comments made about the extent of the duty were in the context of documents relating to the due administration of trust affairs, as is shown by the reference to its being part of the inherent supervisory jurisdiction of the Court. Therefore, it is not so strong as it might be in the context of justification for expenditure with which the trust can be charged by statute or by contract in the trust deed, rather than as expenditure incurred in the running of the trust itself. In any event, the *Bird* case also, quite plainly, shows that the principle admits of exceptions according to the facts of the situation and in my judgment this situation does admit and even require, such an exception.
116. I refuse inspection, then, first and foremost on grounds of privilege. Unlike the Order I made in December with regard to the requirement of supporting documents for the actual invoices being necessary for an initial fair consideration of whether they could and should be accepted as reasonable costs reasonably incurred, these documents go to a second level of detail, which is really not even second-guessing the invoices themselves. In my judgment scrutiny of draft invoices is not necessary, certainly for an initial fair consideration of whether the actual invoices accepted, were or were not, reasonable in themselves.
117. Any adjustment could realistically only have been one way. Furthermore, if anything is to be made of a comparison of the invoices with the draft invoices, it would also seem then to lead inevitably to a demand for disclosure of the questions

asked and the adjustments made. That would be getting completely disproportionate and to my mind is akin to fishing for something to complain about, rather than focusing on the actual point of the exercise, which is to discern whether there is reason to believe that the costs which I&B have shown they did actually incur were incurred unreasonably in the sense that no reasonable former trustee, being pursued as happened and in all the circumstances, could have accepted them. The weight of anything which could be derived from the draft invoices in formulating fairly based objections to I&B's claimed costs on this basis is so marginal that it would in my judgment be disproportionate to require their production.

118. I am also inclined to accept that it is likely to be a major searching exercise to find the draft invoices, taking the point that they have not been preserved in themselves (as final invoices have been) and would have to be located by an indirect search. I have wondered whether I should require Affidavit evidence to this effect bearing in mind that it was only evidence led from the bar table, but in the event I am inclined not to do so because I do not regard this point as a tipping factor in my decision.
119. I would say that I find that the general thrust of my view on this point is also confirmed by the principle that production of privileged material is not to be required simply to test the receiving party's evidence (see *Friston on Costs 3<sup>rd</sup> Edition* at paragraph 46-54 noting a comment to that effect by Pumfry J, *South Coast Shipping Co Ltd v Havant Borough Council* [2002] 3 All ER 779 at 793). This seems to me to chime with my views of the situation regarding the draft invoices.
120. I also accept that if I were to order disclosure it would be open to I&B to withdraw the reference in Mr Day's Affidavit. It seems to me that the sense of what he says in paragraph 24-26 can still be conveyed in different words not mentioning the draft invoices as such. It would accordingly be rather a pointless exercise to order their disclosure if this point were to be taken. It also goes to underlining my view that their relevance to the actual invoices is just not that great and certainly, therefore, as a matter of proportionality not such as should lead me to order their disclosure.

### **Extension of Time Application (1)**

121. Before moving on to the next substantive point, which is F&B's application that I&B and GTC should be ordered to provide further information so as to remedy alleged deficiencies in the evidence they have provided to support their proofs of evidence, I need to refer briefly to the Extension of Time Application.
122. F&B have been complaining about alleged deficiencies in the materials provided by I&BGTC for some time. Advocate Robison submits that in contrast (he says) with I&B, F&B have produced their materials and responses promptly, at any rate recently, but they have received no corresponding cooperation. The lack of information, now together with the intervening Covid-19 pandemic, is what has prevented F&B from complying with the 31<sup>st</sup> March deadline for serving their list of objections to I&B's and GTC's claims. It is this which led to the Extension of Time Application, which was made on 20<sup>th</sup> March 2020 when I&B refused to grant an extension by agreement. It seeks an extension of time for lodging those objections until 1<sup>st</sup> June.

123. In my provisional order of 24<sup>th</sup> March 2020 made on paper in immediate response to that Application, I adjourned that Application to this case management/PTR hearing, scheduled for 27<sup>th</sup> April. I did so in particular because it seemed to me at the time that everything was in such a state of disarray because of the Covid pandemic that it was not very helpful to try and consider the matter in the usual manner of procedure on such an Application, even if carried out on the papers, and the better course was to adjourn the matter until later and hope that matters might even clarify themselves to some degree, at any rate, in the meantime.
124. The Application is, however, still persisted in. It seeks seeking an extension of time for F&B to file their objections, to 1<sup>st</sup> June 2020. This is opposed by I&B and also by GTC, through Mr Hodges, who complains in particular that F&B have a pattern of perpetually seeking means to delay and delay paying them their costs of which they have now been out of pocket for many years.
125. With regard to the chronology, Advocate Wessels points out that the vast bulk of the relevant materials were available to F&B from only a few days after the original date of 31<sup>st</sup> January, namely 4<sup>th</sup> and 5<sup>th</sup> February, and that this delay itself was occasioned by F&B unreasonably refusing assurances about not deploying privileged materials which they would then obtain and be able to see in a few days. Although F&B did then promptly complain about the deficiencies they perceived in the materials, these complaints, says Advocate Wessels, were not reasonable and in any event cannot have prevented F&B from doing a lot of the work necessary to enable them to carry out the appropriate review exercise for an *Alhamrani* taxation bearing in mind its thrust and objective.
126. Furthermore, F&B are not considering the material from scratch, and with no prior knowledge. Personnel involved have been involved for a long time and they know full well what are the disputes and proceedings involved and what they were about, having been on the other side of them. Comparisons with their own expenditure on the opposite side of such matters is an obvious starting point and are easily made. Miss Martin, the usual deponent of affidavits on behalf of F&B, I understand now works for RT Advisory Limited, but whoever she actually works for now, she had been involved in the litigation almost from the outset, when working previously for Ogiers; she has subsequently moved her job.
127. Advocate Robison pointed that Miss Martin had in fact only been involved in the Guernsey 2 parallel Beddoes-cum-Trust-administration applications, being made in the Guernsey Court in the early stages, rather than the substantive Guernsey 1 proceedings which are the kernel of the matter. Nonetheless, it seems to me that this would still give her a considerable springboard in terms of general knowledge and understanding of the points involved and hence a viewpoint from which to form a meaningful appraisal of the reasonableness of costs that were actually being shown to have been incurred in the documents that have been produced, at any rate initially.
128. Advocate Wessels complains that this is just another diversionary tactic by F&B. The Priorities Application has now been going on for two and a half years and therefore, an extension of time, as long as up to 1<sup>st</sup> June, should not be allowed. F&B have already gained an extension of time as a *fait accompli* by the Court's deferring their Application of 20<sup>th</sup> March to be heard at this hearing on 27th April, rather than earlier,

and as to this the Court then particularly took into account the initial destabilising effects of the Covid-19 pandemic. F&B had therefore already had the benefit of an extension of time on that score, and there has been ample time for them to get to grips with dealing with the matter since then. They should be required, therefore, he submitted, to serve their list of objections as soon as possible and, in fact, within seven days of any Order which I make on this Application.

129. It seems to me that consideration of the merits of the Extension of Time Application depends to some extent on my determination of F&B's points with regard to whether further information upon, or elaboration of, material already supplied is required to enable progress to be sensibly made, and so it is appropriate to consider these points first.

### **Remedying of alleged evidential deficiencies**

130. This is actually the topic which I have found most difficult. The reason is not that of deciding the matter in principle, but because of the extent to which these points have really been fully argued in a matter before me, in a hearing which has had to deal with a great deal of rather more substantial points with regard to the progress of the matter.
131. For the purpose of this PTR hearing, Advocate Robison has formulated a schedule (Schedule A to his Skeleton Argument) listing the particular matters as to which he seeks an order for further information to be given. The grounds of these are all, in effect, that he and his clients are simply unable to give fair and proper consideration to the question of whether there is a valid objection to the claims made by I&B/GTC embodied in their proof of debt on the basis of the supporting materials served in pursuance of my December Order, without getting this further information. Alternatively, he submits that it would be so reasonable for I&B and GTC to supply this further information that the Court ought to require them to do so in pursuance of the "overriding objective" namely that of dealing with cases justly, (see RCCR 2007 r 1), which includes cost effectively, and the duty of the parties to assist the Court to achieve the overriding objective.
132. Advocate Wessels, for I&B opposes each of the items sought against his clients on the grounds that they are unreasonable, and unnecessary because F&B has already received all they could reasonably wish to have in terms of supporting material, in order to be able to form an opinion as to whether any properly tenable objections to I&B's claims for reimbursement of their expenditure can be taken. I will, therefore, deal with each item in turn, as best I can.

### **I&B**

133. **Item A.** This particular complaint has assumed a central role. It is that whilst Mourant had provided F&B with a schedule identifying each invoice comprised in the fee claims which are made, with descriptive particulars of date and such like, and including in particular a column with the relevant amount of each invoice claimed to make up the particular element of that section of the proof, Macfarlanes have not provided a schedule in the same form in respect of their claimed fees and

disbursements. F&B initially demanded that such a schedule should be prepared, arguing that it could easily be done by Macfarlanes themselves, but that it would be extremely difficult, if not practically impossible, for them (ie F&B, its advisors or advocates) to do it. Correspondence ensued in which I&B refused to provide such a schedule, pointing out that the Mourant schedule had been provided as a matter of generous helpfulness and all the information comprised in that schedule was in fact available within the Macfarlanes materials although not in the same form. F&B objected that this was not good enough and it was just not readily comprehensible. They have renewed their demand for such a schedule at this hearing.

134. Advocate Robison submitted that this was a reasonable request. He took me to an example invoice and said that he had been unable, despite a lot of consideration of the materials himself, to derive the simple information of identifying where and how the amounts comprising the claim in the proof appeared in the actual invoices attached to Mr Day's First Affidavit, even with the help of a front page schedule which had been provided by Macfarlanes.
135. Advocate Wessels, whilst insisting that this had all been explained to F&B, (ie Babbé) said that it was really very simple, and then went on to explain to me how the Day schedule worked. Whilst accepting that it did not contain a column with the "paid" amount attributable to each relevant invoice, he said it was very easy, and the work of a few minutes, to go down the individual, largely monthly, invoices for work and disbursements and to write the relevant figures in the margin of the schedule which had been provided, thus in fact providing all the information which F&B were apparently complaining they had not had, and were now demanding.
136. He explained that the reason why the schedules were in a different forms was because Macfarlanes had a different way of invoicing from Mourant. Their system of invoicing involved invoicing I&B monthly with invoices expressed globally but including various different matters. Those global invoices were provided in the disclosure to show that payment had truly been made, but the amounts actually billed in respect of the matters for which I&B were entitled to reimbursement were not the entirety of the invoices. Consequently, what was shown against the invoice paid was the work within this invoice which had been billed for the now relevant matters and was being claimed. This work was shown by reference to the firm's internal matter numbers, and the charges allocated to these. The front page schedule which had been provided gave the bundle references to the paid fee invoice in the costs materials bundles, and then details of the relevant charges included within that invoice, by reference to the internal matter numbers, the relevant date period and the description of the matters for which that work was being done. By looking at the worksheets which were provided following each invoice, one could pick up the final amount actually charged for relevant work, but, importantly, this was within, and did not amount to the total of, the covering reference invoice. Each worksheet, though, gave, at the end of it, the amount billed in respect of it. By listing all these amounts that were billed, one could construct the missing column of actual charged values (which were not, therefore, the individual invoice values). This was the material which F&B were complaining they did not have and were demanding to have scheduled. It was not a difficult exercise once understood, and this also explained why it had not been possible to produce a schedule in precisely the same form as had been possible for the

Mourant materials. That form simply did not fit the different billing system operated by Macfarlanes.

137. I am not going to order the production of any further schedule. Advocate Wessels' explanation seemed to me to be easy enough to follow when explained by reference to the documents. In my judgment F&B or their lawyers or advisers should, indeed, be perfectly capable of preparing for themselves a column of the information they say they require, and which is indeed apparently all there in the shape of the final listed billed figures by reference to the worksheets. I am satisfied that what was supplied did comply with the terms of my order as regards the information then required. It is by and large for the person supplying evidence to choose what form it should take if this is not specifically dictated, and only if it is so incomprehensible as to be in effect embarrassing would the Court intervene to order some other form. It does not seem to me that the complaints about this evidence come anywhere near that threshold and I have no doubt that now, and particularly after Advocate Wessels' further explanation at Court, F&B and their advisers should be quite capable of deriving the relevant information from the Macfarlanes materials without undue onerousness.
138. **Item B.** The second item refers to the fees of English counsel. The first demand is for a cross-reference to English counsel's fees, claimed as disbursements, to give the narrative of the work that was done. Reference is made by Miss Martin in her 22<sup>nd</sup> Affidavit to an example of a bill charged for counsel with no details other than counsel's fees. Advocate Wessels said, once again, that the information was all present in the schedules, invoices, narratives and copies provided, and could be readily correlated to descriptions on the disbursement bills which themselves gave dates, counsel's names and the sums charged. One only had to look at the actual fee notes, then, to see the description of the work billed. He showed me where the relevant "4 records" referred to in the disbursement schedule, adverted to in the example given by Miss Martin, were to be found and how they immediately illustrated what was there being billed for.
139. Once again, although with somewhat more hesitation than previously, I am not prepared to make an order for further production of information of this nature at this stage. I have noticed that while there are very many fee notes from counsel within the 5,000-odd pages of various invoices, worksheets and supporting documents, these invoices are all provided, under the Macfarlanes heading which is material in this context, so far as I can see, in date order. Whilst it may be a somewhat tedious exercise to cross-refer them, it does not seem to me to be particularly complicated to do so.
140. F&B were originally granted two months to carry out the exercise of reviewing any proposed objections to I&B's claims for reimbursement of fees on the basis that information with regard to who did what was ordered to be provided. This has been done, and it seems to me that in principle there should have been ample time to carry out such an exercise even if it involved carrying out cross-referencing such as this. I am somewhat surprised that in the time they have so far had, and even allowing for the distractions of the Covid-19 pandemic, they have not apparently done so. I am not satisfied that, as an addition to my original view that the bills and supporting narratives should be produced to F&B, it is necessary now to go further and order an

exercise of explanation to be carried out by I&B. I think F&B can, certainly at this stage, be reasonably expected to carry out this exercise for themselves.

141. If and insofar it proves so impossible that they cannot reconcile the charges to fee notes and form a view of the broadly acceptable reasonableness of the work being paid for and the quantum of fees being charged, then this inability is likely to form the basis of an arguable objection to the fee charges themselves, but, in my judgment, on an exercise of this type it is fair for F&B to be expected to raise a *prima facie* case from information which has been supplied, before it would be right to require yet more work from I&B and their associates. The fee notes show in the words of my Order of 10th December, “*which [counsel] did the work and what he or she did*”, and it does not seem to me to be difficult, starting from those fee notes, to relate them to the disbursement invoices rendered by Macfarlanes, the dates for which are also given, insofar as this may be necessary to form a view of the assertion that such work was done for I&B “*in connection with*” the Trust, the reasonableness of doing that work and the reasonableness of the costs paid for it.
142. The second and third demands in respect of English counsel’s fees ask for the amount of time spent by English counsel on the various attendances, the subject of their fee notes, and the hourly rates of English counsel insofar as not apparent from the fee notes. I am not prepared to order the provision of this further information either. My immediate reaction was that I might be prepared to do it if it was readily available, but then only to the extent that it was readily available and not absolutely, as that would be a practical impossibility. However, and apart from the difficulty of deciding what “readily available” might mean in practice as I think one would then have to do, further argument from Advocate Wessels has convinced me I should not. This is partly because, as he explained, work has not necessarily been billed discretely but has had to be the subject of an apportionment amongst various matters being worked on. Details such as are now being required or sought were not thought necessary to record at the time. Reconstructing them would be difficult, no doubt even for the counsel involved let alone for anyone else trying to interpret the position.
143. Once again, this may be the kind of information which has to be sought out even just by “*doing the best one can*” on a taxation of legal costs, but this is not the exercise being undertaken. Advocate Wessels points out that the real test is an overall assessment of the value of the work done, not necessarily a mechanical assessment of the number of hours spent and the rate applied. Thereafter a general appraisal of that work and its value by persons with experience of their own costs, or otherwise in the legal market, ought to be sufficient to enable a proper view to be taken as to whether there is, or is not, an arguable case that there are proper objections to the fee claim being made.
144. **Item C.** The next item requests, first, a list of the titles of the fee earners whose work is billed by both Mourant and Macfarlanes. This, I am prepared to order to be provided. It does seem to me that there is sufficient general similarity of grades of fee earners among legal firms that there is some utility in doing this. If I had been asked, I would have included this information in the terms of paragraph 14 of the December Order in the first place. It does provide some indication of the level of seniority of the relevant fee earner, which is actually more relevant in practice than a name. It also seems to me that providing such information is not particularly onerous and the

information must be readily available in the records of the law firms in question. As I do not think it is an onerous task, I would be minded to order that the information be provided within seven days of today. [Note; In further discussion post judgment, this requirement in respect of Mourant was refined to include details in respect of recognised core workers on the matter, numbering about 10.]

145. The following two demands seek information as to the standard hourly rates of all the fee earners listed in the invoices provided by Mourant except as listed in an example table given by Miss Hargreaves in her Seventh Affidavit and also by Macfarlanes, and where not apparent the differences between this and the fee rate actually charged.
146. I am minded to direct that Mourant provides such a table in respect of all fee earners to whom reference is made by it insofar as they are now able to do so from their records at this point in time. This does seem to me to fill in a potential gap in the information supplied and make a material addition to it. As I have not heard full argument about this particular point, though, I would be prepared to allow further argument but I would propose to make such an order at least provisionally.
147. I am not minded to make any such order with regards to the Macfarlanes invoices because it seems to me that the explanation provided by Mr Day provides sufficient information certainly for the purposes of the operation at this stage. He explains how discounts from normal charging rates applied at various times, and this explanation, coupled with the information contained on the fee billing sheets which I have been shown examples of and which show work billed at normal rates which can be derived from the time spent, and then the discounts applied, is in my judgment, sufficiently informative.
148. **Item D.** The final item is a request that Mr Day should identify the legal costs in earlier invoices which are not related to Guernsey 1 but are nevertheless asserted to be *“costs incurred in connection with our client’s trusteeship of the TDT and, therefore, properly claimable”*. This request is made on the basis that Mr Day accepts that a separate exercise could be undertaken to identify these if required.
149. I am not prepared to order this, at this stage at any rate. Just because Mr Day says it could be done is no reason to direct that it necessarily should be. The real question is whether there is any basis for thinking that such information is required in order fairly to enable the potential identification of matters being improperly charged to the Trust, because they are not in connection with the Trust.
150. Advocate Robison’s request is a reference to paragraph 38 of Mr Day’s Affidavit which is actually worded slightly differently from the above quotation. He refers to sums *“incurred as a result of I&B’s trusteeship of the TDT, and ...not... claimed in the Guernsey 2 proceedings”*, but also being *“matters ... considered or dealt with in the context of the litigation but which did not ultimately emerge as key matters in that litigation”*. When this statement is considered in its actual terms and in context, what Mr Day is referring to seems to me to become somewhat more defined and not of itself to give rise to any immediate appearance that fees being claimed might not be properly chargeable to the Trust by I&B. In the absence of any positive suggestion as to what, in consequence, those “other matters” might arguably possibly be referring to which are not properly chargeable, and given Mr Day’s sworn evidence which I think

is in reasonably sufficient detail, I do not think it appropriate to require I&B or Macfarlanes to go to the expense of carrying out the requested exercise at this stage. If F&B can substantiate the concern they purport to have in this regard, then the matter may be different but that means giving rise to some potential objection which they ought to be able to formulate in their answer to the materials that have been produced already.

151. In short, therefore, I do not consider there is any significant deficiency in the evidence provided by I&B such as to justify any but the two or three minor further pieces of information which I have said I am minded to grant as mentioned. Unless and until there is an objection formulated which may require the provision of more and more focused information to decide it, I do not propose to order any further exercise to be carried out, in particular because it seems to me that this is likely to cause undue delay. I am only prepared to order such as I am of the view can be achieved without causing undue delay at this stage.

## GTC

152. With regard to F&B's similar list of complaints regarding GTC, I am somewhat hampered in dealing with this as GTC have not instructed counsel, so regrettably I do not have the benefit either of legal argument on their behalf nor the ability to ask questions of somebody who is present with a suitable bundle of documents and, therefore, can deal with matters of detail. This is no criticism or disrespect to Mr Hodges who, I understand, has apparently recently recovered, though perhaps only to a certain degree, from contracting the Covid virus and who has effectively appeared on this hearing for GTC. I asked him what his comments were, and he made general submissions to the Court, to the effect that F&B, who had, he pointed out, so far managed to delay for many years paying GTC's fees, which, he said, they badly needed to pay staff and so forth, should not be allowed to delay the conclusion of this action any longer, thus be enabling such fees ultimately to be paid to GTC. He also expressed a wish that, like Advocate Wessels' application on behalf of I&B, GTC should be granted at least some form of interim payment and for similar reasons. As to this, I had to explain to him that that was not a matter I could deal with without an application, and on that matter he would really need the assistance of a lawyer.
153. Apart from this, Mr Hodges was not really in a position to make submissions in answer to the specific requests for further information made by F&B against GTC, other than expressing the view that certain matters would not be onerous to deal with. I have to say that I took this as largely an attempt to be cooperative and, therefore view the apparent concession with a degree of latitude. I am sure he was trying to be helpful, but the work would have to be done by his lawyers who, by definition, were not present. Mr Hodges, therefore, said that he left the position as to what the Court might think fit to order entirely to the Court.
154. As regards the list of items sought by Mr Robison against GTC, I therefore attempted to apply a similar approach to that which I have applied with regard to I&B.
155. Items A and D, request the titles held by relevant fee earners and an explanation of various initials referred to in fee notes of Mr Giles Richardson. They are both likely, in my judgment, to be of sufficient relevance and to be sufficiently easy matters to

provide, such that it is appropriate to order them and again I am minded to do so. Mr Hodges was minded to accept, although as I have said possibly without consultation with those who would have to be involved, that I should order that this should be dealt with within the next seven days.

156. I am not, however, at this stage prepared to order any of the other items requested.
157. With regard to items B and C, relating to the hourly rates and time spent of English counsel, I refuse this for the same reasons that I refused these in relation to I&B.
158. With regard to item E, the explanation of certain features of the timesheets of Temple Bright, , English solicitors, I refuse this because the answers to those matters seem to me to be either obvious or trivial.
159. With regard to items F and H, these are both in the nature of interrogatories, seeking explanations of the basis of certain claimed charges. In each case, they arise out of a reference in time-sheets or bills to other parties to litigation, or to other entities within the Tchenguiz Trust empire, and whilst this might give rise to questions as to the purpose of the meetings or whether the fees in question were correctly being billed to TDT itself or should be billed to another entity, those features may well give rise to a *prima facie* case or suspicion that the fees were being paid or claimed by GTC which are not properly regarded as work either for GTC as Trustee or Former Trustee of the TDT itself, and in connection with the Trust , or work properly billed at all. It does not seem to me, though, that it is appropriate to make an order with regard to further explanation of them at this stage.
160. I appreciate that it may be said that, in such a case, requiring an explanation of such matters before actually making an objection (which is what F&B are seeking to do) in order to ascertain if there is in fact a proper explanation which shows that these fees are not objectionable, could be said to be a better way of proceeding than simply raising an objection and the matter then having to be dealt with then. However, on balance and in all the circumstances I do not think that that is a convenient way to proceed in this case. I am not prepared to order further information to be supplied piecemeal, and in such a way as would possibly cause a delay to the general timetable for getting any possible objections to the fees charges recorded, as a basis for further progress in the proceedings. I am, therefore, not willing to make an order, here and now, that these explanations be given, but at the same time I will indicate that it might well be helpful, and narrow the issues, if such explanations were in fact provided on a voluntary basis at an early stage. Otherwise it seems to me that these items can, should, and probably will, fall to be dealt with on the basis of an objection which F&B do think they can make to the recovery of certain fees on the grounds that their proper attribution by way of charge to the TDT has not been demonstrated by the information that has been provided. They would, therefore, be doing that in accordance with the directions for the progress of the Priorities Application.
161. As regards item G, I am not prepared to order this either. It is a request for disclosure of further documents which may be subject to litigation privilege (although that has not been argued) but which in any event do not seem to me to be material to any likely question about the propriety or the reasonableness of being claimed by GTC as Former Trustees of the TDT against the TDT assets. Until some such basis is

actually made out, in a more specific way, it seems to me that the contents of such letters are not material or at least not sufficiently material that I should order their production at this point.

### **Extension of Time Application (2)**

162. This leads back, therefore, to the Extension of Time Application. I am going to grant this, but only to 1<sup>st</sup> June 2020, which is now only about four and a half weeks away with two or three bank holidays in between in any event.
163. Despite Advocate Wessels' complaints about delay and complaints about probable intentional attempts to take advantage of any excuse to do so and the fact that F&B could and should, in my view, have been getting on with the required work in the time before the Covid pandemic hit, and certainly subsequently, it seems to me that we are where we are in the present situation. I note the English Court's attitude, to which Advocate Wessels has referred and given some examples in his Skeleton Argument, with regard to refusing to allow delays and departures from timetables because of complaints about the difficulties caused by the Covid-19 pandemic restrictions, but these cases, it seems to me, are largely related to delayed trials, and in any event such questions are procedural considerations. Such matters are really matters purely of local effect and judgment and they are not matters on which the attitudes of the English courts need to, nor even should, have any persuasive force in Guernsey or on the operation of the Guernsey Courts. One does what is appropriate for these particular Courts, and the situation which pertains here.
164. We are where we are, as I have said. I should not make an order that I fear it would not be possible to comply with, in order to somehow sanction F&B for not having got on with it at an earlier stage, or for having done so but not produced any evidence about their problems, but merely relied on assertions and submission about where they have actually got to, so as to demonstrate the practicalities of the claim for extended time that they are actually making. Even if they gained an extension of time up to now, in effect, by my delaying the hearing of their Application until this hearing, Covid-19 and the restrictions it has given rise to have not gone away and are still affecting the ability to carry out work efficiently.
165. I accept that Advocate Wessels has a point that difficulties of remote working should not be exaggerated in these days of the internet and in the context of the resources of prominent legal firms. Equally, however, I accept Advocate Robison's point that they cannot and should not be dismissed. I conclude, therefore, that it is appropriate to grant the extension until 1<sup>st</sup> June as the next deadline for producing F&B's list of objections. It seems to me that there will then be the need for a further case management conference to decide on future conduct of the proceedings. I have already indicated that the progress of this Application in total may well have to be somewhat iterative rather than culminating in one major hearing, having regard to its nature and the fact that individual points seem to keep cropping up and needing a decision.

### **Guidance as to the nature of the exercise**

166. As for the guidance which the Court is requested by Advocate Robison to give, I am not really sure I can say anything more than that my directions as to conduct will be designed to be proportionate and appropriate having regard to the nature of the exercise of an Alhamrani “taxation”, and the fact that it involves consideration of whether a reasonable Trustee could have thought it right to take particular steps or to pay particular bills and not whether those bills can be justified on the principles of legal costs taxations, on whatever basis. Whilst the threshold for making out an objection which should be investigated and determined has been authoritatively held to be simply that it is apparently arguable that such an objection could be made out, and not to be as high as that there are “real concerns” as to whether the fees are unreasonable (see the *Alhamrani* case itself), the fact that the arguable case has to be in relation to an objectively demonstrable unreasonableness in something approaching the “*Wednesbury*” sense of that word, seems to me to produce much the same result. It is also said that there is a high hurdle in actually showing that costs are in practice unjustified. That seems to me to produce much the same result from a different and perhaps more analytically correct angle.
167. I also anticipate that the decisions I may well make at the end of the day will be, as has been indicated to be the practice in Jersey in the *Alhamrani* case itself, to refer to Lt-Bailiff Haworth the conduct of the relevant detailed assessment of the quantum of particular items of costs, on similar lines to what occurs in a taxation of costs, ie with the Court deciding, either in advance or upon being requested, any matters of law which arise. However, the procedure must be flexible and at the moment that seems to me that the right course taking it step by step as there are no specific rules and procedures established with regard to this exercise.

### **F&B’s application for costs**

168. Before considering appropriate directions, which I will have to do in conjunction with counsel at the end of the day, that seems to me to leave two outstanding applications which I can deal with quite quickly.
169. F&B have applied for their costs of dealing with an Application made by I&B in March 2020, to carve out of the requirement in Paragraph 14 of my December Order, to serve supporting materials with regard to costs claimed, the costs of certain other proceedings, by analogy with those expressly agreed to be excluded by Paragraph 15 of the Order. As to this further carve out, F&B objected. I summarily refused this application on paper and it was not proceeded with.
170. Such costs as were occasioned to F&B by the issue of that application can only be minuscule in the great scheme of things. I am satisfied that the Application was made in good faith even if I disagreed with it, but it was accepted that it was in fact nipped in the bud. In the circumstances, I regard no order as to costs for that Application as being the correct order. (By this I mean that I&B shall not be entitled to recover those costs against the TDT assets, and F&B are not entitled to recover their costs against I&B, but this order does not preclude their taking their costs (if any) out of the TDT assets as Trustees, in the normal way.)

### **Application for interim payment**

171. Lastly, there is I&B's claim for interim payment out of the fund now held by the Receivers as available for distribution depending on the eventual determination of competing claimants' rights. That fund, pursuant to applications made by F&B last year, consists, or should consist, of effectively a cash fund sufficient to meet all the claims of Trustees and creditors which could rank ahead of those of F&B itself as Trustees of the TDT on a worst-case scenario (ie the fact that they should all be met in priority to any claims on behalf of the present Trustees of the TDT and those claiming through them) plus sums anticipated to be sufficient to meet the costs of the proceedings likely to be necessary to determine those claims (ie these proceedings) and the finalising of the receivership, and thus all further sums likely to be properly chargeable to the assets of the TDT ahead of F&B and those claiming through it.
172. Advocate Wessels now applies on behalf of I&B for a sum of approximately £1.6 million - in fact, it is £1,615,650.89 - to be paid out of that fund, being the final sum ordered by Lieutenant-Bailiff Talbot QC to be the sum to which I&B are entitled by way of reimbursement of their costs, incurred in Guernsey 2, the *Beddoes* and trust administration applications, by an order of 18th January 2018. Lieutenant-Bailiff Talbot had conducted a full-scale inquiry between competing claims to costs, remuneration, etc, and objections to these, not confined to the present parties in these applications in practice. That sum, which is part but part only of I&B's total claims in this Application, is, therefore, taxed costs as to which their reasonableness as a condition of recovery has already been decided, and is therefore uncontestable. Advocate Wessels argues that I&B are therefore obviously entitled to that sum in principle and they should be allowed to receive it now, on the basis of an interim payment and not be kept out of it any longer.
173. Assuming F&B's appeal is unsuccessful, it is a priority claim on the cash fund. Only if F&B's appeal is successful as to both the BVI debts point such that that remains a debt of the TDT assets, and, the correct distribution regime is a *pari passu* distribution would I&B's claim be reduced to compete with those major claims such that their total claim for recoupment will be reduced to a mere percentage of the available fund, a percentage which Advocate Wessels calculates at about 8.79% which would be equal, he says, to approximately £4.87 million. He is asking for only about a third of this, therefore. This means that not only would F&B's appeal have to succeed on both counts but I&B's claims in this matter would have to be reduced by objections to their reasonableness by about two thirds to produce the result that I&B would not recover, in the end, at least the £1.6 million he is now claiming. He submits, therefore, that an interim payment can safely be made.
174. Advocate Robison does not suggest that he has any objections to the calculations, nor can he object to the £1.6 million figure itself but he argues that a suitably cautious approach must be applied. He says that I applied such an approach in setting up the cash fund in the hands of the Receivers (the "Preserved Assets") itself, always allowing the amount claimed on a generous basis and a bit of headroom to make sure that there was no question of the Order possibly effecting the result that someone's entitlement could not be met at the end of the day.
175. As I have said, Advocate Robison does not dispute the calculations as to the fund and the percentages but he says that the result of such an appropriately cautious approach is that I should not award more than the equivalent percentage of the fund which I&B

would recover if I&B's appeal does succeed, ie, 8.79%, applied to the amount of the now unconstestable debt which I&B are owed from the TDT funds as an interim payment. He submitted, I think, that this came out at something like £140,000.

176. Advocate Wessels does not claim that if it should turn out that his clients have been overpaid, his clients could necessarily, or even at all, be taken to have sufficient means to repay the excess. He has not put in any evidence to that effect. He accepts, therefore, that I should award an interim payment only on a suitably cautious approach, and an interim payment should not risk being an amount in excess of that which his client is likely to be able to substantiate.
177. I will order the interim payment as requested. It seems to me that the prospects of both F&B succeeding totally in the appeal and - and actually this is the more important point and the more obvious point - I&B's present total claim to recover its costs incurred in the course of this ten-year-long litigation being reduced by the availability of reasonable objections to them, by as much as two thirds, so as to bring the total recoverable value down from £4.89 million to a sum that would be less than the £1.6 million which they would now get is so vanishingly small that applying even a suitably cautious approach I can confidently feel that it is safe to grant this interim payment now. I will, therefore, do so.
178. Subsequently to having drafted an outline of this judgment, I received copies of some correspondence from Advocate Robison of Babbé addressed to Advocate Wessels and Mourant Ozannes suggesting inviting I&B to make some kind of statement to (I believe) the Liquidators of the BVI companies, agreeing that they would not seek certain payments, (I think possibly in respect of costs orders) out of particular sums held, as I understand it, in escrow, for the benefit of the BVI Liquidators, as security against any such claims, so as to enable those sums to be released to F&B. I&B have apparently declined to do so. That correspondence was not brought to my attention as part of the hearing itself. It does not seem to me that in it affects the rights that I have looked at in terms of interim payments or the approach that the Court should adopt in that regard, so as to affect the reasonableness or the possibility of my making this order, but I will hear any arguments anybody wishes to deploy. As I say, the correspondence does not seem to me to affect the position at all.
179. Unless, therefore, I have failed to deal with some point that I ought to be dealing with, - I think at one stage, for instance, there were claims that I&B should produce an amended proof of debt which I believe has subsequently gone by the wayside because in practice their proof of debt has been updated - that concludes this judgment.

**Hazel Marshall QC**

**Lieutenant Bailiff**