

Appeal on matters relating to the effects of assignment and the scheme of priority of claims with regard to the Tchenguiz Trust.

[2020]GCA043

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 538

21st August 2020

Before:

**Bailiff of Guernsey, President
James McNeill QC
Sir Michael Birt**

Between:

(1) ITG Limited and

**Plaintiffs and
Respondents**

(2) Bayeux Limited

-and-

(1) Glenalla Properties Limited

Defendants

(2) Thorson Investments Limited

(3) Eliza Limited

(4) Oscatello Investments Limited

(5) Geneva Trust Company SA

-and-

(1) Fort Trustees Limited

**Intervening parties
and Appellants**

(2) Balchan Management Limited

-and-

(1) Helen Green

Joint Receivers

(2) Kelvin Hudson

**Advocate N J Robison for the Appellants
Advocate J M Wessels for the Respondents
Mr R Hodges, as a director, for the Fifth Defendant**

The President

1. This is the judgment of the Court to which all members have contributed.

2. This is the latest instalment within litigation which has been taking place in the courts of this Island, of Jersey and of England and Wales over the past ten years. It concerns issues relating to a trust known as the Tchenguiz Discretionary Trust (the “TDT”), the proper law of which is that of Jersey and to the past and present trustees of the TDT, of whom the Appellants (“F&B”) are the present trustees, the Respondents (“I&B”) are past trustees and the Fifth Defendant (“GTC”) was the trustee for a period in between. As a result of the global economic crisis of 2007-2008, complex corporate and financial arrangements within the trust came adrift, numerous internal and external claims were made, and I&B were replaced as trustees by GTC. Shortly before that point I&B raised proceedings related to their potential liabilities and cross claims were made against them.
3. This part of the litigation came before the Royal Court by way of an application by the First to Fourth Defendants to determine competing claims of entitlement to the proceeds of certain trust assets, in the course of which two significant issues of law arose and were determined by judgment of the Royal Court on 9 December 2019 (Lieutenant Bailiff Hazel Marshall QC, sitting alone). These are as to the effect in law of certain assignments of judgment debts and as to the order of priorities to be applied to the satisfaction of claims properly advanced in the application process.
4. The matters raised on this appeal and related matters require this judgment to deal with the following:
 - (a) An application to intervene in the appeal heard before us.
 - (b) An application to allow fresh evidence to be considered in the appeal.
 - (c) Did assignments made to F&B lead to the extinguishing of the debts being assigned?
 - (d) Does the lien of a trustee extend to all of the trust assets from time to time, even after the trusteeship has passed to another?
 - (e) Where Receivers have been appointed in respect of certain assets, does that event crystallise the trustee's lien to the extent of excluding after-acquired assets?
 - (f) As between successive trustees, do their rights to an indemnity rank in order of the dates of their respective appointment as trustees?
 - (g) Do the rights of trustees to indemnity rank equally with the claims of its own trust creditors?
 - (h) If the rights of trustees take priority, do those rights include not only rights to an indemnity in respect of expenses and liabilities but also rights to their own remuneration?
 - (i) How should this court treat the decision of the Jersey Court of Appeal in the case referred to as *Re Z II Trust* [2019] JCA 106 which is the subject of an appeal to the Privy Council?

For the sake of completeness, we record that a further ground (as to whether F&B held the benefit of assignments by way of resulting or constructive trust for other persons) fell away on our refusal to allow fresh evidence.

Background

5. In her admirably thorough and systematic judgment, the learned Lieutenant Bailiff gives a full account of the background to the salient issues between the parties and to the litigations which have ensued. For the purposes of this appeal we consider that a sufficient understanding is gained from the following rehearsal.
6. The TDT was set up by a Declaration of Trust dated 26 March 2007, as part of a division of the family assets of the Tchenguiz family, and for the principal benefit of that branch headed by Mr. Robert Tchenguiz (“Mr. Tchenguiz”). Mr. Tchenguiz subsequently became the protector of the TDT. The proper law of the trust is that of Jersey and, accordingly, the Trusts (Jersey) Law 1984 (the “TJL”) is applicable to many issues, as opposed to the provisions of the Trusts (Guernsey) Law, 2007 (the “TGL”).
7. The assets of the TDT comprised, in effect, the business empire of Mr. Tchenguiz and these included single-purpose companies incorporated in a variety of jurisdictions. Included among those companies were the First to Fourth Defendants (the “BVI Companies”), beneficial ownership of each of which were assets of the TDT.
8. Funding for such business enterprises had been obtained from banks and outside sources, subject to appropriate security. One lender was the Icelandic bank Kaupthing HF (“Kaupthing”). One of the arrangements made in 2007 was that the then trustees of the TDT, I&B, assumed, as such trustees, or otherwise became liable for very large sums said to be loans due, individually, to the BVI Companies the shareholdings in which were, of course, assets held for the TDT.
9. As the global economic crisis unfolded, Kaupthing in December 2008 appointed receivers over the shares of the First, Second and Fourth Defendants. Shortly thereafter all four of the BVI Companies were placed in liquidation and their common joint liquidators pursued financial claims against I&B as the then trustees, as a result of which the proceedings of 2010 came about. In July 2010, the Protector replaced I&B as trustees with GTC.
10. After a trial, the Royal Court (Lieutenant Bailiff Sir John Chadwick) gave judgment on 6 December 2013 in which, among other matters, he upheld the enforceability of certain of the loans against I&B as trustees of the TDT. Quantification of liability following that judgment gave rise to concern that the assets held for the TDT might be insufficient to meet the liability and, on 23 December 2013, Lieutenant Bailiff Chadwick made a Receivership Order appointing Joint Receivers of certain specified assets being the shareholdings of the TDT trustees in some thirty specified companies and an amount of cash. That order, therefore, protected those assets pending further proceedings which culminated in a decision of the Privy Council on 23 April 2018 which determined the substantive issues between the parties. The Privy Council upheld the validity of the loans but held that I&B were entitled to the protection of Article 32(1)(a) TJL i.e. the BVI Companies had no claim against the personal assets of I&B; their claims extended only to the property held in the TDT. The Privy Council also confirmed that a creditor has no direct recourse against the trust assets and may only enforce his claim by subrogation to the trustee’s right of indemnity for expenses and liabilities properly incurred in the administration of the trust.
11. The matters which now come back to this court are the issues arising out of an application which sought to have a judicial resolution to the working out of the consequences of that final decision.
12. In September 2018 the BVI Companies (through the Liquidators) brought an application seeking directions authorising the Joint Receivers to take possession of all of the assets held for the TDT and to identify liabilities which would properly fall to be met from those assets. That process has been identifying the propriety and scale of various claims, and it is from this part of the overall process that this appeal proceeds.
13. As the learned Lieutenant Bailiff records at [47] of her judgment, by the time of a case management conference in May 2019, the judgment debts owed to the First and Second

Defendants, with accrued interest, totalled just short of £230m. Further, included within the claims were some, totalling about £3.4m, made by three individuals, Messrs. Smalley, Brown and Grunnell.

14. On or about 22 March 2019, F&B, as trustees of the TDT, took an assignment of the judgment debts due to the BVI Companies and of costs orders (“the BVI Companies’ Assignment”). Formal notice of assignment was given to I&B and to the Joint Receivers by the BVI Companies on or about 26 March 2019. Similar assignments of claims under judgment debts had been made to F&B as trustees of the TDT by Messrs. Smalley, Brown and Grunnell.

The Judgment Below

15. We set out later in this judgment passages from the Lieutenant Bailiff’s judgment dealing with specific issues. But in summary, her judgment dealt with two discrete issues. She labelled the first as the ‘Assignment Issue’. This required her to consider the submission of I&B that, by reason of the assignment of the debts referred to above, those debts had been extinguished. On this issue the Lieutenant Bailiff held:

- (i) The effect of the assignment of the debts (owed out of the assets of the TDT) to F&B as the trustees of the TDT was to extinguish the independent existence of those debts because the ultimate right to receive and the ultimate obligation to pay simply became coincident. The debts were thus extinguished or cancelled by merger of right and obligation.
- (ii) A former trustee’s lien extends to all the trust property from time to time and is not limited to the trust property as at the date of the former trustee’s retirement. It thus covers property added to the trust after the retirement.
- (iii) The appointment of the Joint Receivers by Lieutenant Bailiff Chadwick did not affect I&B’s lien in support of their right of indemnity as former trustees.

16. The Lieutenant Bailiff labelled the second main issue before her as the ‘Priorities Issue’. This had two distinct aspects, namely the ‘Global Priorities Issue’ and the ‘Creditor Priorities Issue’. The former concerned whether the creditors claiming through I&B’s right of indemnity took priority over creditors claiming through subsequent trustees or whether all creditors took *pari passu*. The Creditor Priorities Issue dealt with priorities between I&B themselves as to claims made on their own account (for expenses and liabilities previously discharged from their own pocket) and outside creditors of the trust, with whom they had contracted or to whom they had been held liable in respect of the trust assets, but who had not been paid and were claiming through the trustees’ right of indemnity. There was an associated issue in relation to I&B’s claim for trustee’s remuneration.

17. The decision of the Lieutenant Bailiff in relation to these issues was as follows:

- (i) All of the Priorities Issues were governed by Jersey law as the proper law of the TDT.
- (ii) The Global Priorities Issue had been determined as a matter of Jersey law by the decision of the Jersey Court of Appeal in *Re Z II Trust* (supra), which held that the ‘first in time’ principle applied, so that claims through I&B’s right of indemnity took priority over claims through the right of indemnity of subsequent trustees. She further held that, if free to reach her own decision, she would have reached the same conclusion as the Jersey Court of Appeal.
- (iii) As to the Creditor Priorities Issue, she held that a trustee making claims against trust assets in the exercise of its right of indemnity for expenses and liabilities properly

incurred by it as trustee took priority over unpaid creditors of the trust claiming by virtue of their right of subrogation to such trustee's right of indemnity.

- (iv) As to a former trustee's claim in respect of remuneration, she held that a former trustee should be accorded the same priority, as between itself and other competing trust creditors entitled to claim under its equitable lien and right of indemnity, as the trustee's own claims for indemnification, i.e. the right to remuneration will rank ahead of such competing trust creditor claims.

- 18. As alluded to earlier, F&B now appeal against all of these decisions of the Lieutenant Bailiff with the exception of (i) above.

Submissions and Discussion on the Issues

(a) Proposed intervention

- 19. By an application dated 29 July 2020 signed by Advocate Paul Richardson, F&B, in their capacities as trustees of the Tchenguiz Discretionary A Trust (the "TDAT"), and Mr. Tchenguiz applied to be joined as parties to this appeal. There was no material in support. The application indicated that the proposed intervening parties sought to rely on paragraphs 59 to 63 of the skeleton argument already filed by the Appellants and on the affidavits in respect of which F&B had applied to adduce in the appeal as fresh evidence. This application was made pursuant to section 14 of the Court of Appeal (Guernsey) Law, 1961 and/or rules 11(3)(b) and 12(2) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 and/or rule 37 of the Royal Court Civil Rules, 2007 and/or the inherent jurisdiction of the Court.
- 20. On behalf of I&B, Advocate Wessels filed a short skeleton argument dated 31 July 2020.
- 21. We were satisfied that it was appropriate to determine this application summarily on the papers. On 3 August 2020 the application was dismissed and we now set out our reasons for reaching that decision.
- 22. This Court has previously recognised, in *Investec Trust (Guernsey) Limited v Glenalla Properties Limited* (unreported, 11 September 2014, at [12]), that section 14 of the 1961 Law confers on it all the powers of the Royal Court, thereby engaging rule 37(1)(b) of the 2007 Rules on joinder of parties which states:

"The Court may in any proceedings order that any person (i) who ought to have been added as a party, or (ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings, shall be added as a party".

- 23. The Court continued (at [13]):

"In HMRC v Gresh [2009-10] GLR 239, this Court identified three matters to be established if a person is to be added as a party: there must be a question or issue between that person and a party to the action; the question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings; and it must be just and convenient to determine the issue as between that person and the party as well as between the parties to the proceedings. Even if these requirements are satisfied, the court retains an overriding discretion."

- 24. The issue in respect of which joinder was sought is found in F&B's Ground 4:

“Further and in the alternative, the BVI Companies Assignment dated 26 March 2019 was acquired by the trustee of the TDT pursuant to the Kaupthing Settlement which Mr Robert Tchenguiz and F&B, the latter in their further capacities as trustees of the Tchenguiz Discretionary “A” Trust (the “TDAT”), were parties. Pursuant to the Kaupthing Settlement agreement, F&B (as trustees of each of the TDT and the TDAT) and Mr Tchenguiz (the “RT Parties”) agreed to withdraw all proceedings each or any of them had or may have been entitled to have at that time against all or any of Grant Thornton, Kaupthing Bank HF and others (hereafter the “GT / Kaupthing Parties”), including the proceedings in the Commercial Court of England & Wales with claim number CL-2015-000610 (the “English Proceedings”) against GT / Kaupthing Parties in consideration of the Kaupthing Parties, including the BVI Companies, agreeing to, among other things, the assignment of the Debts to F&B as trustees of the TDT. The BVI Companies Assignment was therefore obtained at a cost to the RT Parties. In the circumstances, it follows that F&B hold the benefit [of] the Assignment of the BVI Debts by way of a resulting or constructive trust in equal shares for the RT Parties.”

25. This was not the case advanced before the Royal Court. This ground of appeal was settled by Advocate Robison on 31 January 2020. It follows that it was known to F&B on behalf of the TDAT, and we consider it reasonable to infer also to Mr. Tchenguiz, at that time. The joinder application has been made very late in the day.
26. This issue between the parties to the appeal is already extant in the contest between them. There is no suggestion on the face of the joinder application that Mr. Tchenguiz or F&B, on behalf of the TDAT, would advance any additional lines of argument beyond those available to the Appellants. We are satisfied that the interests of the proposed intervening parties on this ground could be articulated by Advocate Robison without needing to hear separately from Advocate Richardson. Insofar as the application was intended to enable another Advocate to appear on behalf of F&B, we agree with the submission of Advocate Wessels that this is not a proper basis for joinder.
27. In our judgment, the principal reason for dismissing this application is that there is no question or issue between the proposed intervening parties and any party to the proceedings for resolution on this appeal. There has been no suggestion that I&B had any knowledge of the underlying agreement among the so-called “RT Parties” (i.e. F&B as trustees of the TDT and of the TDAT and Mr. Tchenguiz) that creates any issue in respect of I&B. The Appellants advanced a case before the Royal Court based on taking the assignment of the BVI judgment debts on behalf of the TDT. When that resulted in the outcome from which they now appeal, they are now seeking to advance a different case as an alternative to the primary contention that the Royal Court erred in law in finding the debts assigned had been extinguished. Any issue arising, as outlined in Ground 4, would appear to be between the RT Parties and not to extend to I&B and GTC, as parties to this appeal, and the appropriate forum in which to address that issue is before the Royal Court, not in the context of this appeal.
28. Unless and until the Royal Court has considered whether to add the proposed intervening parties to those proceedings, it is premature to seek to circumvent the correct procedural steps by applying to intervene in this appeal to advance the identical case to that being put by the Appellants. The relief being claimed is to permit an amended proof of debt to be accepted, which is yet to be dealt with by the Royal Court. That relief is distinct from what was in issue when the issues now being appealed were determined in the Royal Court. We do not consider it would be just and convenient to determine any issue that might arise by adding Mr. Tchenguiz and the TDAT to these appeal proceedings when the appropriate step for them to take is to seek to be heard before the Royal Court.

29. Even if we are wrong to conclude that the elements of the test are not satisfied, we would not have been minded to exercise our discretion to grant the joinder application. The proposed intervening parties should not have waited until less than a week before the scheduled appeal hearing to make the joinder application. They should have done more than simply lodge the application without any further materials, if only to identify the underlying reason why the application should be entertained. Instead, what was lodged was, in our view, woefully inadequate and we formed the impression that it was intended as no more than an unwarranted distraction to the Respondents and to the Court in the days prior to the appeal. As the joinder application served no useful purpose in the determination of the issues raised by F&B's grounds of appeal, it deserved to be dismissed without further ado.
30. On behalf of I&B, Advocate Wessels has invited us to award costs on the indemnity basis against the proposed intervening applicants on the basis that the joinder application should not have been made. There is no doubt that the costs of the joinder application should follow the event. Those who bring applications that fail can expect to have to pay the costs incurred by other parties. Further, we take the provisional view that the manner and timing of the joinder application take this step in this appeal "out of the norm", and so are minded to award costs against the applicants on the indemnity basis. However, if the applicants wish to make any representations to the contrary, they must be lodged within seven days of the handing down of this judgment.

(b) Further Evidence

31. By two applications dated 10 June and 24 July 2020, F&B applied for permission to adduce fresh evidence pursuant to rule 12(2) of the 1964 Rules. The earlier of those applications relates to a first affidavit of Nicole Martin sworn on 10 June 2020 and a first affidavit of Patricia Whitford sworn on 11 June 2020. The second application relates to four affidavits being relied upon in support of an application of Mr. Tchenguiz and the TDAT to be joined to the proceedings before the Royal Court. Those affidavits are the first affidavit of Joseph Ensink, the third affidavit of Robert Tchenguiz, the second affidavit of Patricia Whitford (none of which is in sworn form) and the twenty-sixth affidavit of Nicole Martin sworn on 23 July 2020 ("Martin 26").
32. In respect of the earlier application, we had the benefit of a skeleton argument from Advocate Robison dated 10 June 2020, to which Advocate Wessels responded in a skeleton argument dated 10 July 2020. Counsel indicated that the arguments in respect of the second application were already adequately addressed in their earlier skeleton arguments. Advocate Robison elaborated on the submissions on behalf of F&B at the start of the hearing on 5 August 2020. We did not feel it necessary to hear from Advocate Wessels or GTC, announced our decision to dismiss paragraph 1 of both evidence applications and now set out our reasoning for those decisions.
33. There was agreement between the Advocates as to the applicable test for admitting fresh evidence pursuant to rule 12(2), which provides full discretionary power to receive further evidence upon questions of fact, albeit that in a case such as this further evidence can only be admitted on special grounds. In *Kirk v Blackwell* (1986) 4.GLJ.65 (repeated in *Smith v Atlantique Holdings Limited* (unreported, 15 January 2013)), this Court has adopted the principles applicable in England and Wales set out by Denning LJ in *Ladd v Marshall* [1954] 1 WLR 1489, 1491:

"To justify the reception of fresh evidence ..., three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

34. The evidence in these six affidavits was stated by F&B to support Ground 4, and in particular contains an explanation of the reasons why Mr. Tchenguiz and the TDAT had not previously filed their own proofs of debt before the Royal Court. Reliance was placed on the terms of the Settlement Deed dated 15 October 2018 between Kaupthing, GTC, F&B, R20 Limited and R20 Advisory Limited and a copy of that document exhibited confidentially to Martin 26. This Settlement Deed had been referenced in the redacted version of the BVI Companies' Assignment, which had been before the Royal Court. It was suggested on behalf of F&B that this further evidence proves the tripartite intention of F&B as trustees of the TDT and of the TDAT and Mr. Tchenguiz (described as "the RT Parties") giving rise to the constructive or resulting trust mentioned in Ground 4. Advocate Robison described Martin 26 as the "crucial evidence" that assets were to be held by F&B outside the TDT. The affidavits of Mr. Ensink (on behalf of the TDAT), Mrs Whitford (on behalf of the TDT) and Mr. Tchenguiz all confirm the accuracy of Martin 26. Similarly, Mrs Whitford's first affidavit, to which the earlier application relates, confirms the accuracy of Ms Martin's first affidavit so far as it relates to the TDAT's interest in the BVI Companies' Assignment.
35. F&B submitted that none of this evidence could have been obtained before the hearing in October 2019 in the Royal Court. They point out, citing *Bills v Roe* [1968] 1 WLR 925 and *Skone v Skone* [1971] 1 WLR 812, that there is no obligation on a party to make a request for evidence which he reasonably thinks will be refused. The test of "reasonable diligence" is not one of perfection or theoretical possibility. Prior to the judgment that is the subject of this appeal, F&B understood that the BVI Companies' Assignment did not operate to extinguish the underlying debts, so no further evidence was required. Further, the confidentiality of the Settlement Deed meant an approach to Kaupthing was needed before it could be deployed, which was not forthcoming until February 2020. The fresh evidence is important and potentially decisive on Ground 4 and it is obviously credible because it amounts to the best and most credible evidence of the reasons underpinning the BVI Companies' Assignment.
36. I&B submitted that none of the conditions for the admission of fresh evidence was satisfied. An e-mail exchange with Kaupthing in early February 2020, exhibited to Ms Martin's first affidavit (and also to Martin 26), explains that Ms Martin took the view that clause 11 of the Settlement Deed already permitted disclosure of the provisions of the Deed, without consent, for the purpose of pursuing or defending court proceedings or to the extent necessary to enable or facilitate the implementation or enforcement of the terms of the Deed. This demonstrated that asking for Kaupthing's consent, which was then given, was no more than an exercise in courtesy. The decision not to deploy the Settlement Deed at the hearing in October 2019 was a tactical one. Ground 4 is a new argument not raised before the Royal Court. This argument contradicts the case F&B had advanced in October 2019. Relying on admitting fresh evidence to run a different and factually irreconcilable case on appeal should not be permitted. The Lieutenant Bailiff's views on this approach were given at the pre-trial review on 30 April 2020 ([2020] GRC 020, at [40] to [43]). The inconsistency with the factual case of F&B before the Royal Court, as found in Ms Martin's previous affidavits, particularly her twelfth affidavit sworn on 7 June 2019, which referred to the amount claimed by F&B as trustees of the TDT as including the full amount of the judgment debts awarded to the BVI Companies and assigned to F&B, with the new case now being made, demonstrates that the evidence is not apparently credible.
37. During his oral submissions, Advocate Robison explained that Ms Martin's twelfth affidavit had been informed by what F&B understood the state of the law to be at that time. This meant that there was no perceived need for any additional evidence because the view was taken that the arguments about the debts merging would not succeed. However, he did acknowledge, albeit perhaps a little reluctantly, that a tactical decision had been taken prior to the hearing before the Royal Court not to deploy the Settlement Deed and the explanation of how it affected the RT Parties. He maintained that seeking consent from Kaupthing was a necessary step.

38. We are not persuaded that the first condition for the admission of fresh evidence has been established by F&B. In the first place, as Ms Martin's exhibited e-mail to Kaupthing proves, Kaupthing's consent was not required because the Deed itself permitted disclosure in the circumstances that prevailed before the Royal Court, which is a view with which we agree. In any event, when Kaupthing's consent was sought, it was given by return. No explanation was offered as to why F&B delayed approaching Kaupthing until February 2020. Had Kaupthing been approached before October 2019, we are satisfied that its consent to refer to the Settlement Deed would have been as forthcoming then as it was in February 2020.
39. Had F&B chosen to use reasonable diligence, all the evidence for which permission was now sought could have been placed before the Royal Court. We have taken into account that Ms Martin provided many affidavits during the relevant period. The other deponents were clearly all available to F&B had they wanted to rely on their evidence. We are satisfied that a conscious decision was taken to rely on F&B's case that, as trustees of the TDT, they had taken the assignment of the full amount of the BVI Companies' Debts (as is apparent from the terms of the BVI Companies' Assignment itself) when F&B could, had they wished, have proceeded on the alternative basis now put in Ground 4 using evidence now found in the affidavits which are the subject of the present applications. We do not think these findings set the bar for "reasonable diligence" unduly high. Instead, our conclusion recognises the reality of the situation where F&B chose the case to pursue without modifying it to reflect that, by the time of the October 2019 hearing, the legal position had shifted. In short, we consider that F&B had sufficient opportunity to adjust its own stance in these proceedings, yet chose not to do so.
40. Because a tactical decision was taken not to contend for the alleged constructive or resulting trust before the Royal Court, Ground 4 and the evidence to support it amount to a new approach to the issues raised in this appeal. Advocate Robison's skeleton argument in respect of these applications recognises that the first issue between the parties is the effect in law of the BVI Companies' Assignment. That was the position before October 2019. Similarly to what was said in *Al-Kronsky v Time-Life Entertainment Group Limited* [2007] 1 Costs LR 57 (at [23]), to which Advocate Wessels referred, this Court "*would, in effect, be conducting a new and very different hearing from that which occurred at first instance, and such a departure from the well-established principles is not justified.*" We also find that it would be wrong and contrary to the interests of justice to admit this fresh evidence at this stage.
41. Whilst we have our reservations about the propriety of Ms Martin deposing to two quite different cases in sworn evidence, it is not strictly necessary to our rejection of these evidence applications to form a conclusion as to whether the fresh evidence is apparently credible and so say no more about that condition.
42. For these reasons, we were satisfied that paragraph 1 of each of the evidence applications should be dismissed because all three of the necessary conditions for admitting fresh evidence were not satisfied. Advocate Robison urged us to confirm that such a conclusion did not preclude F&B, as co-trustees of the TDAT, and Mr. Tchenguiz from pursuing their arguments about the constructive or resulting trust before the Royal Court. Without giving any encouragement as to the wisdom of doing so, we do not consider that our decision precludes them from that course of action and the proper manner in which to deal with those arguments rests with the Lieutenant Bailiff.
43. We did, however, grant paragraph 2 of the second of the evidence applications and ordered that the confidential exhibit to Martin 26 should be sealed on the Court file. There was no need to grant paragraph 2 of the earlier application, also relating to confidentiality, because Advocate Robison only sought an order in respect of the confidential exhibit, so paragraph 2 of the 10 June application is formally dismissed. Although he referred to principles and cases that concern when the Court sits in private, we were satisfied that the parties to the Settlement Deed had agreed between themselves that the confidentiality of its terms should be preserved so far as

possible. Further, we noted from correspondence exhibited to Martin 26, that a copy of the Settlement Deed had been provided to I&B's Advocates on the understanding that it remain confidential and that no collateral use was to be made of it. When the Settlement Deed was not admitted into evidence on this appeal, we were satisfied that it was appropriate to seal that exhibit and to order that any party to which it had been provided should not disseminate its contents any further without further order of the Court.

(c) The effect of the assignments

44. The key passages from the Lieutenant Bailiff's judgment relating to this issue are as follows:

"The Assignment Issue

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

119. *In my judgment, the effect of the Assignment of the BVI Debts (owed out of the assets of the TDT) to F&B as the Trustees of the TDT was to extinguish the independent existence of those Debts because the ultimate right to receive and the ultimate obligation to pay simply became coincident. ...*

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

...

131. *In my judgment, therefore, the effect of the Assignment is that the BVI Debts (as there defined) have been discharged and/or (amounting to the same thing) extinguished by merger. This result is simply the necessary effect, in law and in all the circumstances, of the Assignment which has been executed. The claimed "proofs" of debt put forward by F&B in this Application based on its claimed ownership of the BVI Debts are therefore bad in law and must be disallowed.*

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

45. For F&B it was contended that the Lieutenant Bailiff had fallen into error in holding that the effect of the assignments was to discharge and extinguish the debts. The classic doctrine of merger was described in Chitty on Contracts, 33rd edition paragraph 25-004:

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

46. The salient present circumstances did not fall within that principle. F&B and I&B were not the same person. The “Trustee of the TDT” is not a legal person. The debts that were the subject of assignments were not owed to the BVI Companies by the TDT; they are judgment debts owed by I&B. The creditor has no direct right of action against trust assets but must proceed by subrogation. Even here, where Article 32(1)(a) TJL applies, and a creditor has known he was transacting with a trustee, his claim is still a claim against the trustee, albeit only as trustee, and with no claim to the trustee’s personal property. The former trustee was still a necessary party. There is no rule preventing a current trustee from maintaining an action against a former trustee.
47. Further, the Lieutenant Bailiff was incorrect to suggest, at [101], that what had been assigned was not an actual judgment debt, as a chose in action, but rather the rights to require I&B to compel the current holders of the trust estate to raise sums out of those assets to pay the relevant debts and pay those sums to I&B for the purpose of paying them to F&B.
48. For I&B, Advocate Wessels submitted that the approach of F&B mischaracterised matters. I&B were not assignors: the assignors were the BVI Companies and individuals. Further it was clear in each Assignment that F&B took “in [their] capacity as co-trustees of the Tchenguiz Discretionary Trust”. As a result of the assignments and the operation of Article 32(1)(a) TJL, the relevant debt was payable out of the trust assets of the TDT to F&B to be held subject to the trusts of the TDT. Accordingly, to adopt the wording from Chitty at 25-004, the rights and liabilities under the various contracts became vested in persons in the same right and distinct legal capacity. The Lieutenant Bailiff was right to decide the issue on the footing that there was on any analysis a “coincidence” of the right to receive and of the liability to pay the debts: at [118] to [120].
49. Further, the effect of the judgment of the Privy Council in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] JCPC 7 was that a trust is now to be treated as an entity (a single legal person) for the purposes of enforcement when Article 32(1)(a) applies: see especially at [61]. There was a sense, therefore, in which the “trust” assumed the liabilities involved in an Article 32(1)(a) application. Whilst I&B had ceased to be officeholders, the loans owed to the BVI Companies were still owed to them by I&B in their capacities as trustees for the purposes of Article 32(1)(a). As it had been put by Lord Hodge “only the trust estate is engaged”: at [61(ii)].
50. In practical terms, F&B are already entitled to the assets of the TDT and cannot pursue a claim against assets which they already hold. Further, the capacity in respect of which and the estate from which F&B would both claim and satisfy the BVI judgment debts was one and the same. If such an exercise took place the exercise would be entirely circular.
51. In our judgment this ground of appeal fails.
52. We look first at the Assignment (taking that by the BVI Companies as applicable to the others). The parties were the BVI Companies, the Joint Liquidators of the BVI Companies, ‘Fort Trustees Limited in its capacity as co-trustee of the Tchenguiz Discretionary Trust....’, and ‘Balchan Management Limited in its capacity as co-trustee of the Tchenguiz Discretionary Trust....’ The Assignors were the BVI Companies and the BVI Joint Liquidators. The Assignees were F&B. Unsurprisingly given the specification set out in the designation of parties, at clause 2.1, the assignment is merely to F&B. The assets being assigned are ‘the Judgment Debts’ being, essentially, the orders for payment as made by Lieutenant Bailiff Chadwick on 6 December 2013, as varied and confirmed both by this court and by the Privy Council.
53. Some other provisions are also noteworthy. There is an ‘entire agreement’ clause. It is also made plain that no person not a party to the assignment has any right to enforce any of its terms. Whilst many other individuals and entities are recorded in the defined terms, few appear in the unredacted portions of the Deed before us. It is also made clear that the Assignment proceeds pursuant to a Settlement Deed dated 15 October 2018. A copy of that Deed was made available

to the court and to Advocate Wessels, but on conditions of confidentiality and it will not be placed on the court file. However, Advocate Robison read out to us clause 5.1.1 the opening words of which state ‘the BVI Joint Liquidators shall assign to [F&B] (in their capacity as the co-trustees of the TDT and for the benefit of the beneficiaries of the TDT) the judgment debts owed pursuant to the [Glenalla and Thorson] Loans’. Here, the specification of the capacity in which F&B were to receive the assignments was apposite: because in the rehearsal of parties, each of F&B were designed ‘in its capacities as co-trustee of the [TDT] and co-trustee of the Tchenguiz Discretionary A Trust’. Specification of capacity at 5.1.1 was therefore required; and that specification was carried into the Assignment where it was given in the designation of parties.

54. It is seen, therefore, that each of F&B were without doubt receiving the benefit of the assignment of the judgment debts in their capacity as co-trustees of the TDT and, as would in any event be presumed, irrebuttably, for the benefit of the beneficiaries of the TDT. Mr. Tchenguiz was a party to the Settlement Deed.
55. F&B therefore being the holders of the assigned rights in that capacity, it is worth pausing to recollect what was being assigned, and the various results as a matter of law. The Assignors (the BVI Companies and their Liquidators) had been successful in obtaining judgment regarding their claims of recoverable loans from I&B (as they now are), as trustees of the TDT, in amounts which had been finalised through a consent order in January 2019. However, as found by this court and confirmed in the Privy Council, I&B were entitled to rely on Article 32(1)(a) TJL to the effect that they had no personal liability and the BVI Companies’ claims could extend only to the trust property. As a matter of law therefore, I&B were the obligants in the debt constituted in the judgment but were not personally liable to make payment.
56. What, then, is the proper characterisation, as a matter of law, of the position of the various roles in the chain which now exists?
57. F&B now hold the judgments and are entitled to enforce them. They may do so through Her Majesty’s Sheriff and will have to produce to the Sheriff both the judgments and the assignments. The judicial demands will therefore be to make payment to F&B as trustees of the TDT and the person meeting the demand will require to be sure that this is the destination of the funds.
58. It is the ensuing process which then becomes of importance. On being faced with the demand to pay, I&B will respond that they hold no funds as co-trustees of the TDT and have no personal liability. This will be an inevitable step as, otherwise, the Sheriff would move to use her powers to arrest the assets of I&B for the purposes of securing the judgment creditor’s position. No such security is available here over the personal assets of I&B as they are not liable personally.
59. At this point two or three approaches might be sought to be used by a judgment creditor. First, they might enquire of the former trustee who it is who is the present trustee holding the trust estate and request the Sheriff to proceed to make the demand to that person. It is not inevitable that the Sheriff would not accept such a request as the judgment is not against that person.
60. Second, having found that there has been a change in trusteeship, they might demand – privately or judicially – that the former trustee institute a claim against the present trustee either to make payment to the former trustee for onward transmission to the judgment creditor or to make payment directly to themselves as judgment creditor. This approach can be discounted on the basis of practical considerations: no such judgment creditor would take the risk that the funds might enter the hands of the former trustee and then either take too long to reach them or be open to the claims of adverse creditors of the former trustee.

61. Third, and most usual, is that the person claiming through the trustee would exercise the right of subrogation, instituting an action directly against the present trustee, including the former trustee as a third party, and thereby seeking direct payment from the present trustee to the claimant.
62. As it seems to us, it matters not which procedural route would be pursued; under each, the former trustee would merely be a technical – if, as a matter of law, wholly appropriate – participant in litigation. But the former trustee’s position would be merely a procedural requirement: the ultimate obligant, as a matter of law, would be the present trustee. Considered from the viewpoint of rights, obligations and liabilities, the former trustee would never be obliged, in a personal capacity, to meet the debt; rather the person who, in his or her or its accounts would have to note the potential financial impairment, would be the present trustee. In short, the debts would ultimately be payable by F&B (as trustees) out of the assets of the TDT and would be received by F&B as trustees of the TDT. The assets would therefore begin and end being held in the TDT.
63. How, then, does the existence of this new set of relationships affect the judgment debt? It might be argued that, a judgment having been given, the obligation to pay must remain; but when the creditor and the only obligant are the same person, such an analysis is unnecessary and sterile. No-one would think of suing herself or himself unless perhaps it seemed that there might be some advantage in doing so. But this, necessarily, would be an attempt to create an advantage which would affect relationships with other persons; for example to suggest that the size of the estate available to creditors was reduced by the amount of the judgment debt. To allow such a claim would be to permit mere casuistry to prevail over the reality that the existence of the judgment had no effect on the estate of the holder of the judgment. If it becomes necessary – as it does on the arguments for F&B here – to identify as a matter of law the result of the effect of the juristic act of taking the assignment, the most appropriate analysis is that the bundle of rights contained in the judgment are extinguished: they have ceased to be a thing of value capable of being assigned. If a creditor of F&B pressed for payment of a debt, they would not accept a further assignment of this, separate, judgment debt: they would press for direct payment of their own. The judgment has ceased to be a thing of value.
64. This analysis is consistent with the approach to the doctrine of merger of rights and liabilities under a contract set out in *Chitty* at paragraph 25-004, quoted in paragraph 45 above and consistent with the Roman Law concept of *confusio*. The principle of extinction of a right on the coincidence of creditor and debtor is seen in one of the authorities cited at paragraph 25-004, *Harmer and Ors v Steele* (1849) 4 Exch 1 where, at pp14-15, the court found that all right of action on the acceptance of a Bill of Exchange was extinguished when an acceptor became the holder in his own right at or after maturity. The technical argument to the contrary set out at pp 9-10 clearly did not find favour. In *Chalmers and Guest on Bills of Exchange and Cheques* 18th Edn (2017) at 8-057 the learned editor makes the point that the rule as it is applied to Bills of Exchange is merely a deduction from the general principle that a person cannot sue themselves; a principle stated by Best CJ in *Neale v Turton* (1827) 4 Bing. 149, at 151. It follows that there can be no proof of debt in the present processes below based upon the judgment debts obtained by the BVI Companies and assigned away by them to F&B as trustees of the TDT.

(d) The nature of the trustee's lien

65. The key passages from the Lieutenant Bailiff’s judgment on this issue are as follows:

“135. ... In my judgment, the effect of a departing trustee's non-possessory lien over trust assets to support his right of indemnity from the trust assets is equivalent to a floating charge over the trust assets in the hands of a subsequent trustee from time to time. this is both explicit in Jersey law at the level of the Court of Appeal: see the Re Z II Trust case (above) and also implicitly found in the Guernsey Court of Appeal in this case (above).

...

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

66. The issues arising under this ground of appeal are of relevance only if F&B are entitled in some way to recover sums relating to the assigned debts; at which point the lien of I&B as former trustees becomes important. Advocate Robison observed that the learned Lieutenant Bailiff's rejection of his case that the retirement of a trustee crystallised the lien on the property held in trust at that time had relied upon the decision of the Jersey Court of Appeal in *Re Z II Trust* (supra), a decision which had not been unanimous and was now the subject of an appeal to the Privy Council. Further, whilst the decision of this Court in the earlier stages of present litigations had by implication treated the lien as extending to the trust assets from time to time, it was not certain that the Privy Council had clearly endorsed that point. Such persuasive authority as there might be in the decision of *Rothmore Farms Pty Ltd v Belgravia Pty Ltd* [1999] FAC 745 was extremely limited as the case was not concerned with accretions to the trust fund after the date of the removal of the original trustees.
67. Separately, while a trustee was in possession of the trust estate the lien is possessory and attaches to the assets which are held. When possession is parted with on retirement, the lien is necessarily converted to some form of equitable security which did not permit priority. A retired trustee should not enjoy greater rights in retirement than he enjoyed during trusteeship. The better approach was to treat after-acquired property as giving rise to a new trust to which the retired trustee has no rights. In any event the dissenting judgment in *Re Z II Trust* indicated that Jersey law did not recognise equitable security or, generally, non-possessory security over moveable property.
68. Advocate Wessels, in refuting the general contentions for F&B, noted that the issue of whether a trustee's charge was limited by reference to assets acquired before or after a certain point in time had been determined by the House of Lords in *Dowse v Gorton* [1891] AC 190, at 198 (Lord Herschell) and at 208 (Lord Macnaghten).
69. That decision had been applied by the High Court of Australia in *Octavo Investments Pty Ltd v Knight* (1979) 144 CLR 360. There the equitable charge was found not capable of differential application to different assets but applied to the whole range of trust assets in the trustee's possession.
70. None of the other leading Australian authorities dealing with the equitable charge of a trustee suggested the charge being fixed on assets as at the date of the retirement or removal from office.
71. Separately it was clear from *Stott v Milne* (1884) LR 25 Ch D 710, 715 (Lord Selborne LC) that the trustee's charge is a first charge on all assets including both capital and income. Were after-acquired income to be excluded, apportionment issues would arise; and such a point seems never to have been the subject of litigation.

72. Numerous other authorities in England and Australia regarding the scope and effect of the trustee's lien were silent on the question of whether after-acquired property was excluded; in circumstances where, had that been a concern, decisions and orders would have been different.
73. Further, since the trustee's lien bites on all the assets of the trust, without temporal limit, the concept of crystallisation as understood in relation to English law floating charges did not provide a legal theory to cut down the extent of the lien over the trust fund. To speak of an outgoing trustee's lien as crystallising would merely be to say that the current trustee loses the right directly to deal with the trust assets.
74. Case law supported the view of the Lieutenant Bailiff that the trustee's lien might be in the nature of a floating charge but that such terminology did not adequately capture all practical aspects of how the lien operated. In any event, crystallisation in the context of a floating charge over company property merely terminated the debtor company's right to deal with the property subject to a charge, but did not operate in any way to the debtor company's advantage by excluding after-acquired property from its scope.
75. Separately, it was not correct to suggest that the former trustee was being given greater rights than enjoyed during his trusteeship. The right remained the same and a settlor who added property as an accretion to an existing trust would be made aware that the property would be subject to the trustee's lien.
76. In our judgment this ground of appeal cannot be sustained.
77. In Re Z II Trust, Logan Martin JA stated at [190]:

“Given the character of a trustee’s lien as a single right of lien which is enforceable in respect of all and any of the individual liabilities incurred by the trustee, I regard it as reasonable to characterise it as being “in the nature of a floating charge” as was suggested in the judgment of Robson J in the Supreme Court of Victoria in Re Amarind at paras 386-388, and by reference to what was said in the judgment of Brereton J in the Supreme Court of New South Wales in Re Independent (2016) FLR 222, at p 230 (albeit that the trustee’s right of indemnity did not satisfy the requirements to be an actual floating charge under Australian law). Robson J said that it was “clearly the case” that a trustee’s lien was in the nature of a floating charge “as the charge’s value expands and contracts with the liabilities incurred by the trustee on behalf of the trust.” I agree with that characterisation and description of a trustee’s lien. I also observe that in Snell at paragraph 44-004 it is said that “Equitable liens are similar to mortgages in the sense that they provide security without possession” (although they differ from mortgages because they arise by operation of law rather than being created by the parties). The analogy of a mortgage is also consistent with a single form of security possessed by a party and exercisable by reference to the assets secured against in respect of all of the individual liabilities incurred by that party which are secured by that single security.”

There are further repeated references in Re Z II Trust to the fact that a former trustee’s lien continues over the ‘trust property’ but at no point is there any suggestion that this is limited to the property as at the date of retirement.

78. That being the law of Jersey as it presently stands in relation to the trustees of Jersey trusts we are strongly of the view that it ought to be applied wherever the trust assets are situated. However, if the location of the trust assets were of relevance and the law of Guernsey fell to be applied, we consider that the same result would proceed through application of the approach in the decision of the House of Lords in Dowse v Gorton.

79. There, a business was carried on for about three years by executors in accordance with the will and with the assent of the creditors. One issue was whether the indemnity was limited to that portion of the assets which had come into existence or changed its form since the death. Their Lordships found not.

80. Lord Herschell stated (at p. 198):

“..... I am unable to concur in the distinction drawn between the assets which come into the hands of the executors at the time of the death of the testator, and property which, in their capacity of executors, they afterwards acquire. The case of Abbott v. Parfitt appears to be a distinct authority that property so acquired is as much assets of the testator as that which was in his possession at the time of his death. It was there held that the price of goods sold to the defendant by the executors, who had carried on their testator's business, no part of the materials of which had belonged to the testator, would, when recovered, be assets of the testator; and I do not think it is possible, on principle, to maintain the suggested distinction.”

81. Lord Macnaghten was to the same effect (at p. 208):

“But I can see no reason in any case for limiting the indemnity to that portion of the assets which may have come into existence or changed its form since the testator's death. An unsecured creditor has no right against any specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate.”

82. As it seems to us, this principle is equally applicable to the trustee's lien. There is only one estate and if the settlor chooses to settle further assets knowing that there has been a change of trusteeship, he places those in the same pot of trust assets and they are just as amenable to the lien as earlier assets. We see no foundation in authority or common sense to accede to Advocate Robison's characterisation of the further settlement of funds as giving rise to a new and separate trust. If the assets are placed with the trustees for the same purposes for which the existing trusteeship exists, there is but one trusteeship.

83. Furthermore, we consider that Advocate Robison's submission that a former trustee's lien only extends to the trust property (or its traceable proceeds) as at the date of that trustee's retirement is wholly inconsistent with Article 32(1) TJL which is in the following terms:

“Trustee's liability to third parties

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

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

(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).”

84. In our judgment, the reference to ‘trust property’ in Article 32(1) can only be a reference to the trust property as at the time the relevant claim is sought to be enforced against the trust property; there is certainly no indication that the trust property is to be ascertained at any other time. The Privy Council emphasised in its decision that a creditor can only claim through a trustee's right of indemnity and supporting lien. If the reference to trust property in Article 32 is to the trust property from time to time, it would be nonsensical for the former trustee's lien (which

constitutes the security for the right of indemnity) to extend only to the trust property as it was at the time of the trustee's retirement. In our judgment, this is a clear indication that the former trustee's lien extends to the trust property from time to time (including any property added after its retirement) because it is via the trustee's right of indemnity and supporting lien that the rights of a creditor are vindicated.

(e) The effect of the appointment of the Joint Receivers

85. Advocate Robison then turned to pose the question: if no new trust of after-acquired property had been established and the lien operates akin to a floating charge, what event crystallises the lien/floating charge?
86. By reference to English law on floating charges he argued that the appointment of a receiver was a crystallising event as, prior to that, while the company was carrying on business and no steps had been taken to wind up the company, the security holder could not single out a particular debt due to the company and require by notice that debt to be paid to him. Further, if each trustee's lien were akin to a floating charge, there had to be some mechanism to avoid what would otherwise be a tension as between two co-existing floating charges.
87. The further question was: over what assets does the floating charge crystallise? The present Receivership Order specifically identified the assets to which the appointment applied and was not open-ended.
88. It was also important to consider the specific powers given to the Joint Receivers, including the power to dispose of the assets listed. Such an appointment created an entirely different relationship that was outwith the terms of I&B's trusteeship and subsequent lien.
89. Advocate Wessels, in response, observed that the nature of the floating charge could not be reconciled with the trustee's equitable charge or lien. The floating charge was ambulatory until a crystallisation. The trustee's charge was ambulatory until its right of indemnity had been satisfied.
90. In the present circumstances, it was instructive that the Joint Receivers had no power to make any distributions, for example to creditors. Indeed, the Joint Receivers had to give an undertaking to "*comply with any order that the Court of Appeal may make in respect of the restitution to the Present Trustee of the Assets*".
91. Not only that, paragraph 8 of the Receivership Order specifically provided that the appointment was without prejudice to such indemnity as the former trustees and the then present trustee might be entitled to in respect of expenses and liabilities.
92. In any event, there were individual reasons why certain assets were not initially transferred to the Joint Receivers but subsequently added.
93. In our judgment this ground of appeal also fails.
94. Although the trustee's lien may be akin to a floating charge in that it is ambulatory until the occurrence of some event, that event will normally be the trustee's claim or a determination of competing claims. There is no need to find a crystallisation similar to that which, for floating charges, takes the control of the company's assets out of the hands of the directors and where, indeed, notwithstanding crystallisation, further assets may emerge.
95. We agree with Advocate Wessels that it is instructive to note not only that the Joint Receivers had no power to make any distributions, but also that they had to give an undertaking to comply with any order that the Court of Appeal may make in respect of the restitution to the present

trustee of the Assets. This shows that they had no independent powers of disposal but were put in office to ensure that the assets in potential dispute were held to the order of the Court.

96. We therefore reject this ground.

(f) Trustee Indemnity – Priority as between successive trustees.

97. As mentioned above, the Lieutenant Bailiff held that all of the Priority Issues are governed by Jersey law as the proper law of the TDT. F&B have not sought to appeal that part of the Lieutenant Bailiff's decision. We must therefore determine as a matter of fact what the law of Jersey is on these issues.

98. In the *Z II Trust* case in the Royal Court ([2018] JRC 119), Commissioner Clyde-Smith held that, where the assets of a trust are insufficient to pay all creditors (conveniently if not wholly accurately referred to as an 'insolvent trust'), the creditors should be paid *pari passu* no matter which trustee they are claiming through. Thus creditors claiming through a former trustee have no priority over those claiming through a subsequent trustee.

99. On appeal, however, the Jersey Court of Appeal took a different view. It held that, under the law of Jersey, a trustee has a right of indemnification which is supported by an equitable lien which ranks in priority over any right of indemnification and right of lien of a successor trustee (see [211]). That decision was clearly part of the ratio of the case.

100. Advocate Robison submits that the decision of the Jersey Court of Appeal was wrong. He notes that that court has given leave to appeal its decision to the Privy Council both on the issue of whether those claiming through a former trustee's right of indemnity have priority and on whether Jersey law recognises the existence of a non-possessory equitable lien on the part of the former trustee. Both before the Lieutenant Bailiff and this court, he put forward a number of reasons as to why he submitted that the Jersey Court of Appeal had erred. Thus he argued that an open-ended possibility that the retired trustee might at some point in the future wish to call upon his indemnity would prevent the current trustee from ever satisfying his own claims. Alternatively, if the incumbent trustee were allowed to satisfy his own indemnity as and when it arose, it would undermine the value of the first charge. The priorities would not depend on the order in time in which the charge it has was created, but instead on the order in which claims under them arose. The rights of creditors would depend upon with which trustee they happened to deal. A creditor of a second or subsequent trustee would enjoy very limited rights because the trustee through whom he claims would be at risk of being defeated by the claims of the original trustee. Yet the creditor would not necessarily know, and would not be entitled to know, whether the trustee with whom he is contracting is the original trustee or a successor.

101. He submitted that the Lieutenant Bailiff should have focused on fairness and should have held that, once it was known that there was a deficiency of assets to satisfy all of the liabilities, all trustees, past and present, should rank equally with each other.

102. In our judgment, it is not open to us to consider the merits of the submissions put forward by Advocate Robison. A decision as to the law of another jurisdiction is a finding of fact. The law of a common law jurisdiction is to be found in its statutes and in the decisions of its superior courts. No expert evidence as to the law of Jersey was called before the Lieutenant Bailiff. There is therefore no alternative but to find that the law of Jersey is as laid down by the Jersey Court of Appeal in the *Z II Trust* case. We accept that it is of course possible that the Privy Council will take a different view and will be convinced by the sort of arguments put forward by Advocate Robison. However, unless and until that occurs, the law of Jersey is as established by the Jersey Court of Appeal in the *Z II Trust* case and it is not open to this Court to find that it is different. It follows that this ground of appeal fails and claims brought through I&B's right of

indemnity and supporting lien have priority over those brought through the right of indemnity of successor trustees including F&B.

(g) Trustee's Lien – Priorities as between the Trustee and its Creditors

103. The key paragraphs of the Lieutenant Bailiff's judgment on this topic are as follows:

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

...

208. As to this issue, I again prefer the submissions of Advocate Wessels. In my judgment the proper scheme of priority between, on the one hand, a trustee making claims against trust assets in the exercise of his equitable lien for proper costs, expenses and liabilities incurred by him as trustee, and, on the other hand, unpaid creditors of the trust claiming by virtue of their right of subrogation to such trustee's lien, is that the former take priority over the latter.

...

210. I reach this conclusion on the basis that it is necessary in order to respect and implement the trustees' rights to indemnity for proper costs expenses and liabilities incurred by them as, and in consequence of being or having been, a trustee of the TDT, according to their respective entitlements, and also giving appropriate – and I think the only correct – legal effect to the principle that creditors under trust transactions have no right to payment out of the trust assets except by claiming to be subrogated to the rights of the trustee with whom they contracted the relevant obligation.

211. In reaching this conclusion I have not overlooked the fact that this principle of priority accords some advantage to creditors whose debts the trustee is willing or able to pay and does pay, as against those who remain entirely unpaid. I also realise that this difference of treatment might afford the trustee a means of exercising preference or conferring an advantage as between different trust creditors claiming through him. Whilst this is not a desirable result of my conclusion as to priority, it appears to me to be the inevitable consequence of the correct analysis of the parties' respective rights. I cannot see any way of avoiding this result, and it is not so grave as to cause me to doubt my conclusion.”

104. Advocate Robison submitted first that, although this was also a matter to be determined under Jersey law, the observations of the Jersey Court of Appeal in the *Z II Trust* case on this topic – to the effect that a trustee has priority over the claims of creditors with whom he has transacted as trustee – were obiter and therefore not binding. The matter should therefore be considered afresh by the Guernsey courts.

105. In his submission, the Lieutenant Bailiff had erred in finding that the trustees ranked ahead of their respective trust creditors and her views were not founded on principle or supported by authority. Whilst Article 32 TJJ improved the position of the trustee by limiting the rights of third party creditors, it did not limit the creditor's recovery to the value of the trust after the trustee had satisfied his own claims. As a matter of construction, therefore, as well as a matter of fairness, there should be equal ranking.

106. The suggestion that a trustee's creditors know who they are bargaining with and what they are bargaining for, and can therefore take security, was impractical. In effect, it would require a prospective counter party to an arrangement with a trustee to demand a list of assets and values and then take security over the most appropriate asset before any agreement could be finalised.

107. In our judgment, the Lieutenant Bailiff reached the correct conclusion for the following reasons:

(i) The Jersey Court of Appeal specifically stated in its judgment (at [221] and [222]) that this issue had not been the subject of any detailed contention or submission before it and that its observations were obiter. We agree therefore that the Guernsey courts are not bound by such obiter observations and are free to reach their own decision as to Jersey law on this topic, although we note in passing that the obiter views of the Jersey Court of Appeal are consistent with the decision reached by the Lieutenant Bailiff.

(ii) Article 26(2) TJL reflects ordinary principles of trust law when it provides:

“(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.”

(iii) There is well-established Jersey authority to the effect that a trustee's right of reimbursement is just that; he should not be left out of pocket. Thus, in *In Re Internine Trust* [2006] JLR 176, Bailhache, Bailiff at [14] quoted with approval the observation of Danckwerts J in *In Re Grimthorpe* [1958] Ch 615 at 623 to the following effect:

“... [P]ersons who take the onerous and sometimes dangerous duty of being trustees are not expected to do any of the work on their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred ... The general rule is quite plain; they are entitled to be paid back all that they have had to pay out.”

The Bailiff of Jersey went on at [19] to say:

“In Jersey, it is a particularly burdensome duty to act as a trustee. The legislature has seen fit to regulate the position by requiring that any person seeking to carry on a financial service business as a professional trustee should first be registered by the Jersey Financial Services Commission and approved to undertake such functions. The Commission is entitled to impose, and does impose, stringent conditions upon registered persons. These burdens are in addition to the usual responsibilities of a trustee under the general law. It is not in the public interest that an additional duty should be imposed upon trustees requiring them to pay out of their own pockets costs and expenses which have been reasonably incurred.”

(iv) To like effect is the observation of Vos JA in the Jersey Court of Appeal in *Alhamrani v JP Morgan Trust Company (Jersey) Limited* [2007] JLR 526 at [39]:

“As a matter of law, therefore, the trustee is entitled to be reimbursed for the expenses and liabilities that he has reasonably incurred in connection with the trust. The concept of “reimbursement” implies full repayment and the authorities in England have always made it clear that a trustee has the right to full reimbursement of his expenditure properly incurred on behalf of the trust.”

- (v) The effect of this well-established principle is that the trustee's right to reimbursement ranks ahead of the interests of the beneficiaries (being the persons with the economic interest in the trust). It was held by the Royal Court of Jersey in Re the Z II Trust [2015] (2) JLR 108 that a trust which becomes insolvent should thereafter be administered on the basis that the creditors, rather than the beneficiaries, are the persons with the economic interest in the trust, but we do not see why this should result in the trustee's right of reimbursement no longer ranking ahead of the persons (now the creditors) with the economic interest in the trust.
- (vi) The effect of ordering *pari passu* payment of Article 32(1)(a) creditors and a trustee claiming reimbursement is to cause the trustee effectively to contribute to payment of the creditors at the expense of his right of reimbursement because, if the trustee does not have priority, the available assets for creditors will be swollen at the expense of the trustee's claim to reimbursement. Given the importance which, as described above, trust law attributes to full reimbursement of a trustee, this would not seem to be a logical outcome.
- (vii) It is in the interests of good trust administration that, even where a trust is or is at risk of becoming insolvent, the trustee should remain in post and, where necessary, incur expenditure and liabilities on behalf of the trust in the expectation of obtaining reimbursement. If a trustee does not have priority as against unpaid trust creditors, he is less likely to remain in post and is certainly less likely to pay any necessary expenses or liabilities, which would be to the prejudice of good trust administration.
- (viii) Similarly, it is not unusual for trusts to have an illiquid asset (such as real property) and no liquid assets with which to pay expenses. In such circumstances a trustee will often pay expenses and liabilities on behalf of the trust in the expectation of reimbursement upon realisation of the asset in due course. Again, this is to be encouraged in the interests of the beneficiaries and the good administration of the trust. If it were to be the case that a trustee's right to reimbursement did not rank ahead of unpaid trust creditors, it seems to us that it would be less likely that a trustee would act in this manner in the interests of beneficiaries.
- (ix) We accept that, as submitted by Advocate Robison and accepted by the Lieutenant Bailiff, a principle of priority for a trustee gives some advantage to creditors whose debts the trustee is willing to pay as against those who remain unpaid. It might also afford the trustee a means of exercising preference or conferring an advantage as between different trust creditors claiming through him. Nevertheless, in agreement with the Lieutenant Bailiff, this appears to us to be an inevitable consequence of the correct analysis of the legal position and does not cause us to change our view.
- (x) As the Jersey Court of Appeal pointed out at [232] and [233] of its judgment in Re Z II Trust, the judgment of Lord Hodge in the Privy Council indicated that the plain intention of Article 32(1)(a) was to improve the position of trustees by insulating their personal assets from liabilities to third parties expressly incurred as trustees and that this would have to be at the expense of creditors. A creditor would be aware of this and could take security if he chose or decide not to contract. A *pari passu* payment as between trustee and unpaid trust creditors would result effectively in a trustee becoming partly personally liable to an Article 32(1)(a) creditor because he would be funding that creditor out of his assets by reason of not obtaining full reimbursement of expenditure which he had incurred.

108. For these reasons we dismiss this ground of appeal and agree with the Lieutenant Bailiff that a trustee making claims against trust assets for proper expenses and liabilities incurred by him as

trustee has priority over unpaid creditors of the trust claiming by virtue of their right of subrogation to such trustee's lien.

109. Given the views which we have just expressed, certain contentions for I&B, set out in a Respondents' Notice, do not arise.

(h) Priority of a Trustee's Right to Remuneration.

110. The question for determination under this heading is whether a former trustee's claim in respect of his proper remuneration as trustee should be accorded the same priority, as between himself and other competing trust creditors claiming through his equitable lien and right of indemnity, as the trustee's own claims for indemnification, i.e. they will rank ahead of such competing trust creditor claims. It was not disputed that this too is a matter to be resolved according to Jersey law as the proper law of the trust.

111. Clause 12 of the trust deed of the TDT provided for the remuneration of trustees in the following terms:

"12.1 Any Trustee for the time being hereof who shall be a company empowered to undertake trust business shall be entitled, in addition to reimbursement of its proper expenses, to remuneration for its services in accordance with: (i) such terms as are agreed from time to time in writing between the Trustees and the Protector; and (ii) in the absence of such agreement, such company's published terms and conditions for trust business in force from time to time or in the absence of such published terms and conditions in accordance with such rates as it shall from time to time reasonably determine.

12.2 Any individual Trustee being a person engaged in any profession or business, in addition to reimbursement of its proper expenses, shall be entitled out of the Trust Fund and the income thereof to all usual professional or proper charges for business transacted, time expended and acts done by him or his firm in connection with the trusts hereof, including acts which a Trustee not being in any professional business could have done personally."

112. The Lieutenant Bailiff's conclusion is summarised in the following paragraphs of her judgment:

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

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

...

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

232. *Second, the trustee's claim even if it relates to a term of the trust deed, has an obvious similarity to contractual claims for services provided by third parties, who claim subrogation to the trustee's right of indemnity to meet their own claims.*
233. *As regards allowing priority to a trustee's claim for remuneration over competing claims from third party trust creditors, the following points, to my mind, tend to favour doing so.*
234. *First, there is lingering, if somewhat uncertain, recognition of a trustee's right upon retirement/removal, to claim retention of physical control of trust assets sufficient to protect him from liabilities – in other words a possessory application of his lien: see Lewin (ibid) at 17-031 et seq. Lewin appears to acknowledge that this could also apply to create, in effect, physical security for the trustee's right of remuneration: see the final sentence of paragraph 20 – 222, advising a trustee to*
- “... be cautious in parting with trust property without having his charges paid or otherwise reasonably secured...”*
- This position is implicitly recognised, I think, in Re Carafe Trust (above). The effect of such a right would seem to elevate the status of the trustee's right to his fees above that of mere competing trust creditors to some extent, at least.*
235. *Second, and arising from this, it is plainly unsatisfactory, as a matter of trust administration, for a departing trustee to retain control over trust assets, or part of them, even to protect his reasonable personal interests.*
236. *Third, it is a continuing theme of trust law that it is necessary to enable those who administer trust assets to be fairly and effectively remunerated, in order to ensure sufficient entities willing to take up the office of trustee.*
237. *Fourth, by definition, as the trustee will have already earned his (proper) remuneration at the time of his departure, whilst it is true to say that he is not directly out of pocket if he is not paid, he will have suffered indirect loss in the shape of the time spent on his trust functions which it is likely that he could otherwise have spent remuneratively on other matters.*
238. *Lastly, although only a minor consideration, treating an outgoing trustee's claims in respect of recoupment, and of remuneration, as having different priorities as a matter of principle seems to me to be undesirably untidy, in context. If there is obviously good and sound reason for doing so, then such complexity would have to be accepted, but it does not seem to me that there is. It would be in the interests of all concerned in such matters for the regime governing distribution of assets in the context of an “insolvent” trust situation to be as simple as possible.*
239. *For the above reasons, therefore, I come down on the side of Advocate Wessels' submissions, and I hold that a former trustee's claim in respect of his proper remuneration as trustee should be accorded the same priority, as between himself and other competing trust creditors, entitled to claim under the aegis of his equitable lien and right of indemnity, as the trustees' own claims for indemnification, ie they will rank ahead of such competing trust creditor claims.”*

113. For F&B, it was submitted by Advocate Robison that the Lieutenant Bailiff had erred in holding that the rights of the trustees in priority to those of trust creditors included not only their rights to an indemnity in respect of expenses and liabilities but also their rights to their own remuneration. It was contended that, in the absence of any authority to the contrary, it would have been fairer

and more equitable to treat the trustees' rights to remuneration as ranking equally with those of trust creditors.

114. The right to remuneration was qualitatively different from a right to indemnification. Reference was made to Lewin on Trusts 19th edn at paragraphs 20-030 and 20-031. Indeed, the right to remuneration was inherently antithetical to the historic position which expected trustees to act without remuneration.
115. It was accepted that the issue had to be decided from first principles, but the approach of the learned Lieutenant Bailiff failed to have sufficient regard to the qualitative difference between the right to indemnification (a protection) and the right to remuneration (a profit). The right to remuneration, being akin to a contractual right, ought not to establish any form of equitable interest.
116. The approach of the Lieutenant Bailiff had put a right to remuneration on equal footing with a right to indemnification, which was not warranted in principle or on authority. In particular, such authority as there was suggested that a right to remuneration did not carry with it a lien or equitable charge. If that was correct, the right to remuneration had to rank behind the trustee's lien for its indemnity, through which trust creditors claimed. At the very least, a right to remuneration which was not included in the trustee's lien could not rank ahead of trust creditors claiming through that lien.
117. In our judgment, for the reasons given in her judgment and put forward by Advocate Wessels before us, the Lieutenant Bailiff reached the correct conclusion.
118. As the issue is governed by Jersey law, one begins by seeing whether there is any Jersey authority on the point. The only case to which we have been referred is *Re Carafe Trust* [2015] JLR 159. In that case there was, in somewhat complicated circumstances, a dispute over the level of fees which a retiring trustee was proposing to charge and the retiring trustee refused to hand over the trust property to the new trustee until its fees were paid. In passing, the Royal Court said at [37]:

“A retiring trustee is entitled to be paid its fees before retiring. However, fee disputes often arise. In those circumstances, a trustee is entitled to security for its disputed fee. But it is not entitled to exert improper pressure to agree the fees by withholding the entire trust fund; nor is it entitled to security over the whole trust fund. An escrow arrangement of the nature proposed gives the retiring trustee all the security to which it is entitled.”

119. However, we agree with the Lieutenant Bailiff that this case was not required to consider the nature of a trustee's right to remuneration and how it ranks in relation to the claims of trust creditors. It does however indicate that a retiring trustee is entitled to security for outstanding remuneration.
120. We agree therefore that the matter has to be considered as one of principle.
121. In *In Re Duke of Norfolk's Settlement Trusts* [1982] 1 Ch 61, the issue before the English Court of Appeal was whether it had jurisdiction to vary the remuneration payable to a trustee under the trust deed. One of the arguments raised against the existence of such a jurisdiction was that a trustee's right to remuneration was a beneficial interest in the trust property and that there was clear authority (*Chapman v Chapman* [1954] AC 429) that the Court had no inherent jurisdiction to vary the beneficial interests under a trust. At pp. 77 – 78 Fox LJ accepted that, for certain purposes, the right of a trustee to remuneration could be regarded as a beneficial interest in the trust property but concluded that the application was concerned not so much with beneficial interests as with the administration of the trust fund and the court accordingly did have power to vary the remuneration.

122. In *Perpetual Trustees WA Limited v Kelly* (1993) 8 WAR 480, Anderson J, sitting in the Supreme Court of Western Australia, held that no charge or lien exists as a matter of general law in respect of a trustee's right of remuneration and this is so even where the trust deed confers on the trustee a right to 'retain' its entitlement to remuneration from the income and capital of the trust fund.

123. *Perpetual Trustees* was distinguished by the Court of Appeal of Western Australia in *Southern Wine Corporation Pty Limited (In Liquidation) v Frankland River Olive Co Limited* [2005] WASCA 236 where the majority held that it was arguable that the particular provisions of the document constituting the trust in that case had conferred an equitable charge on the income of the trust in respect of the trustee's remuneration. The court appears (at [46]) to have placed some weight on the fact that the trust property was the sole source of payment of the remuneration.

124. In passing, McClure JA, speaking for the majority, said at [47]:

"Further, and in any event, Fox LJ in Re Duke of Norfolk's Settlement Trusts ... regarded the right of a trustee to remuneration as giving rise to some type of equitable interest short of a vested and indefeasible beneficial interest. The type of equitable proprietary interest envisaged by Fox LJ may be the same as the nature of the equitable interest a trustee has in the trust assets pursuant to its right of indemnity..." [Emphasis added]

125. In the absence of further guidance from the cases, we turn to consider whether the leading text books offer any assistance. According to the Lieutenant Bailiff, Snell's Equity 33rd Edition and Underhill and Hayton Law of Trusts and Trustees 19th Edition do not consider the point. The only text book to do so is Lewin. The Lieutenant Bailiff considered the 19th Edition, the relevant paragraphs of which are as follows:

"Whether right to remuneration analogous to right of indemnity

20-221 A trustee's rights under a remuneration provision differ from a mere personal right under a contract since they derive from the terms of the trust instrument and not a contract between the settlor and the trustee. Those rights also differ from a right of indemnity in respect of expenses in that they derive from the terms of the trust instrument and not, as in the case of a right of indemnity, from rights conferred by the general law as confirmed by statute. Rights to remuneration under a remuneration provision are not and cannot simply be equated with a proprietary right to indemnity out of the general law. We consider that, in the absence of special terms of the contrary in the trust instrument, a remuneration provision entitles the trustee to deduct charges authorised by the provision before making payments out to beneficiaries. But such a right does not necessarily amount to an equitable charge over or proprietary interest in the trust property like a right of indemnity capable of enduring after the trustee has ceased to hold office and parted with the trust property, or taking priority over equitable charges subsisting over the trust property which are subordinated to a trustee's right of indemnity. The matter depends upon the true construction and effect of the remuneration provision.

20-222 It has been held in Australia that a right of retention under a remuneration provision is not enough to create an equitable charge or interest similar to a right of indemnity, and even a right to payment of remuneration from the trust property under a remuneration provision may not itself be enough to constitute such a charge or interest, at any rate where the trustee has ceased to hold office. In England, however, a right to remuneration under a remuneration provision is regarded as a beneficial "interest" at least to some extent. Though the interest does not have all the incidents of a beneficiary's beneficial interest, it does not follow that a right to remuneration should be regarded as a mere personal right. Arguably, in England, it is an equitable charge or interest falling short of a beneficial interest but nonetheless sufficient to

carry proprietary rights similar to those of a right of indemnity, if the remuneration provision confers a right to payment from the trust property. Yet, as the authorities stand, a trustee should be cautious on parting with the trust property, without having his charges paid, or otherwise reasonably secured or protected by express security, escrow or similar arrangements, even more so than in the case of expenses covered by his right of indemnity which are commonly made subject to such arrangement.”
[Emphasis added]

The 20th Edition is to like effect, save that it refers specifically to the Lieutenant Bailiff’s decision in the present case. We should add that the authorities relied upon by Lewin for the various propositions in the text are, in the main, the cases we have referred to above.

126. Against that somewhat sparse background, we agree with the Lieutenant Bailiff that this issue falls to be determined as a matter of principle. In doing so we remind ourselves that it is to be determined as a matter of Jersey law.

127. In our judgment, the Lieutenant Bailiff reached the correct conclusion. We would summarise our reasons, which largely replicate those of the Lieutenant Bailiff, as follows:

- (i) Whilst historically trustees were expected to act without remuneration, that is no longer the case in practice. In a jurisdiction such as Jersey (as also in Guernsey), virtually all trustees will be companies carrying on the business of acting as trustees for reward. The issue must therefore be considered against that background.
- (ii) We agree with the Lieutenant Bailiff that it is in the interests of beneficiaries generally that it is necessary to enable those who act as trustee to be fairly and effectively remunerated in order to ensure sufficient entities are willing to take up the burdensome office of trustee. It is also important that it is not too difficult to find a replacement trustee where, for one reason or another, differences have arisen between the present trustee and the beneficiaries and a change is desired. A rule whereby a trustee’s right to remuneration carries priority over unpaid trust creditors will encourage trustees to accept office whereas a contrary rule would be likely to have the opposite effect. This would be particularly so if there is any risk of the trust becoming insolvent. Yet that is just the situation where it is important for the interests of both beneficiaries and creditors that there be a trustee willing to act in the interests of all parties in administering the trust assets.
- (iii) In this respect, we agree with the Lieutenant Bailiff (at [236]) that some analogy can be drawn with the position of liquidators, administrators and receivers who are invariably entitled to receive their fees as a first charge on the funds they administer. We agree that the analogy cannot be carried too far but it does point in favour of conferring protection on a trustee’s right to remuneration. In this respect, it is of note that in Zedra Trust Company (Jersey) Limited v Chiddicks [2019] JRC 069, where the trust was insolvent, the Royal Court of Jersey, when establishing a scheme for administration of the insolvency, authorised the trustee to pay its fees and expenses from the trust in priority to all other claims.
- (iv) The foregoing reasons are based on what would be the best outcome in terms of the general administration of trusts. But we also conclude that there are sound reasons of legal principle for concluding that Jersey law recognises that a former trustee has an equitable lien or interest in the trust fund in support of its right of remuneration in the same way as it does in support of its right of indemnity.
- (v) In the first place, although not directly in point, the decision in Re Carafe Trust recognises that a retiring trustee is entitled to security for its remuneration.

- (vi) Secondly, we see no logical reason to distinguish, in terms of security, between a trustee's right to reimbursement for its expenses and liabilities and its right to remuneration. Both are considered equally to be incurred in the interests of the trust and the beneficiaries thereof. It is just as important for the good administration of a trust that a trustee should be able to receive the remuneration to which it is entitled pursuant to the trust deed as it should be able to recover its expenses and liabilities. If it is right to confer an equitable lien upon a trustee for the latter, it seems to us equally appropriate to recognise a similar right in support of the former.
- (vii) Thirdly, there is some support for this proposition. As Lewin states in the emphasised passage at paragraph 20-222 quoted above and drawing on the authority of *Re Duke of Norfolk Settlement Trusts* and *Southern Wine Corporation*, it is arguable under English law that a right to remuneration confers an equitable charge falling short of a beneficial interest but nonetheless sufficient to carry proprietary rights similar to those of a right of indemnity where the remuneration provision confers a right to payment from the trust property. We think that that is indeed the position under Jersey law. There is no logical reason to hold that that lien does not rank equally with the lien of the trustee for reimbursement of its costs and expenses. Accordingly, like the lien for expenses and liabilities, it also ranks ahead of the claims of unpaid trust creditors.

128. For these reasons and those additional reasons mentioned by the Lieutenant Bailiff in her judgment, we uphold her decision that a former trustee's claim in respect of his proper remuneration has the same priority, as between himself and other competing trust creditors entitled to claim through his equitable lien and right of indemnity, as the trustee's own claims for indemnification, i.e. his claim for remuneration will also rank ahead of such competing trust creditor claims.

(i) Whether the decision of the Jersey Court of Appeal in *Re Z II Trust* [2019] JCA 106 was wrongly decided.

129. In a brief submission, Advocate Robison observed that the decision of the Jersey Court of Appeal in *Re Z II Trust* was the subject of an appeal to the Privy Council. On behalf of F&B, he submitted that any orders made in relation to the present appeal which turned on the decision of the Jersey Court of Appeal in *Re Z II Trust* should be stayed pending the outcome of the appeal to the Privy Council.

130. However, we have already dealt with this point at (f) above. In our judgment it is not open to this Court to find as a fact that Jersey law is anything other than it has been held to be as part of the ratio of the decision of the Jersey Court of Appeal in *Re Z II Trust*.

131. It would be quite wrong to stay any orders made pursuant to this appeal pending the outcome of any appeal to the Privy Council. In the first place, although leave to appeal has been given, we have no evidence before us as to whether an appeal is being actively pursued and will definitely proceed nor do we have any timetable even if an appeal does proceed.

132. Secondly, it would in any event be wrong as a matter of principle. There is always a risk of foreign law (or indeed local law) changing course as a result of a decision of a higher court. Any court determining foreign law as a fact has to proceed on the basis of the law as it is at the time and proceed accordingly.

133. Accordingly, we are not willing to stay any of the orders resulting from our decision on this appeal.

Conclusion

134. For the reasons which we have given, we dismiss this appeal.