

Examination of the principles applicable to trustees' and former trustees' claims for indemnity out of the trust assets, in respect of the costs of legal advice and proceedings.

[2021]GRC007

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION
Civil Matter 1462

Between:

- (1) ITG LIMITED (formerly Investec Trust (Guernsey) Limited)
(2) BAYEUX LIMITED (formerly Bayeux Trustees Limited)

Plaintiffs

-and-

- (1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LTD
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) GENEVA TRUST COMPANY (GTC) SA (formerly Rawlinson & Hunter Trustees SA)

Defendants

-and-

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

Intervening Parties/Current Trustees

Before HER HONOUR HAZEL ELEANOR MARSHALL QC
LIEUTENANT BAILIFF
Sitting alone

Dates of hearing: 14th - 18th and 21st - 23rd December 2020

Judgment handed down: 23rd April 2021

Counsel for the Plaintiffs: Advocate J M WESSELS and Advocate B B D MANCHAK
Counsel for the Intervening Parties/Current Trustees: Advocate N ROBISON
The Fifth Defendant appeared by Mr R Hodges (By Microsoft Teams from Geneva)

JUDGMENT (approved)

Legislation, cases and textbooks referred to:

Statutes:

Guernsey

Trusts (Guernsey) Law 2007 s 42

Royal Court Civil Rules RCCR rr 19, 52

Jersey

Trusts (Jersey Law) 1984 Arts 26, 32 and 43

Cases

Guernsey:

Albany Trustee Company Limited v Jeandin (2012): Guernsey Judgment 32/2012, (RC)
ITG Ltd and another v Glenalla Properties Ltd & Ors (2013): Guernsey Judgment 38/2013 (RC)
ITG Ltd and another v Glenalla Properties Ltd & Ors (2015): Guernsey Judgment 35/2015 (GCA)
Re: The Tchenguiz Discretionary Trust (Royal Court 27 November 2015, unreported)
Rawlinson & Hunter Trustees SA v ITG Ltd and another (2015): Guernsey Judgment 52/2015 (RC)
Rawlinson & Hunter Trustees SA v ITG Ltd and another (2016): Guernsey Judgment 43/2016 (GCA)
Re: The Tchenguiz Discretionary Trust (2017) Guernsey Judgment 49/2017 (RC)
ITG Ltd and another v Glenalla Properties Ltd & Ors: [2018] UKPC 7
ITG Ltd and another v Glenalla Properties Ltd & Ors: (2019) Royal Court [2019] GRC 064
ITG Limited and Ors v Glenalla Properties Ltd & Ors: (2020) Court of Appeal [2020] GCA042

Jersey:

Alhamrani v JP Morgan Trust Company (Jersey) Ltd [2007] JLR 527
Re JP Morgan 1998 Employee Trust; des Pallières v JP Morgan Chase & Co Ltd [2013] (2) JLR 239, [2013] JCA 246

England and Wales:

Henderson v Henderson (1843) 1 Hare 100
Turner v Hancock [1882] 20 ChD 303
Re Beddoe [1893] 1 Ch 547
Ladd v Marshall [1954] EWCA Civ 1
Re Spurling's Will Trusts [1966] 1 WLR 920
Gomba Holdings (UK) Limited v Minories Finance Limited (No 2) [1993] Ch 171
Perry v Lord Chancellor (1994) The Times 26th May 1994
Armitage v Nurse [1998] Ch 241
Public Trustee v Cooper [2001] WTLR 901
Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)
Renewable Power & Light Limited v McCarthy Tetrault [2014] EWHC 3848 (Ch)

Legal materials:

Lewin on *Trusts* 20th Edition 48-005, 48-006, 48-007, 48-115-118,
Cook on *Costs* 19th Edition, Chapters 36 and 38

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Paragraph

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JUDGMENT

Introduction:

Background to and nature of the Application

1. The structure of this judgment will be apparent from the Index above. I begin it with the familiar introduction that this is the latest stage in the working out of the consequences of a decade of litigation involving disputes essentially between, on the one hand, the Plaintiffs, (“**I&B**”), the former co-Trustees of the Tchenguiz Discretionary Trust (the “**TDT**”) and, on the other hand, the subsequent Trustees from time to time of the TDT, (currently being the Intervening Parties (“**F&B**”)), acting on behalf of the TDT and its beneficiaries, the principal beneficiary being Mr Robert Tchenguiz (“**Mr Tchenguiz**”).
2. A trustee, or former trustee is, in principle, entitled to an indemnity out of the trust assets for his reasonable costs, reasonably incurred in connection with the trust. This litigation now concerns the claim of I&B, as such trustees/former trustees for such indemnity out of the TDT. For the purposes of this Application, the relevant expenses comprise their legal costs incurred in and about the two sets of proceedings which are this action itself (Civil No 1462/2010, known as “**Guernsey 1**”) and a later action, Civil No 1793/2013, known as “**Guernsey 3**”. In those actions claims totalling £561 Mn were made on behalf of the TDT against I&B. I&B were ultimately successful in the actions. For completeness, I mention that there is also a claim for unpaid remuneration, but that has taken a very back seat.

3. This description of the subject matter of this Application comes from the express terms of Paragraph 14 of my Order made in this matter on 10th December 2019 (“**the December 2019 Order**”). Any claim by I&B in respect of legal costs relating to other proceedings - and there were and are several - or costs other than those mentioned above, are not within the scope of the present Application as it has thus been delimited.

History

4. A highly condensed and simplified summary of the background, but which is necessary for a basic appreciation of I&B’s indemnity claim and the issues which have arisen in this Application, is as follows. The TDT was constituted in 2007 to be the vehicle for holding the assets, and running the business empire, of Mr Tchenguiz. Whilst he is the principal beneficiary of the TDT, other members of his family are also beneficiaries. R20 Ltd, (“**R20**”), a company in which Mr Tchenguiz was interested and in which he was closely involved, was appointed as the business and investment advisor to the TDT.
5. The proper law of the TDT is Jersey Law, but the proceedings have taken place in Guernsey because the relevant Trustees, I&B, were resident here. I&B were the duly appointed Co-Trustees of the TDT from shortly after its inception in 2007 until July 2010. At that time, Mr Tchenguiz, who had recently become the Protector of the TDT, removed I&B from office and appointed Geneva Trust Company (GTC) SA (“**GTC**”), then known as Rawlinson & Hunter Trustees SA, as Trustees of the TDT in their place. Although the exact date of this change has not always been clear, both parties’ chronologies produced in this Application put it as 2nd July 2010, and I shall therefore use that date.
6. That removal was not long after this litigation, (Civil No 1462/2010) had been commenced by I&B, in March 2010. The litigation was, in essence, a three way dispute between (i) the four BVI companies who are the first four named Defendants, (ii) I&B as the Trustees of the TDT, and latterly (iii) GTC as the successor Trustees of the TDT. The BVI companies, through their liquidators, claimed debts totalling about £180Mn plus interest from I&B as Trustees of the TDT. I&B argued first that the debts, which arose under inter-company loan arrangements, were not recoverable at all, for various reasons. On that point, their own interests were aligned with those of the beneficiaries of the TDT. However, I&B also argued that if the debts were recoverable, then (a) I&B were entitled to an indemnity in respect of them out of the assets of the TDT, and also (b) they were not recoverable against I&B personally, but only to the extent of the assets of the TDT available to meet those liabilities, and thus, in effect, I&B’s indemnity in respect of them. For this argument, I&B relied on the true construction of Article 32 of the *Trusts (Jersey) Law 1984* (“the **JTL**”). (Section 42 of the *Trusts (Guernsey) Law 2007* (“the **GTL**”) is to similar effect.) On this issue, I&B’s interests were opposed to those of the TDT beneficiaries. Through GTC, they argued that the debts had been incurred or permitted to continue only through I&B’s negligence and/or breach of trust, such that either I&B were deprived of their indemnity or (amounting to the same thing) they were liable to the TDT for damages equivalent to the amount of the BVI companies’ claim against the TDT assets. However, to succeed in this argument in the face of a fairly standard form of trustee exoneration and indemnity clause in the TDT Trust Deed (Clause 9.1), GTC had to prove that any such conduct by I&B amounted to gross negligence.
7. The trial in Guernsey 1 took three weeks, which in itself illustrates that the issues were detailed and complex. I&B were only partially successful in resisting these claims at first instance (judgment given by Lt Bailiff Chadwick on 6th December 2013: Royal Court Judgment 38/2013), but were entirely successful after an appeal and cross appeal to the Court of Appeal, on which judgment was given in August 2015 (see: Guernsey Court of Appeal Judgment 35/2015). The litigation then went to the Judicial Committee of the Privy Council, with a hearing in November 2017.

8. About one month before the Privy Council hearing, on 3rd October 2017, GTC were removed (by Mr Tchenguiz) as Trustees of the TDT and replaced by F&B.
9. The Privy Council upheld the decisions of the Court of Appeal. In its judgment given on 23rd April 2018 (*ITG Ltd and another v Glenalla Properties Ltd and others* [2018] UKPC 7), it confirmed that the BVI loans were payable, but that I&B were not personally liable for these, and were only liable to the extent of the trust assets available to meet those claims. Neither were they deprived of their trustee indemnity in that respect, nor were they liable in breach of trust; they were entitled to the benefit of the exoneration clause in the Trust Deed, (Clause 9.1) absolving them from liability for loss to the TDT except in the case of “*fraud, wilful default or [materially] gross negligence*”, and gross negligence had not been proved.
10. On 25th June 2013, and thus after the trial in Guernsey 1 had finished but before judgment had been delivered, GTC, on behalf of the TDT, commenced a further set of proceedings against I&B, those which eventually became known as “Guernsey 3”. This action claimed damages for negligence and/or breach of trust against I&B totalling £381Mn. The first part of the claim was in respect of I&B’s previous investment and alleged maladministration of the TDT trust assets, a claim of £264Mn. To give the flavour of this, it included claims in respect of I&B’s allegedly blindly following the investment recommendations of R20 and failing, in so doing, to consider the particular interests of Mr Tchenguiz’ minor children, as well as a claim for negligence in commencing the Guernsey 1 proceedings themselves and thus provoking the claim by the BVI companies to recover the disputed loans. The second part of the claim was in respect of the allegedly negligent and inadequate way in which I&B had defended, and the poor terms on which they had then, in June 2010, compromised, an earlier set of English proceedings (the English “**Somerfield Proceedings**”) brought against them as Trustees of the TDT by the Icelandic bank Kaupthing HF and others. This latter was a claim for £127 million, which alleged that I&B had acted both negligently and under the improper motivation of a conflict of interest in this respect.
11. I&B applied in December 2014 (thus during the pendency of the first appeal in Guernsey 1) for this further action to be struck out for disclosing no reasonable cause of action and/or being an abuse of the process of the court, and/or for summary judgment. They were only partially successful under a judgment of McMahon DB (as he then was) of 11th November 2015 - *Rawlinson & Hunter Trustees SA v ITG Ltd and another*: Guernsey Judgment 52/2015 (RC) - (thus after delivery of the judgment of the Court of Appeal in Guernsey 1), but they were, once again, wholly successful in the Court of Appeal on the ensuing appeal and cross-appeal on 4th October 2016 (*Rawlinson & Hunter Trustees SA v ITG Ltd and another*: Guernsey Judgment 43/2016 (GCA)). The proceedings in Guernsey 3 were thereby dismissed and/or summary judgment given for I&B, in their entirety.
12. Guernsey 3 also went on appeal to the Privy Council, and was con-joined with the appeal in Guernsey 1. In its judgment of 23rd April 2018, ([2018] JCPC 7) the Privy Council upheld the dismissal of the Guernsey 3 proceedings.

Scope of the Claim

13. The content of I&B’s indemnity claim for present purposes has been identified by reference to legal bills (the “**Invoices**”) rendered to I&B and paid by them (or perhaps more accurately by their insurers), by both their Guernsey Advocates, Mourant Ozanne (Guernsey) LLP, formerly Mourant Ozanne (“**Mourant**”), and their English solicitors, Macfarlanes, who have also at times instructed various English counsel whose fees are included as disbursements. The Invoices are, broadly, monthly bills, and the date range is from July 2008 to October 2019. However, 13 of the Invoices, dated from September 2008 to September 2009, have recently been discovered to have previously been paid or recouped by I&B out of the TDT

assets, before their removal as Trustees. This reduces the quantum of the claim, but not the scope of present contest.

14. The total number of invoices is 961. Each invoice is supported by a narrative with details from the fee-earner worksheets, breaking the invoice down into individual items of time charge. Disbursements appear separately in the usual way. The total number of pages comprised in the Invoices and these supporting narratives and worksheets is at least 5,897 (further items were added after this page count) and each worksheet page includes many – say 30-40 on average; some will exceed 100 – individual entries. The total amount of the claimed indemnity for these expenses is £27,575,774.18, before the adjustment for the Invoices, etc, discovered to have been paid.
15. The total number of Invoices on which F&B make some express objection on behalf of the TDT is 749. The aggregate claim on the remaining 212 Invoices is £332,187.93. They are characterised mainly by the fact that they are for very small sums, in context. None is higher than £15,000. Only 14 exceed £5000. The greater part are for less than £1,000 and the average is about £1,700. They give the appearance of just being too small to worry about. However, F&B do not accept that their aggregate sum is therefore immediately payable, because they say that no sums at all should be ordered to be recovered by I&B under their indemnity until their whole indemnity claim has been examined and adjudicated upon. It is not clear whether this is based on a contention that I&B’s overall claim can be reduced by some argument as to its overall reasonableness, such as the influence of “proportionality” (see [85] *et seq* below) to which it is linked in F&B’s skeleton, or by the reasoning referred to in [17] below.

Subject of the Application

16. By this Application, I&B seek to strike out most of the objections which have been made by F&B to the greater part of their claim for indemnity, and thus effectively, to seek summary judgment for that greater part. There are a relatively small number of Invoices as to which I&B accept that F&B have raised some sufficiently cogent question as regards some particular charges, that it is reasonable that further information or explanation should be given in respect of those charges. They therefore do not seek to strike out those objections, (the “**Excepted Objections**”) although they emphasise that these are accepted only in relation to the particular charges to which an acknowledged objection applies, and not to the remainder of the charges on the relevant Invoice, and this acceptance cannot and should not be used as a gateway for a further consideration of the whole Invoice. They have provided a Schedule of the Excepted Objections (Schedule 3 to a Skeleton Argument dated 6th October 2020) which number about 120. They each relate to what one might call “allocation” objections, i.e. these particular charges are disputed by F&B for being wrongly allocated to the costs of these two actions, being said, rather, to be in respect of matters which F&B contend
 - (i) were not related to the TDT, or
 - (ii) were proceedings outside the scope of this Application, or
 - (iii) related to a set of proceedings (“**the Delivery Up proceedings**”) to which different considerations apply - considered later, or
 - (iv) related to a different action (“Murray Holdings”) with which I am not familiar.

I&B accept that those objections are reasonably made, such that they should be the subject of a further hearing as to which directions should be given.

17. F&B maintain that all their objections raise issues which require to be fully investigated at further hearings so as to establish that I&B's claim is justified. Indeed, it is my understanding that, having set out broad criticisms and also examples of individual charges which they say are questionable for various reasons, they contend that this means that everything on the Invoices - certainly all the charges on those Invoices in respect of which some specific objection is made, but also, I think, by extension of reasoning even the Invoices as against which no particular objection has been stated - requires to be scrutinised and given some degree of focused further examination. In other words, F&B contend that an exercise should be conducted which would be akin to that of taxation of a litigant's bills of costs in these existing forms, on all the 749 (and possibly even the further 212) Invoices supporting the amounts claimed.
18. In summary, therefore, on the one hand, apart from accepting a handful of specific objections, I&B contend that F&B's objections to all and any of the remaining charges listed in the 961 invoices should be struck out and appropriate judgment given, whilst on the other hand, F&B argue, for various reasons, that all these Invoices and charges should be investigated further and in detail by the court.
19. The key issue between the parties is thus whether any, and if so which, of F&B's objections (other than those conceded) surmount the threshold of being sufficiently arguable that they must go forward to a full hearing. The proper test for this is also a matter of dispute. That dispute requires examination of what has been called the "*Alhamrani*" threshold, as will appear later. But the Application is still not a single "all or nothing" application depending on that issue, because, apart from generalised arguments, each side raises arguments of particular application to identifiable sets of charges by type or subject, with a view to striking out, or maintaining, at least those particular charges. The interaction of the various arguments is intricate.

The general nature of the challenges

20. In support of their claim to indemnity, I&B had originally provided, as directed, a "proof" of their total claim, breaking this down into parts and giving an amount and general description in respect of each of these parts. This exercise included identifying what was claimed in respect of the costs of these two actions. I&B were subsequently directed to, and did, provide the Invoices, narratives and worksheets referred to above in support of these parts of their total claim, together with the names, positions and charging rates of the personnel whose work had been billed, and together also with affidavit evidence in support and some explanation of these matters, provided by Ms Louise Hargreaves of Mourant and Mr Simon Day of Macfarlanes.
21. F&B, on behalf of the TDT, were directed to formulate their objections with regard to these Invoices. Some of F&B's objections were the "allocation" objections already mentioned above. The remainder fell into two broad classes.
22. First, where any challenges were formulated specifically in respect of the 749 Invoices these have been made under general headings of "Insufficient Particularity", "Unreasonably Incurred" and "Unreasonable in Amount", with some explanation under each head. Whilst some points specific to individual charges are made in these objections, many, if not most, are to the effect that the information supplied in support of the Invoices and charges generally has not been sufficient to enable F&B to satisfy themselves positively that the work *did* relate to Guernsey 1 or Guernsey 3, or *was* on matters reasonably incurred, or *was* reasonable in amount for the work to which it related. F&B contend, therefore, that a final quantification of I&B's indemnity entitlement must go to a hearing to determine the merits of all these matters at the detailed level of the individual charge elements. They submit that this is what is required in the interests of justice in adjudicating on I&B's claim against the

TDT. The obvious corollary is that further supporting explanations and information should be given wherever F&B claim that there is insufficient information for them to make a judgment.

23. The second class of challenges is based on the principle that a trustee can be deprived of its indemnity for “misconduct”. This is examined later. These challenges, which emerged procedurally rather late in the day - I think only the working day before this hearing - were formulated by identifying particular subjects of the costs claimed, as to which F&B argued that I&B had been guilty of some relevant misconduct which disqualified those costs from their indemnity. Ultimately, of course, this approach also requires identifying the particular charges which would be subject to this criticism, but the point is that this class of objection is determined by reference to the subject of the expenditure, rather than the reasonableness of the charges claimed, and these challenges can therefore be considered as “block” objections at this first stage.
24. The above illustrates the general point that objections to the claimed costs are made at several different levels of detail, although ultimately quantification of I&B’s entitlement will have to be made by totalling up individual items of qualifying expenditure. The question will be: at what point, and on what basis, do any items of charge get finally accepted into, or finally ruled out of, the pool of charges for which I&B are properly to be indemnified?

***Alhamrani* assessments and the legal framework for the Application**

25. The proceedings within which this Application is made are what is now known as an “*Alhamrani* assessment” or “*Alhamrani* taxation”. This is a convenient label for the particular *sui generis* exercise of determining a dispute between a beneficiary and a trustee or former trustee about the trustee’s claimed indemnity for his expenditure. It is a reference to the Jersey case of *Alhamrani v JP Morgan Trust Company (Jersey) Ltd* [2007] JLR 527 which concerned a dispute about the proper approach, both procedural and substantive, to resolving such a claim. It was in fact for the costs of some legal proceedings. (It is, of course, the case that this exercise is to be decided by reference to Jersey law, as the proper law of the TDT, although I cannot see that Guernsey law would be any different.)
26. As to the terminology, I prefer the term “*Alhamrani* assessment”. I note that the Jersey Court of Appeal, in *Alhamrani* itself, preferred the term “*Alhamrani* taxation”. It did so on the basis that “taxation” just means “quantification” and also that it was better to use “*language that is non-technical and easily understood*” (see [4]). However, it seems to me that the term “taxation” is not only technical – it is the specialist language of lawyers – but is also not even totally clear, because, to anyone with legal knowledge, a “taxation” immediately connotes the court taxation process in respect of a court costs order, or in England (but not necessarily in the Channel Islands; there is no such process in Guernsey at any rate) the formal statutory “taxation” of bills between a solicitor and his own client. To my mind the issues in this case become clouded by any subconscious association with the processes of a court taxation of legal costs, so familiar to lawyers. It is therefore far from non-technical, and actually unhelpful, to use the word “taxation” in the present context. This is because the discussion (see [120-1] below) involves drawing an actual comparison with the process of a party and party indemnity costs taxation properly so called, and the present exercise to make a quantification of a trustee’s right to indemnity. Therefore, without meaning any disrespect to the Jersey Court of Appeal, and even though I appreciate that I am dealing with a trust of which the proper law is Jersey law, I prefer to use the term “*Alhamrani* assessment” in relation to the latter. This is, first so as to help keep in mind the importance of avoiding such subconscious influence, and second, for succinctness, to save later explanation whenever the word “taxation” is used. In this, I am fortified to note that it had also been the preferred terminology of Birt DB (as he then was) in *Landau v Anburn Trustees Ltd* [2007] JLR 250, for the same reasons.

27. It is common ground that, on an *Alhamrani* assessment, the law (and this is Jersey law, although again I do not think Guernsey law would be different) is that the burden of proving the unreasonableness of any relevant part of the trustee's claim to indemnity lies on the objecting party, and the benefit of any doubt is to be given to the trustee: see *Alhamrani* at [66(v)]. This arises out of the fact, which is emphasised in *Alhamrani*, that the starting point is that a trustee is entitled to a "full" indemnity for his expenses - in other words for everything which he has spent. Once such actual expenditure is proved, any challenge must therefore be shown to be on grounds which are properly effective for cutting down that *prima facie* entitlement.
28. This is, therefore, a key difference from a party and party costs taxation. In the latter, the claiming party must positively make out his claim to have his expenditure reimbursed. In an *Alhamrani* assessment the starting point is that once the trustee demonstrates expenditure which *prima facie* qualifies for being made in connection with the trust, it is for the objecting party to prove that such expenditure does not qualify, or should be disallowed. The starting points are different.
29. I&B submit that since the burden of proof thus rests on the complaining beneficiary (or later trustee) the validity of any objection to the trustee's claim can be examined at the outset, and must pass a threshold test of showing sufficient of a *prima facie* case to be allowed to be progressed, and it can be struck out if it does not do so: see *Alhamrani* at [60]. This follows from the fact that there is no automatic right for a beneficiary to have an assessment (or taxation) of a trustee's claim to reimbursement, and therefore a case for doing so at all must be made out.
30. This provides the legal framework for I&B's present Application. With regard to the bulk of F&B's formulated objections (i.e. other than the Excepted Objections), the Application was made informally, in I&B's skeleton argument for a previous case management hearing on 29th July 2020, to strike out all those objections, in effect for disclosing no reasonable grounds of objection. This was both (i) generally, having regard to the objections as formulated, the burden of proof resting on F&B and the weight of this burden and (ii) specifically, in respect of objections made under reasonableness of amount alone, on the grounds that F&B do not specify what amount they would assert *is* reasonable for the costs of the work which, *ex hypothesi* in that case, they accept was reasonably done; I&B argue that this assertion is a fundamental requirement when making an objection as to amount, rather than as to principle. Since the emergence of the "misconduct" challenges, I&B also argue that these too should be struck out for lack of substance, when properly examined.

Trustee's right of indemnity – the law

31. I&B's claim to indemnity is in relation to its legal costs incurred in and about the two actions, Guernsey 1 and Guernsey 3, in each of which they were ultimately successful. Their claim is not, though, under costs orders but in right of their entitlement to indemnity as Trustees of the TDT. That indemnity is claimed not so much in reliance on the Trust Deed, although Clause 12 does provide, dealing with remuneration for a corporate professional trustee, that this is

"in addition to reimbursement of its proper expenses",

but under Art 26 of the JTL, which provides that

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

32. In the *Alhamrani* case, the Jersey Court of Appeal warned against applying Art 26 (2) so as to “cut across” the terms of the trust deed in question (see [2007] JLR 540 at [32] - [35]). Whether this was as regards cutting down a trustee’s statutory right substantively, or only in the context of procedure - see[33] - is not entirely clear to me, and I have therefore considered whether the terms of Clause 12 have any material impact in this case, when compared to Art 26 (2).
33. In a judgment of 27th November 2015 in *Re: The Tchenguiz Discretionary Trust Civ.1505/2010* (Royal Court, Unreported) at [8], Lt-Bailiff Patrick Talbot QC said that there is no material difference between the position under the Trust Deed and that under Art.26 (2). I agree. This is the case, in my judgment, because Clause 12 can and should be construed harmoniously with Art 26 (2), having been written in the context of that Article’s known application in Jersey trust law. The reference to “*proper*” expenses in Clause 12 is thus, in my judgment, intended to acknowledge and be equated with the phrase “*reasonably incurred*” in Art. 26 (2). Although this was a point which appeared to trouble the Jersey Court of Appeal in *Alhamrani* at [27], I do not see how, in the context of a trustee’s claim to an indemnity for costs, it would be possible for costs to be incurred “properly” but still “unreasonably” so as to give “reasonably incurred” a potentially narrower meaning than “properly incurred”; a trustee can only “properly” incur “reasonable” costs. Such a distinction could only be made by treating “reasonable costs” as confined to a judgment on quantum, and not character, but the reference to “reasonably incurred” in Art 26 (2) obviously encapsulates the well-known rubric of “reasonable costs, reasonably incurred”, i.e. costs which are both reasonably incurred in principle, having regard to their subject matter, and are reasonable in amount, having regard both to that and to the work actually done. Where I refer in future to “**reasonable costs**”, therefore, I will be doing so as shorthand for this description.
34. It will be noted that Clause 12 does not specifically refer to “liabilities”, which may arise or be incurred otherwise than through expenditure (LB Talbot QC was not concerned with this point), but I do not think that matters. The trustee’s entitlement to indemnity for liabilities is so well known and accepted that it would be bizarre to suggest that its omission was intended to have the dispositive effect of excluding any indemnity for liabilities. Either the word “expenses” in Clause 12 is wide enough to include liabilities, or, if it is not, the omission of liabilities leaves these to be dealt with under the general law, which comes back to Art 26 (2).
35. It follows, therefore, that I can proceed by reference to Art. 26 (2) only, and I think it unnecessary to refer further to the Trust Deed. As to Art 26 (2) itself, it will also be noted that the words “*in connection with*” [the trust] are of potentially very wide application, and presumably intentionally so.
36. I also observe that, quite rightly in my judgment, no-one has sought to argue in this case that this statutory entitlement to indemnity applies only whilst a trustee holds the office of trustee and that it ceases (as would be the case with entitlement to remuneration) on his ceasing to hold the relevant office. The self-same policy consideration which underlies the principle that a trustee should be able to be confident that, absent fault (in general terms), he will not be left out of pocket through accepting to be a trustee, applies just as much in respect of financial liabilities which arise or continue after his leaving office but because of his prior position as trustee, as they do to liabilities incurred during office. This is the basis for the original principle that a departing trustee was entitled to retain trust assets sufficient to meet any prospective liabilities incurred in right of his trusteeship, unless and until provided with alternative security. It is also reflected in the provisions of Art 43 (1) (a) of the JTL, which expressly entitles an outgoing trustee to require to be given security against potential liabilities whether existing, or “*future or contingent*”.

37. Lastly, in considering the question of the right to an indemnity, and therefore the situations which may be said to cause the trustee to “lose” that right, it is, I think, helpful to keep in mind that there are actually three different situations in which that term may be being used. The first is where the expenditure in question is held not to have been incurred “in connection with” the trust, as a finding of fact in all the material circumstances. The right of indemnity is then not really “lost”; it simply never arose in the first place. The second is where the expenditure in question was clearly incurred “in connection with” the trust, but is challenged for not being reasonable costs. Once again, the right of indemnity is not really “lost”; it is simply that the subject expenditure has been held not to meet the qualifying conditions for the right of indemnity to be availed. The third is where the expenditure is obviously incurred in connection with the trust, and cannot be said to be unreasonable in itself, but where it is argued that the trustee ought to be deprived of his right of indemnity nonetheless. It is only in this last sense that the right of indemnity can truly be said to be “lost”. I will consider what extra or extraneous matters may bring this about later, where necessary, but for present purposes the important general point is that the description of a trustee’s “losing” his right of indemnity may be being used in any one of the three senses mentioned above, and it is important to be aware of which is the pertinent sense at any time.
38. For succinctness, where, in future, I refer to a trustee’s costs or expenses “incurred in connection with the trust”, I will be including a former trustee’s costs or expenses incurred as a consequence of his former trusteeship unless I state otherwise.

The further litigation context

39. Returning to the circumstances of this claim, as remarked above, and as is clear from the quantum of the claims in Guernsey 1 and Guernsey 3 and the nature of their subject matter, this was major, complex and high value “commercial” litigation. Several other points are worth noting.
40. First, within each set of proceedings, but in particular Guernsey 1 since that was fully litigated, there have been a host of interlocutory or incidental applications and contests – such as for delivery up of trust assets, disclosure of documents, security for costs, admission of further evidence, costs themselves, etc. The likely incidence of such applications will be familiar to those with experience of high value, hotly disputed commercial litigation.
41. Second there have been other related or incidental proceedings, with which I am not directly concerned, but which again illustrate the breadth and intensity of the litigation environment. The proceedings known as “**Guernsey 2**” are an obvious omission from the above account. These were a set of “Trustees’ directions” applications under the case title *Re: The Tchenguiz Discretionary Trust* Civ 1505/2010 which took place from about May 2010 over a period of about 5 years. There appear to have been at least 36 of these. They related to the administration of the TDT pending the resolution of the litigation and in particular the preservation of the TDT assets, as to which Lt-Bailiff Chadwick had granted an order appointing Joint Receivers in respect of the vast majority of such assets, on 24th January 2014. Such applications were thus administrative, although not all in the nature of strict “*Beddoe*” relief: see *Re Beddoe* [1893] 1 Ch 547. They were generally heard in private and were convened as and when the court’s jurisdiction was invoked by any of the parties and possibly (latterly) the Joint Receivers.
42. Interestingly, the costs in Guernsey 2 have already been adjudicated on by Lt-Bailiff Talbot QC, who delivered two judgments respectively on 27th November 2015 (Unreported) and 29th June 2017 (Guernsey Judgment 49/2017 (RC)), as a result of which entitlement to quantified sums in respect of costs payable out of the TDT assets were formally ordered in respect of all effective parties. I&B were awarded £1,625,650.89 to be paid out of the

TDT assets under this adjudication. Apart from providing context for this Application, these costs proceedings in Guernsey 2 explain why Guernsey 2 costs are expressly excluded from the Application before me (see Paragraph 15 of the December 2019 Order). They may also provide some useful material with regard to the way in which this court has previously approached a similar application of the *Alhamrani* principles which I shall have to consider in this Application, albeit on a rather small scale. I will refer to this later, where appropriate.

43. Third, there are yet other proceedings between material parties, (and in particular involving I&B), which either have been, or are currently, on foot in this and other jurisdictions such as England and (I think) Jersey. I am not fully aware of the detail and scope of these, and it is not proportionate for me to consider or investigate this, but I have in mind applications with regard to collateral use of documents, other proceedings which have been referred to as the “**NS1 Proceedings**,” which I think are in both Guernsey and England and relate (I believe) to the creation of other “Tchenguiz” trusts, and applications relating to other companies such as Murray Holdings. Once again, I am not concerned with these because, by agreement, any issues relating to I&B’s expenditure on legal costs through being involved in those proceedings are expressly carved out of the subject matter of this Application.
44. Fourth and more materially, there are also the **Somerfield Proceedings**. These have already been noted and can be seen to have overlapped with the commencement of Guernsey 1. Any expenses incurred in connection with these would strictly not be part of the claim to indemnity by I&B according to its verbal description in this Application. It has emerged, though, that some part of costs relating to that action may have been included in legal expenses incurred and claimed by I&B in this Application; at the time, the parties’ legal advisers did not necessarily separate out and invoice separately for work undertaken on the various different matters as these have subsequently been classified for the purpose of this Application. I shall have to deal with the detailed effects of that possibility later, where it arises. For the present, though, the point is that I am recording the extensive litigation landscape which is the background to the legal costs and expenses which are the subject of the present Application. To further illustrate this, I need to explain, very briefly, the subject matter of the Somerfield Proceedings, which I have had to explore and consider.
45. The background to the Somerfield Proceedings went back to shortly after the creation of the TDT in March 2007. As previously mentioned, as Trustees, I&B used R20, a company in which Mr Tchenguiz was both interested and actively involved, as investment and financial advisor to the TDT. The TDT was set up as part of the division of assets from an earlier trust settled by Mr Victor Tchenguiz, Robert Tchenguiz’ father, amongst the next generation, and as part of this, very large loans (up to about £500Mn) in respect of the TDT empire had been borrowed from Kaupthing HF and were secured by Mr Robert Tchenguiz’ personal guarantee. In December 2007, owing partly to the global financial crisis but also to Mr Tchenguiz’ desire to rid himself of this guarantee, there had been an internal reorganisation of certain companies in the TDT group, and further borrowings. This reorganisation had involved the creation of the “Oscatello structure” (a reference to the Third Defendant in this litigation) as the vehicle for borrowings from Kaupthing, and the entering into of a general agreement called the Framework Agreement between, inter alia, I&B as Trustees of the TDT and Kaupthing, with regard to such borrowings and security for them. It was a mishap in the novation of various loan obligations to Oscatello, in connection with this, which had left the TDT/I&B exposed to the loan obligations claimed by the four BVI companies, and which gave rise to the Guernsey 1 proceedings, but that is incidental to the present point.
46. There had later arisen the prospect of the receipt of considerable sale proceeds from TDT group companies selling their interests in the Somerfield supermarket chain which were held as a joint venture with other unrelated companies with a commercial association with Kaupthing. However, under the Framework Agreement as the TDT group was then structured, if those proceeds were paid over they would be automatically “streamed up” to

companies where Kaupthing (principally) could demand their being paid over in reduction of its lendings. In order to prevent this, and relying for justification on an informal agreement known as the “Scott’s Agreement” which R20 and Mr Tchenguiz claimed had been made, to the effect that Kaupthing would not require this upstreaming of the proceeds if R20 would otherwise approve the sale of the Somerfield interests so as to enable all the owners to sell, I&B entered into, or caused companies controlled by them to enter into, certain internal transactions (“**the TDT Transactions**”) aimed at by-passing the upstreaming provisions in the Ocatello structure, so as to prevent the proceeds being appropriated by Kaupthing and possibly being incapable of retrieval (because Kaupthing was then in financial difficulties), if the Scott’s Agreement were upheld. This provoked, first, proceedings in the BVI where most of the subsidiaries were registered, alleging that the TDT Transactions were actually fraudulent – although I&B and R20 denied this, having revealed the transactions openly to Kaupthing. The kernel of the dispute, though, was that the TDT Transactions were in breach of the Framework Agreement, and as this contained a proper law clause giving exclusive jurisdiction to the English courts, the BVI proceedings were stayed, and the dispute was transferred, instead, to England to become the proceedings referred to above as the “Somerfield Proceedings”. These were the proceedings, the settlement of which, on the advice of leading counsel as to the poor prospects of success, was implemented by I&B in June 2010, which event became the subject of the second part of the claim in Guernsey 3.

47. The above account is again very simplified, but that does not matter. The point of my referring to these proceedings and describing their subject matter, is to illustrate more of the circumstances in which the legal costs and expenses which I&B now seek to recover under their indemnity were incurred and paid by them. Guernsey 1 was not a new venture into legal proceedings. It was commenced in an environment of previous, high value, highly disputed, highly charged and (one can infer) strenuously fought legal proceedings.

The route to this hearing.

48. The above is a broad account of the litigation landscape. It is obviously a matter of central importance that I&B ultimately proved successful in both Guernsey 1 and Guernsey 3, with both those actions having become decidedly hostile litigation as between I&B as former Trustees of the TDT defending themselves against the current Trustees of the TDT and effectively, therefore, its beneficiaries. The effect of I&B’s ultimate success was to leave the assets of the TDT liable for the loans and other liabilities claimed by the BVI companies in Guernsey 1, which, by the time of the Privy Council judgment, had risen, with interest, to a total of about £270Mn. The effect of this liability having to be satisfied from the TDT assets, along with all the other claims which creditors of the TDT - both successive Trustees and any third party creditors claiming through such Trustees - might make, raised the prospect that the TDT would be “insolvent” in the sense that its liabilities would exceed the value of its assets.
49. The concept of an “insolvent trust” is capable of arising in Jersey or Guernsey law because of the statutory provisions of Art 32 of the JTL (the equivalent in the GTL being s 42), already discussed, which has the potential to limit the pool of assets available to pay creditors of the trust enterprise to those of the trust estate. This is so, even though a trust technically has no independent legal *persona*, although the effect comes close to creating one. That situation cannot arise in English law, which the Jersey and Guernsey Trust Laws adopted but with modifications, because in English law a trustee’s liability for debts or liabilities incurred on behalf of the trust remains his personal liability; he is protected by his right of indemnity against the trust assets but only *pro tanto*. He remains personally liable as the debtor of immediate recourse, and thus for any shortfall which his trustee indemnity does not satisfy in practice. Thus, in English law, it is only the insolvency of the trustee himself which comes into play. The possible “insolvency” of the trust has no legal effect on the creditor’s rights.

50. The potential for insolvency of a Jersey or Guernsey trust therefore created major and untested questions with regard to the distribution of inadequate trust assets, and in particular whether the regime for distribution should be that of priorities, similarly to successive mortgages, or should apply the principle of *pari passu* distribution among all creditors, familiar from the winding up of insolvent corporate entities. Once the judgment of the Privy Council in April 2018 had provided a degree of certainty with regard to what the relevant claims against the TDT assets were, the focus of the litigation therefore moved on to that of distributing those assets on correct principles, and to devising an appropriate process for deciding what those principles were, and working out the consequences.
51. This is what has been taking place during the last two and a half years. The initial stages are as described in my first judgment on the major issues of law which have arisen, see *ITG Limited and ors v Glenalla Properties Ltd and others*, 8th December 2019: Guernsey Royal Court Judgment [2019] GRC 064, paras [36] - [44]. That judgment decided two issues which were significant for priority purposes, namely the effects of an assignment of the BVI companies' debts which had been taken by F&B as Trustees of the TDT in March 2019, and the general scheme for priorities with regard to creditors claiming in any distribution of the assets of the TDT. As to the Assignment Issue, I decided that the assignment had had the effect of extinguishing the debts claimed by the four BVI companies against the TDT's available assets. As to the Priorities Issue, I held that the principle of distribution of assets in an "insolvent" trust situation was not *pari passu* but was a matter of priority according to time. Each trustee gained a lien over the trust assets to indemnify him for his own liabilities and expenses (and also any unpaid remuneration) as trustee, and this lien would also be invoked by third party creditors who had transacted with him, and who would therefore claim any outstanding debts or liabilities against the TDT's assets by subrogation to such trustee's lien. Debts thus claimed therefore ranked in priority according to the successive dates of creation of the relevant trustees' liens, which were the respective dates of their appointments. As between the trustee himself and third party debtors claiming through his lien, the trustees' own claims took priority, but as between any creditors claiming through subrogation to that trustee's lien but in competition with each other, their claims would then rank *pari passu* between themselves.
52. My decision was upheld by the Court of Appeal on 28th August 2020 (see Guernsey Judgment [2020] GCA042). I understand that the Priorities Decision, but not the Assignment Decision, is being appealed further to the Privy Council, but a final decision on that point does not affect issues of the quantum of any liability claimed by way of indemnity. Those issues will have to be decided eventually in any event. It is to be noted, though, that the effect of the Assignment decision takes (I understand) the TDT back into the realms of solvency, as opposed to insolvency.
53. By common consent, after determination of the above two issues of law, the process of quantifying claims on the assets of the TDT has moved on to focus on I&B's claim for indemnity. I&B will have first priority if the Priorities Decision is upheld and its quantum will have to be decided in any event if it is not. It has therefore been a convenient starting point in the task of ultimate determination of recoverability and distribution of assets generally, and would, incidentally, decide any points of general application which could apply with regard to the claims of later trustees, and thereby narrow the issues.

Material points previously decided

54. Because there has been little previous authority in this area, the process of determining the proper amount of I&B's indemnity entitlement has proceeded in what I have described as an "iterative fashion", seeking to decide any points of general approach, or of principle, or of wide application first of all (if this can be done) with a view to narrowing issues for the

future and making the situation more manageable. Some points of law which are material to quantum issues have therefore already been decided by me, because they have previously been raised, and it has been possible and convenient to make a decision on them.

55. Also, in the course of case management hearings in January, April, July and September 2020 it emerged that there was a significant disagreement between I&B and F&B about the extent of appropriate evidence for this intended *Alhamrani* assessment, and in particular the admissibility of a lengthy affidavit (the third) of Ms Patricia Whitford, director of the parent company of F&B, which F&B wished to rely on. Whilst it had been intended that the first substantive hearing as to quantum would be in October 2020, the resolution of certain legal points described as “points of principle” was necessary in order to decide issues of evidence and admissibility. In the event, therefore, the October hearing had to become a further case management hearing and the first substantive hearing was adjourned to December 2020.
56. As this is the first comprehensive hearing on quantum, it is useful to set out here the points which have already been determined, but never reduced to a formally finalised judgment, and which are relevant background to later decisions made in this judgment. I also record, for completeness, that I disallowed Ms Whitford’s third affidavit, in both its original and an amended version, on the grounds of (i) inadmissibility, her views and opinions, liberally expressed, being matters for submission, (ii) immateriality, both generally and in the light of my decision noted below at [84], and (iii) lack of proportionality, having regard to the disruption and expansion of the proceedings which admitting it would cause procedurally, compared to what I regarded as its very little evidential worth as an affidavit. I did accept, though, that contemporaneous documents to which Ms Whitford might have referred would potentially be admissible in evidence in their own right, in accordance with the usual rules of evidence. In reliance on this permission F&B produced an electronic bundle of such documents of over 9,000 pages.

(1) Impact of previous costs orders.

(i) Between trustee and third parties

57. First, (see Paragraph 10 of the December 2019 Order) I have already decided that a trustee’s right to claim indemnity in respect of costs incurred as such trustee in legal proceedings is not affected (either by bar or by being suspended) by the fact that there is an unsatisfied costs order in his favour against a third party in those proceedings. A trustee is not obliged to marshal his remedies in this way. (Of course, if he does recover his expenditure from the trust estate, it would seem right that he would be obliged to assign the benefit of any costs order against a third party to the estate, but this is not a point which has had to be considered in this case.)

(ii) Between trustee and the trust estate

58. Second, (see Paragraph 11 of the December 2019 Order) I have also previously decided that the making of an express “no order as to costs” in proceedings to which the trustee is a party does not bar the trustee from recovering his legal expenses under his right of indemnity out of the trust fund unless the order made by the court shows, expressly or by obvious necessary implication, that the court was intending to deprive the trustee of that right of indemnity. Costs orders are made under the court’s jurisdiction as to “costs shifting” in respect of legal proceedings, and they reflect policy and the court’s discretion as to the appropriate incidence of the costs of proceedings having regard to the circumstances material to the proceedings. A trustee’s right of indemnity, however, is either contractual or statutory. To deprive him of that right therefore requires justification according to the principles applicable to such contractual or statutory rights. A simple “no order as to costs” is not sufficient to carry the inference of an intention to affect the trustee’s contractual or statutory rights, at any rate in

the absence of clear evidence that it was made upon consideration of those rights as contrasted with merely the appropriate disposal of costs in the proceedings themselves. Any residual claim by the trustee under his indemnity will, though, still fall to be determined on its merits as such, in all the circumstances.

(2) The effect of personal benefit to the trustee

59. This is not a point on which I have made outright rulings previously, but it is convenient to mention it here, because it has been a recurrent feature of argument in this phase of the litigation, and I have previously expressed some views. F&B have sought to place limits on the extent of I&B's right to indemnity by arguing that I&B could not recover costs incurred if they benefitted I&B. Initially, Advocate Robison argued that, to be recoverable at all, I&B's claimed costs must have been incurred *for the benefit of the TDT*, usually with the added argument that if the costs could be seen to provide any benefit to I&B then, almost by definition, they could not be for the benefit of the TDT. Ultimately Advocate Robison accepted that benefit to the TDT was not an absolute requirement (and certainly this is impossible where the trustee is claiming indemnity for the costs of hostile legal proceedings against the trust in which he has been successful, as is the case here) - but the contentious issue of costs being disqualified from recovery because of personal benefit *to the trustee* has still persisted.
60. Argument that personal benefit to the trustee disqualifies expenditure from indemnity has been advanced by F&B as to three different situations. The first case is where the expenditure was said to be solely for I&B's benefit, and of no benefit to the TDT. As to this, the grounds of the argument are obvious. The second case is where the expenditure was argued to be for I&B's benefit but it was accepted that it might also be viewed as having some benefit for the TDT. As to this, the argument was that the personal benefit element must override that latter as a matter of principle, and exclude the right to indemnity. The third case has been where it was said that legal costs were incurred for I&B's benefit but also to the actual detriment or disadvantage of the TDT, or even to be pursued for I&B's benefit "*at the expense of*" the TDT beneficiaries. The argument here is that a trustee's indemnity then could not possibly extend to such costs, as a matter of justice.
61. However, none of these situations, in my judgment (and as I have previously indicated), conclusively puts such expenditure outside the right of the trustees (here, I&B) to recover under their indemnity, because that indemnity is not framed, either under statute or under the Trust Deed, by reference to a requirement to be of benefit to the trust, but only by reference to being "incurred in connection with the trust". If expenditure is obviously connected with the trust, then, in my judgment, for the right of indemnity to be truly "lost", either the actual expenditure itself must have been made in breach of trust, or it must, at least, be so closely associated with some such breach as to be fairly regarded as tainted with it. It may well be that this latter situation is more satisfactorily analysed as being expenditure "unreasonably incurred", rather than "lost by misconduct" but the effect is the same, and the difference would just be a matter of the more natural description on particular facts.
62. Viewed this way, it can be seen that in the first two cases mentioned above, the fact of benefit (or not) to the trust is simply irrelevant because benefit to the trust is not co-extensive with "connection with" the trust. In the third case, the claimed detriment or damage to the trust would usually mean that there was a legal dispute between the beneficiaries (or a successor trustee) and the trustee about the propriety of that trustee's conduct in relation to the expenditure. If the trustee is ultimately vindicated, then he has incurred such expenditure "in connection with" the trust and *ex hypothesi* without fault in doing so, and the principle that he should be indemnified for all costs incurred through his trusteeship remains engaged: see *Re JP Morgan 1998 Employee Trust, des Pallières v JP Morgan Chase & Co Ltd* [2013] (2) JLR 235 at [21], which states the principle emphatically. If the trustee is not

vindicated but is held liable, then the costs which he incurred were incurred in connection with defending that which should not have been defended, and this has therefore been revealed not to have been a reasonable incurring of costs. If no such dispute has actually been litigated, then the situation will be more complex and will be very fact specific.

63. I accept that the above analysis, i.e. focusing on the phrase “in connection with”, cannot be taken too far, in that the “connection” in question has got to be real and of recognisable substance and not just possible use of language. If the claimed “connection” is slight or ephemeral then the proper analysis will be that it is so lacking in substance as not to be a real “connection” at all, such that the indemnity would not even be engaged, or that incurring expenditure on such matters was not reasonable. This will be a matter of fact and degree.
64. The above is, in my judgment, the correct approach to the materiality of any apparent personal benefit to the trustee on that trustee’s claim to indemnity for expenditure in any particular respect. To summarise: a trustee’s indemnity is not confined to costs incurred directly in administering the trust, because “in connection with” has a wider ambit than that, and inevitably includes matters pertaining to the trustee’s personal position or interests as affected by trust affairs. The trustee has a basic right to be held harmless from financial loss which he incurs, or has to incur, without material fault, through being the trustee. In the context of hostile proceedings, if a trustee is successful, this right includes the right to indemnity for the costs of defending himself, even though he is, obviously, then acting solely in his own interests. It will take operative misconduct on the trustee’s part to override the above basic principles.

(3) Whether a trustee who successfully defends an allegation of gross negligence may nonetheless be deprived of its indemnity for all or part of its legal costs.

65. This next point of principle was decided in October 2020 because of its very significant evidential consequences, if the arguments of F&B were upheld. It is a particular example of the broad question: what are the circumstances in which a trustee will, or can, lose his indemnity on more general grounds than because particular expenditure is found to be unreasonable in nature or amount?
66. With the focus for the purpose of this argument being mostly on the second limb of Guernsey 1, F&B asserted a good argument that although I&B had succeeded in defeating the trust’s claim against them for damages, I&B must still be deprived of their indemnity if it were shown that they had been guilty of “misconduct”, and that this required a proper examination of their conduct leading up to the Guernsey 1 (and Guernsey 3) proceedings.
67. Advocate Robison accepted, following the Jersey Court of Appeal’s decision in *des Pallières v JP Morgan Chase & Co Ltd* [2013] JCA 146 (above) at [57] that

“If a trustee is unsuccessfully sued for breach of trust, he is entitled to a full indemnity [ie for “the costs of defending himself; see [21]] out of the fund; and can therefore reimburse himself the difference between the costs he recovers from the unsuccessful beneficiary and his actual costs (so long as not unreasonably incurred or unreasonable in amount).”

68. However, he argued that a trustee’s right of indemnity, and its right of exoneration, were separate and distinct, and their effects could and should therefore be analysed and applied separately. Relying on Lewin on *Trusts* 20th Ed at paras 48-006 and 48-007, he argued that a trustee could be deprived of his indemnity for “misconduct” which caused loss to the trust fund, and that “misconduct” was to be widely construed; it would include mere negligence, or even any unreasonable conduct. Whilst I&B had been successful in resisting the claim for damages in Guernsey 1 because they were exonerated (by the Trust Deed) from

liability for anything short of *gross* negligence, they had not been cleared of mere negligence, and this would constitute “misconduct”. Indeed, he submitted that *dicta* in the original judgment of Lt-Bailiff Chadwick showed that he would have regarded their conduct as being negligent - just not “grossly” so. As regards Guernsey 3, because the action had been struck out/dismissed on procedural grounds, those issues had never been tried and therefore remained at large.

69. If, therefore (Advocate Robison submitted), it could be demonstrated that I&B had been guilty of negligence which had effectively “*put in train*” the Guernsey 1 and Guernsey 3 proceedings, they would not be entitled to any indemnity in respect of their costs of those proceedings, because such costs would only have been incurred, and therefore would have been caused, by I&B’s own fault or misconduct. He referred, as illustrating this principle, to *Albany Trustee Company Limited v Jeandin*, (2012) Royal Court Judgment 32/2012, where a trustee whose poor drafting had caused the necessity for proceedings, was ordered, in consequence, not to be entitled to an indemnity for his costs out of the trust estate, (more accurately, his excess costs incurred over and above the costs he recovered under a costs order made in his favour on the recoverable basis against the losing active hostile party). Advocate Robison accepted that the consequent procedural conclusion from this was that the *Alhamrani* assessment would have to receive evidence to determine the issue of whether negligence or misconduct by the trustee had been the causative trigger for the proceedings, but he submitted that this was simply inevitable, in order to apply the correct principles.
70. Unsurprisingly, Advocate Wessels argued that Advocate Robison’s proposition was wrong. There was, first, the practical point that if it were accepted, the process of adjudicating on I&B’s claim for indemnity would in effect turn into a re-litigation of the issues in much of the Guernsey 1 and Guernsey 3 proceedings. This was utterly disproportionate, and could not be right, particularly in the light of the fact that F&B’s attempt to raise the very same such issues in Guernsey 3, in 2013, had actually been dismissed or struck out as an abuse. (Advocate Robison’s response to this was that the claimed indemnity was for nearly £28Mn so that it was by no means disproportionate to expect to test this by a proper review of all relevant evidence, even if wide-ranging; he also submitted that the strike out finding in Guernsey 3 had been in a quite different context with different considerations, based on procedural principles, and not the principles of a trustee’s indemnity). Advocate Wessels also pointed out that, in any event, the issue of whether any loss had been occasioned to the TDT by I&B’s criticised conduct was strongly denied, and had never been decided in either set of proceedings, and that this must influence whether it could be right to deprive I&B of their indemnity under this argument.
71. Whilst the prospect of such hugely wide-ranging evidence being necessary to determine this indemnity point gives one cause to pause, I do accept that the overall sums in issue are large, and that the practical significance of the claim must not be treated as diminished simply because it arises as part of the working out of the consequences of a previous even larger action. In its nature, it is, I find, a separate claim or cause of action in itself. If, therefore, the principle advanced by Advocate Robison were correct, it seems to me that there would be no choice but to try the resultant dispute fully, admitting whatever evidence would properly and reasonably be required to do so.
72. However, Advocate Wessels’ second major point was that this argument was an incorrect analysis of the right to indemnity and, moreover, that this rule was already established by authority. He first submitted, I think with some force, that if Advocate Robison’s argument were sound, one would have expected to find some example of it in the authorities and text books, because this situation must surely have arisen previously. However, there was no trace. More directly to the point, he argued that cases such as *Re Spurling’s Will Trusts* [1966] 1 WLR 920 and particularly *Armitage v Nurse* [1998] Ch 241 showed - and indeed he submitted that the latter had even directly held - that it was not correct: see in particular per

Millett LJ at p 262-263. He argued that the clear effect, and effectively the *ratio*, of *Armitage v Nurse*, is that where a trustee successfully defends himself against claims for breach of trust, even though by resorting to the protection of a trustee exemption clause, he is still *ipso facto* entitled, under his right of indemnity, to recover his costs incurred in such defence from the trust fund.

73. As I understood it, Advocate Robison's argument was that *Armitage v Nurse* did not go that far; it decided only that a trustee could not properly be deprived of his indemnity by the court in the failed breach of trust proceedings themselves, when the question of "misconduct" sufficient to justify such deprivation had not been decided against the trustee (see p 263C). That, he argued, was only because that particular issue had not arisen for determination in the actual proceedings. There was therefore no reason why it could not be later examined and adjudicated on in the context of an *Alhamrani* assessment, where this was necessary to determine whether the trustee should be entitled to his indemnity or not.
74. I prefer Advocate Wessels' argument, but in my view this result is most easily and correctly supported simply on the grounds of causation - certainly as applies in this case, but I think also as a matter of general analysis.
75. As regards Guernsey 1, I&B incurred costs in (i) defending themselves against an interpretation of Art 32 of the JTL which was detrimental to their personal situation as trustee and (ii) defending themselves against a claim for damages for breach of trust, which claim failed. They defended themselves, and they were proved right. They were, therefore, entitled to their reasonable costs of doing so under their trustee indemnity because they had been compelled, through having been a trustee, to incur costs in justifiably resisting ill-founded claims. (In fact, even if they had been unsuccessful, that would not necessarily have debarred them from claiming an indemnity as to costs: see again *Armitage v Nurse* (above) at p 263A; but the question would then fall to be determined by whether their costs had still been reasonably incurred or not, which would be fact specific and is not this case.) In my judgment, the fact that the relevant costs for which indemnity is claimed are the costs of a hostile action between the trust (in effect) and the trustee, in which the trustee is ultimately successful, is the determinative matter that is to be viewed as the cause of the trustee's incurring the costs in question; the trustee's indemnity therefore extends, in principle, to recovery of his reasonable costs thus incurred. It was broadly the pursuit of bad claims against I&B which obliged them to incur the costs for which they now claim indemnity. There may be some costs included which relate to the failed claim that the loans were not recoverable, but as that claim was initiated in the interests of the TDT as well as I&B, and was persisted in subsequently on behalf of the TDT by GTC, there could be no grounds (it seems to me) for arguing as a general point that those costs were unreasonably or unnecessarily incurred.
76. As regards Guernsey 3, I&B were again entitled to defend themselves by taking the point that those proceedings were not properly brought and should be struck out. It was the bringing of unsupportable proceedings which was the cause of those costs having to be incurred and, once again, therefore, having succeeded, I&B are entitled to recover their costs of such defence, under their right to indemnity.
77. Advocate Robison's proposition that one can look at I&B's conduct in roving generality to form a possible conclusion that there was "mere" negligence which could be said to have brought about all the proceedings, and thus the costs of these, and therefore is sufficient to deprive I&B of their indemnity in respect of them, depends on how far back one can legitimately go in lighting upon an operative "cause" for the incurring of costs. In my judgment it is not legitimate to go back beyond the actual cause of the actual costs being incurred - and this was the bringing of bad claims against I&B. Any previous conduct of

I&B is simply factual context for that operative cause. I&B did not itself cause the costs of badly founded proceedings to be incurred.

78. In my judgment, it is this issue of identifying the “operative” or “effective” cause of the costs in question which is the key to the distinction between the situation here, and that in, for example, the *Albany* case (above). There, a trustee was deprived of his full indemnity for the costs of administration proceedings in which he had remained neutral, but which arose from his deficient drafting of a document. This brought about proceedings in court which should not have been required. It is unclear whether that drafting would in itself have amounted to negligence such as to be held to be a breach of duty by the trustee, but it was plainly conduct open to criticism, and the court, having regard to the relative merits of the interested beneficiaries as contrasted with those of the trustee, concluded that the trustee ought not to have an indemnity for his legal costs out of the trust fund, effectively at the expense of the winning party. The court plainly concluded that the real cause of those costs being incurred was the trustee’s own - culpable - acts which necessitated, or unreasonably occasioned, proceedings and that was sufficient to justify depriving him of his indemnity in respect of his costs. The proceedings were not hostile to the trustee, but were quasi-administrative, being hostile as between beneficiaries.
79. *Turner v Hancock* [1882] 20 ChD 303 (a case which clearly distinguishes the different bases of a court’s costs order and a trustee’s right to a costs indemnity) illustrates the other side of the dividing line. There it was the trustee’s assertion that the state of account between him and the trust was in his favour which caused the need for legal proceedings to take an account. In the end it was held that the balance was in fact the other way, but as the trustee had not been culpable but innocently mistaken, the court concluded that the trustee should not be deprived of his indemnity in respect of the costs of the proceedings. This shows, in my judgment, that it is only where the legal proceedings and their costs can be said to be truly caused by the actual misconduct, or unreasonable conduct, of the trustee that this would result in his being deprived of his indemnity in respect of them. However, (and whether this is viewed as an analysis of causation or simply a policy decision) where the proceedings in question are hostile proceedings between the trust and the trustee, and the latter is successful, he is not to be regarded as being at fault, and he is entitled to his trustee indemnity in respect of costs incurred in those proceedings.
80. Thus, in my judgment the test with regard to the potential deprivation of a trustee of his indemnity for legal costs incurred in connection with the trust for misconduct, is two-fold:
- (i) What was the effective cause of the trustee’s incurring those costs?
 - (ii) Was that effective cause the fault of the trustee (or at any rate, more the fault of the trustee than the beneficiaries?)

Only if the former can be laid at the door of the trustee, and the latter question is answered adversely to him, will he be denied his indemnity from the trust funds. When the costs in question are the trustee’s costs of successfully defending, on whatever basis, a hostile claim against him made by the trust, then the first question must be answered in his favour. Put another way, the answer to the general practical question identified at the start of this section (namely: what are the circumstances in which a trustee will, or can, lose his indemnity on a general basis?) can be summarised as being: when his own conduct has culpably been the direct cause of the expenditure which he has incurred, but not if that conduct is a circumstance for which he is not liable.

81. I should add three further points for completeness. The first is that the interaction between orders with regard to a trustee’s costs in court proceedings themselves, and the right of a trustee to recover such costs by way of contractual or statutory indemnity is often difficult, and it seems to me that, at times, the cases have not clearly distinguished the two, a point

recognised in *des Pallières v JP Morgan Chase* (above) at [22]. This is very probably because the point only usually comes up in the consequential orders dealt with at the end of substantive proceedings, and therefore receives less attention than its intricacy or subtlety might perhaps merit. The relevant cases therefore need to be considered with some care.

82. Second, and associated with the above, the undoubted jurisdiction of the Court to make an order in trust proceedings positively prohibiting a trustee from recovering his costs of those proceedings out of the trust estate must, it seems to me, be founded on an invocation of the court's overall inherent supervisory jurisdiction over trusts, rather than being either part of the court's jurisdiction over the costs of proceedings *per se* (since that is clearly discretionary) or the summary determination of an issue of breach of trust, (since that would have had to be fully addressed and determined). The decision in the *Albany* case (above) appears to me to be an illustration of this.
83. Third, whilst I take into account the above point, and the fact that costs orders in legal proceedings are decided according to the principles there applicable, and those are distinct from the principles governing a trustee's legal right to indemnity (see *Armitage v Nurse* (above) at p. 263C), it does seem to me that, in this case, if there were any possibility of conduct which was examined in the course of Guernsey 1 being of sufficient gravity as to suggest that I&B ought to be deprived of any right to indemnity because they had only escaped liability because of the trustee exemption clause, I would expect there to have been some reference to that in the judgments or subsequent orders. As already noted above, there is none. Whilst I do not rest my decision on that point, I find it of reassurance.
84. In summary therefore, it is, in my judgment, correct to proceed on the basis that I&B's previous conduct is simply factual context. What happened, and what they did, may be relevant to deciding the reasonableness of the costs which they show they actually incurred, but it has no significance as regards the availability of I&B's right to indemnity in principle. I make this last qualification because of further arguments raised by F&B at this hearing, which I will refer to later.

(4) The place of "proportionality"

85. At the hearing on 14th and 15th October 2020, Advocate Robison argued on behalf of F&B that a former trustee's right of indemnity, and therefore I&B's right in this case, was subject to limitations imposed by a trustee's duty to act "proportionately" in incurring legal costs, meaning thereby, to have regard to the size of the TDT trust estate, its fragility, and potential insolvency. He submitted that this consideration should apply to the assessment of such a trustee's proper expenses for indemnity purposes both on a general overall level and also as to individual items of expenditure incurred. This was by extension of reasoning from the duty of an incumbent trustee to have regard to the size of a trust fund, as well as of the matters at stake, when choosing and instructing lawyers: see *Landau v Anburn Trustees Ltd* [2007] JLR 250 at [33 (i)]. With the former trustee's expenses being potentially imposed on the trust fund, Advocate Robison argued that the same duty must extend, therefore, even after the trustee had ceased to be trustee. More than 90% of the costs claimed had, he emphasised, been incurred after this point, when I&B were clearly well aware of the TDT's potential to become insolvent.
86. Advocate Wessels submitted that this was an illegitimate attempt to limit the right to indemnity by imposing a qualification to the meaning of Art 26 (2) which was simply not there. As a general point, the concept of "proportionality" was an unjustified importation from the distinction between "standard" and "indemnity" costs orders in the English Civil Procedure Rules, where it was laid down in the rules for taxing (there: "assessing") the former, and produced a potentially less generous basis for a costs award than in the latter, where it was not mentioned. The test with regard to a trustee's indemnity entitlement was

simply as laid down in the JTL, and, once the costs were shown to have been incurred “in connection with” the trust, the test was purely one of the reasonableness (as to both nature and amount) of the trustee’s incurring the actual expenditure which had been incurred.

87. I prefer Advocate Wessels' arguments. The eligibility for indemnity under Art 26 (2) of the JTL is that of costs “*reasonably*” incurred, having regard to all the material circumstances. When an incumbent trustee incurs legal costs in dealing with the administration of the trust, then taking into account the resources of the trust itself, as well as the importance of the matter in question, will clearly be appropriate and reasonable; the trustee is incurring costs on behalf of the estate. However, as I indicated in my *ex tempore* judgment of 15th October 2020, that situation changes when the trustee ceases to be trustee but remains embroiled in litigation arising out of the trust, in which his own interests are at stake, because he then ceases to owe those duties to the trust and a replacement trustee takes them over. He is entitled - always assuming his position is ultimately vindicated as against the trust - to indemnity under Art 26 of the JTL because he has incurred costs, obviously, “*in connection with*” the trust, i.e. through, or as a result of, having been trustee, but the interests which he is entitled to protect because of that connection are his own personal interests, from at least that time, because these are what have been put in jeopardy by the dispute. It follows, and I so decided, that at that point the question of reasonableness of expense falls to be determined by reference only to what costs a reasonable hypothetical *litigant* in the position of the (former) trustee, and spending his own money, would or could (since the benefit of the doubt is accorded to the trustee) think it reasonable to incur. Any other interpretation leads to the extraordinary result that one party to litigation (the former trustee) would operate under the potential restriction of having to limit the expense he incurred in the litigation to what the other party could apparently be expected to afford, or else forgo the indemnity which was his statutory (or contractual) entitlement. That simply cannot be right.
88. There is no conceptual difficulty about the above analysis as regards the principle of a trustee’s indemnity. The point is that, either by contract or under statute, the settlor and/or beneficiaries of the trust have promised that, absent relevant misconduct, the trustee will not be out of pocket from having undertaken his office. That necessarily includes indemnifying him where he has reasonably incurred liabilities such as legal costs to protect himself, consequently on being trustee. Just as there was a very strict principle applied in original trust law that a trustee may not make a profit from his trust, the indemnity implemented the corresponding principle that he should not either (without misconduct) incur any loss. Therefore “reasonable costs, reasonably incurred” must be judged simply with regard to what was done in furtherance of that end; no additional, or extraneous, consideration of “proportionality” to the trust resources enters into it when a trustee is legitimately defending his own position, but entitled to do so at the expense of the trust estate.
89. There are also practical difficulties about applying such a concept to the process of determining the reasonableness of a former trustee’s costs. The indemnity claim relates to the trustees’ costs actually incurred. These are the aggregate of individual bills paid, so that it is these which form the material for examination. There is no room for any separate concept of proportionality to the trust estate at the level of scrutiny of individual bills. One could only apply the notion of “proportionality” by imposing it as a cap on the whole, or particular sections of any expenses being claimed. This flies in the face of a trustee’s indemnity for reasonable costs being supposed to be a “full” indemnity in respect of the bills he has paid. The fixing of any such cap would be arbitrary, a matter of impressionistic or discretionary judgment. That is incompatible with a process for calculating the measure of a “full” indemnity.
90. In my judgment, therefore, proportionality to the size of the trust fund is a concept which applies only as a matter of circumstance, and therefore, in practice, largely - and probably only - in the case where it is a trustee’s legal expenditure on trust administration matters

which is being called into question. Its significance in other contexts can be a matter of evidence, i.e. an indication suggesting that actual claimed expenditure ought to be investigated, but it is only that, rather than affecting the quantum of proper indemnity directly. How this can arise is illustrated by the *Landau* case (*Landau v Anburn Trustees Ltd* [2007] JLR 250, above) in which the Jersey Court (see [33.1]) concluded that a beneficiary had made out a case that an *Alhamrani* assessment of his trustee's costs should be allowed to proceed, because the evidence included the fact that the trustee had claimed to incur £75,000 of legal expenses (in conjunction with £25,000 of its own remuneration) in taking a supposedly 'neutral' part in relatively straightforward administration proceedings with regard to a trust fund of £1Mn.

91. However, the impact of any such a "proportionality" argument really disappears, on an on-going basis, from at least the date when a trustee is removed or retires from office because, obviously, that is when his fiduciary duties to the trust *qua* trustee cease. Moreover, and generally, the whole landscape changes (as Advocate Wessels graphically put it) if and when there is a final judgment vindicating the trustee in any dispute, (as happened in this case on 23rd April 2018 when the Privy Council handed down its absolutely final judgment in favour of I&B) because at that point the trustee *retrospectively* establishes his entitlement to an indemnity for his costs of defending the action. These two easily recognisable events thus have obvious consequences which negate the possible application of arguments for proportionality to the trust fund as an additional aspect of "reasonable costs", but the position may not always be so clear cut. Where, as happened in this case, the trustee retains physical possession of trust assets in support of a claim to a trustee's lien, he obviously retains a duty to protect and preserve those assets even after ceasing to be trustee, and that duty can still properly be described as "fiduciary" because of its origin. Whether that affects any aspect of an indemnity claim by arguably importing a *Landau* (proportionality) consideration will then depend on the facts. It is unlikely to do so where the particular costs under scrutiny have nothing to do with preserving the trust assets retained by the trustee.
92. Of more significance and difficulty is the case where a dispute develops during the trustee's tenure of office, which brings his personal interests into opposition or conflict with those of the trust. It seems to me, however, that, whilst this will have some fact-sensitivity, the same principles will apply. Proportionality to the trust estate does not enter into the matter where the trustee is justifiably engaged in defending his own interests or position from attack by the beneficiaries, even though he still remains trustee. Any fact sensitivity arising from an argument of proportionality to the trust estate could, it seems to me, apply only in an extreme case in that situation. Whether it would apply to the incumbent trustee merely seeking advice about his own position is more difficult, and would depend on the trustee's obligation fairly to balance the interests of all those who are interested in the trust fund, including his own, in deciding (say) whether it was justifiable to seek advice from a major or a more minor firm of advocates or solicitors. The general rules as to indemnifiable costs having to be "reasonable costs" in all the circumstances will still apply there.
93. In summary, a former trustee's right to indemnity in respect of legal expenditure incurred in connection with the trust is not to be cut back by reference to any consideration of "proportionality" to the trust fund if it would otherwise appear to qualify as "reasonable costs, reasonably incurred" having regard to the work done. This would apply even before a trustee has ceased to be a trustee as regards legal costs incurred in legitimately protecting, or successfully defending (and success may be "proved" retrospectively), his own position in connection with the trust. A trustee or former trustee engaged in defending himself against a hostile claim from the trust owes no duty to the trust (apart from the normal duties between hostile litigants) as to how he chooses to conduct his defence, and if successful he is entitled to claim indemnity for his full legal costs if reasonable as such, i.e. as incurred by a litigant-client. Proportionality to the trust fund has its place in relation to the judgment of "reasonable costs, reasonably incurred" where a trustee incurs legal costs in the

administration of the trust, but otherwise, any appearance of “disproportionality” to the estate (as contrasted with: to the work in question) can really only be a pointer to the possibility that the intrinsic reasonableness of particular costs themselves may require more investigation.

(5) Conflict of interest

94. Lastly, I was asked by Advocate Robison to decide a further point of principle with regard to what should have happened in the case where a conflict of interest between the trustee and the trust began to emerge.
95. Relying on comments made by LB Chadwick at a case management hearing in October 2011, to the effect that it was “*very dangerous*” for a solicitor who had been advising trustees as such then to start advising them as individuals against a hostile trust claim, F&B submitted that in such a case the correct thing for the trustees to do was to take separate advice (which could not be charged properly to the trust, at any rate at the time), and if they did not do this, then that would be a breach of trust which would disentitle them from charging the trust with the costs of advice taken for their personal benefit at all.
96. Advocate Robison relied on I&B’s previous conduct in accepting, many years ago, to withdraw certain bills rendered to them by Quinn Emanuel from payment by the TDT because they accepted that these were personal retainers, as evidence that I&B itself accepted this principle. This meant, first, (it was argued) that it should also be applied in relation to Mourant’s and Macfarlanes’ fees now under examination, and second that insofar as I&B had paid bills within which fees for personal advice and advice *qua* Trustee had not been distinguished, they were disentitled from recovering their costs because this was a failure to follow LB Chadwick’s warning, and a breach of duty.
97. I declined to decide this point separately on the grounds that such points were either already covered by the indications I had given with regard to the inter-relationship between a trustee’s right of indemnity and the question of his own personal interest or benefit, discussed above, or that this was a backdoor way of seeking to get to litigate matters which were not of relevance because they had been subsumed in the failure of the TDT’s claims against I&B in Guernsey 1 or their dismissal in Guernsey 3. Any question of alleged conflict of interest and duty would not, in any event, have survived I&B’s removal as Trustees of the TDT, which was as early as 2nd July 2010. Also, I&B’s reaction to LB Chadwick’s comments at the time was very much overtaken by I&B’s later having been ultimately successful in both Guernsey 1 and Guernsey 3. Such issues, insofar as they arose at all, would be very fact-sensitive, and therefore appropriate to be decided in a fact specific context, rather than as a general statement of legal principle, and I was not, in any event, attracted to Advocate Robison’s proposition as being a potential rule, it being too much of a blunt instrument.

Where we are now and the shape of this hearing

98. The above account brings matters to the present Application. This was heard over an 8 day period, between 14th and 23rd December 2020, and is, procedurally, I&B’s Application to strike out the majority F&B’s objections to their claim for indemnity under the directions in Paragraph 14 of the December 2019 order, in respect of 749 of the 961 invoices which they have submitted in support of that claim.
99. There are two stages of this current exercise. The first is a general one of deciding the correct overall approach in considering a trustee’s claim to indemnity, but in particular as applied to legal costs and expenses as these are effectively the whole of I&B’s claim to an

indemnity in this Application. The second is the more detailed one of identifying the logical sequence of steps in the process of then actually quantifying such claims.

100. As regards the latter, although the list of issues below was not formulated or agreed by the parties, I have distilled it from the disputes raised on the Application. In my judgment it identifies the appropriate sequence of questions with regard to quantifying a trustee's indemnity claim. They are, in order:

- (1) What actual sum or sums are being claimed for indemnity purposes by I&B?
(In practice, this has already been answered; it is the charges identified in the relevant invoices.)
- (2) Whether or not these sums were indeed incurred "in connection with" I&B's trusteeship of the TDT, within the true meaning of that phrase;
- (3) Whether there are any grounds for depriving I&B of their indemnity in respect of any such matter(s)/sum(s);
- (4) If not, what was the work for which such payment obligations were incurred?
- (5) Was that legal work reasonably done? i.e. whether it was reasonable to incur legal costs upon it, in principle;
- (6) If so, were the costs actually incurred upon such work incurred in a reasonable amount?

It follows that any particular objection which may be taken to the recoverability of any element of I&B's overall claim will come under one or other of the above Questions (which I will in places refer to by number) although, clearly, objections may be made on different levels, ranging from points which would apply equally to a set of individual elements, enabling groups of such objections to be considered together, down to points which are entirely individual. (There is a further, separate, limitation in this case imposed by the terms of Paragraph 15 of the December 2019 Order, with regard to the subject matter here, but that is a procedural limitation, and not a matter of general principle.) It will also be seen that most of the questions which I have previously decided, and which are mentioned above, are aspects of Question (3).

101. I have found it extremely difficult to construct a sensible, sequential framework for this judgment, because the arguments which have been made approach the dispute from several different angles. I think it sensible, first, to deal with one major central issue between the parties, namely the *Alhamrani* threshold test, referred to above at [19], its place, and how I find it to apply in this case. I will then deal with further points of argument, in a convenient order, to the extent which I think I can properly and usefully do so upon this hearing of this Application.

The *Alhamrani* threshold test and its application

102. As mentioned at the outset, this Application takes the form of a strike out or summary judgment application by I&B, in respect of all objections raised by F&B save the Excepted Objections. The dispute therefore focuses on the *prima facie* strength of the challenges which F&B have made. I&B seek to strike out some objections for particular grounds, which I will deal with separately later, but as to the remainder, I&B say that, upon examination, the objections advanced by F&B are not of sufficient substance to justify any further investigation of those objections and the relevant charges, such that the Court can and should, effectively, give summary judgment on their right to indemnity for these. F&B dispute this; they say that, on the authorities and a proper application of law, their objections are sufficiently "good" to require to be taken forward to a full hearing rather than dismissed

at this stage. This raises a major dispute as to what has been termed the “*Alhamrani* threshold test”, a reference to Paras [56] - [62] of the *Alhamrani* case (above), where the court asked the question:

“If there is no automatic right to taxation, what is the threshold which a beneficiary must surmount before the court will order a taxation?”

103. It is important to note the particular situation which was in issue in the *Alhamrani* case. *Alhamrani* was indeed concerned with a trustee’s reimbursable costs of engagement in legal proceedings, but not quite as here. The background was that there had previously been hostile legal proceedings in which the trustee had been involved (see [61]). However, the immediate dispute itself was about the costs of legal proceedings in which the corporate trustee had participated on a neutral basis, (see [1] of the judgment); it was the trustee’s proper level of expenditure in this latter regard, and the appropriate procedure for determining this, which was considered in the case at [2007] JLR 527. The situation was affected by the fact that the court had made orders in the earlier proceedings for the trustee to recover its costs of such neutral involvement out of the fund and also, in some cases, that these should be taxed (see [17]). There had therefore already been a taxation by the Greffier Substitute, which had been carried out on the “indemnity” basis as applied in court ordered costs, and this had produced a scaling down of the trustee’s costs expended from about £60,000 to £15,000, without any suggestion of unreasonable conduct by the trustee (see [14]).
104. This result (i.e., the costs taxation) had been appealed. The appeals were therefore concerned with the inter-relationship (or more accurately the separateness) of costs orders under Rules of Court and a trustee’s right of indemnity under the general law. On the first level appeal, the Bailiff had held that the Rules of Court as to indemnity costs did not apply and that there would not normally be any need for the taxation of a trustee’s costs, but that as a taxation had been ordered, the Greffier should conduct it along lines which respected the common law rule that a trustee, acting reasonably, was entitled to a “full indemnity” out of the trust fund, rather than on the principles of the indemnity costs Rules. He also opined that where (as in that case) the trustee had acted reasonably, then to disallow any item was a “high hurdle” (see [18]). Subsequent hearings, and the second level appeal to the JCA, had therefore been concerned with the question whether it was correct that there was no automatic right for a beneficiary to have a taxation (i.e. a legal assessment) of a trustee’s costs of legal proceedings, and if not, what would trigger such a right. This therefore centred on the “threshold” point above. The last issue was - unsurprisingly in the light of the confusion identified - what would be the appropriate procedure for requesting and conducting such an assessment (see [3]), and the court therefore focused, very much, on how such an issue would arise in practice.
105. The Court of Appeal confirmed that the ordering of a taxation or assessment of a trustee’s recoverable expenditure was an invocation of the court’s supervisory jurisdiction over trusts, whether general or statutory, in that respect (see [37]). It also approved implicitly the proposition that the ultimate decision to deprive a trustee of costs which he had incurred, on the grounds that such costs had been unreasonably incurred, was appropriately stated to be a “high hurdle” (see [62]). However, the JCA disapproved dicta in the decisions below, (and also applied by Birt DB in *Landau v Anburn Trustees Ltd No 6* : (2007) JLR 250), which had been to the effect that the test for going to a full hearing with regard to the issue of disallowance was, in each case, whether there were “*real grounds for concern about the propriety of fees and expenses sought to be charged*” or whether there was a “*real cause for concern that something had gone wrong*” (see [21], [27], [41] and [57]). The JCA considered that this was setting the test too high. Its ultimate conclusion is contained in [60] of the judgment. Vos JA said:

*“Before leaving the question of threshold, I should say that as a matter of principle it seems to me that the Royal Court should be prepared to entertain any allegation that could properly be the subject of proceedings. If, for example, the allegation made can be seen without investigation to be without foundation, and would therefore in any other proceedings be struck out as disclosing no reasonable cause of action, then the court will not allow the beneficiaries’ complaints to be progressed, but **if the allegation is not obviously bad and requires investigation**, I do not believe that the court can or should erect an artificial threshold for the beneficiary to overcome before his allegations will be determined by the court.”* (emphasis added)

106. By way of explanation, Vos JA continued in [61] to give the example, apparently drawn from the case itself, that an allegation that the trustee had (innocently) confused the costs incurred in the hostile part of the litigation with its costs incurred as a neutral trustee could not be struck out, and indeed it was not being suggested (in the case) that it should be, although no doubt it would be contested. He also took the view that such an issue was most sensibly to be resolved by a “taxation” (i.e. assessment) by the Greffier, and endorsed the finding below that:

“If the costs or expenses are to be disallowed in relation to a specific item, it should be on the basis that the [greffier] is satisfied that [the trustee] was acting unreasonably and that is a high hurdle”.

But he concluded, at [62] that the “high hurdle” test was applicable to the resolution of the issue, but not to the threshold of entitlement to have it resolved, commenting:

“The only threshold is the one equivalent to a striking out.”

107. He then reiterated that once a challenge was made, costs and expenses would be disallowed only if they are shown clearly to have been unreasonably incurred, that being the “high hurdle”, and he added, significantly

“...and the trustee will have the benefit of any doubt on that issue.”

108. Advocate Robison relies on the passage emphasised in the citation from [60] above namely the express holding that the “only” threshold is that of striking out, and also on the rejection of the higher test of “real cause for concern”. He argues, therefore, that once F&B articulate an objection to any particular bill (or part of it) put forward by I&B, then unless that objection is unsustainable on its face, it is “not obviously bad” and thus “requires investigation”. There is, he submits, no higher threshold to be erected, and F&B are entitled to have those objections determined by the Court; they cannot be struck out and summary judgment given.

109. Advocate Wessels argues that this is, in fact, to lower too far the threshold as it ought to be applied. All that is required to pass the test as contended for by Advocate Robison is to raise an expressible doubt - but since the benefit of doubt is given to the trustee in this situation, just raising such a doubt is insufficient. Applying the threshold test correctly as it is logically laid down, means that the case put forward must show a sufficiently arguable real prospect that the objection will be made out without any reasonable doubt, not merely that it can possibly be made out.

Discussion

110. I considered *Alhamrani* in general terms in the judgment which I gave on 30th April 2020, when asked to give guidance about the procedure to be adopted for determining the

remaining disputes in the matter. However, the further arguments in this case make it appropriate to consider this case and its implications in more detail.

111. I derive the following points from *Alhamrani*. First, *Alhamrani* was focusing on the test for disallowing litigation costs claimed by a neutral incumbent trustee. I note that it also derived the threshold test from a comparison with the threshold, as the court perceived it to arise, in relation to a dispute about the reasonableness of a trustee's non-litigation costs (see [49] - 51)), holding that, as a matter of law, the test for the court's intervention in the case of a trustee's neutral litigation costs must be the same [53]. By definition, a "neutral" trustee is an incumbent trustee. I am not dealing, for the most part, with litigation costs claimed by an incumbent trustee, but with litigation costs incurred by a former trustee who has successfully defended itself against claims made by the trust. I accept that this cannot alter the general description of the standard of the threshold test, but this change of circumstance is appropriately taken into account in applying it.
112. Second, the test of an objection's being allowed to proceed is said to be "*not obviously bad and requires investigation*". There are three possible interpretations of this. The first is that the second limb is tautologous, merely reiterating the first. The second is that there is an implicit "therefore" between the two limbs which comes to much the same thing. On either of those interpretations, an objection which is simply expressed capably and without logical flaw as a matter of language is sufficient to require the objection to be fully litigated. The third interpretation is that the two limbs express two separate requirements. On that basis, it is insufficient merely not to be "obviously bad"; the objection must also pass a test of apparently "requiring investigation".
113. Third, whilst *Alhamrani* lays down that the threshold test is to be equated with that of a strike out, I do not interpret that as being rigidly limited to a strike out for disclosing no reasonable cause of action on the face of the allegation. Just because a form of objection is capable of being articulated without obvious logical or other flaw, does not necessarily mean that it should be allowed to go forward. Whilst an application can be made to strike out a claim (or defence) for disclosing no reasonable cause of action or defence: see RCCR r 52 (2) (a), the court may also grant summary judgment to a party on the grounds that the other party has "*no real prospect of success*" in propounding or defending (respectively) the claim or issue, and there is no other compelling reason why there ought to be a trial: see RCCR r 19 (2).
114. The effect of success upon either type of application (i.e. striking out or summary judgment) is the same, namely judgment in favour of the applicant. The difference - certainly in earlier times and under the English equivalents of these rules - was that in the former case (striking out for disclosing no reasonable cause of action) no extraneous evidence was allowed and the strike out had to be justified on the form of the pleading itself, but in the latter case (summary judgment), evidence was admissible to show the asserted hopelessness of the opposition's case. I am not sure that this distinction is so rigidly adhered to these days.
115. The fully detailed scope of the approach of this court to claims to summary judgment on the grounds of the opposing case having no real prospect of success was described by DB McMahon, as he then was, in his judgment in Guernsey 3: *Rawlinson & Hunter Trustees SA v ITG Ltd and another* (11th November 2015) Royal Court Judgment 52/2015. It is distilled from the approach of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), with further elaboration. It is therefore quite lengthy and intricate. I am aware of the full text, but I use the central description of "*no real prospect of success*" as a convenient shorthand reference.
116. The "*no real prospect of success*" test has been interpreted to mean that the prospects do not have to be as great as 50%, but that there must be a "real" as contrasted with a "fanciful" prospect of success. The further requirement of "*no other compelling reason why there*

ought to be a trial” provides a safety net for cases which may appear somewhat hopeless, but where the court is simply not satisfied, in all the circumstances, that justice will fairly be served by the applicant obtaining judgment without having to prove his case at a trial.

117. In *Alhamrani* the court stressed that an objection to a trustee’s costs could be taken informally, if appropriate; no specific procedure was required or to be laid down. By the same token, I do not consider that the statement “*the only threshold is the one equivalent to a striking out*” (see [62]) was intended to limit consideration to that of striking out for disclosing no reasonable cause of action, even though that was the example given at [60]. In my judgment it extends also to the “*equivalent*” test of “*standing no real prospect of success*”, being the test for granting, in effect, summary judgment.
118. Fourth, in applying any threshold as a gateway with regard to striking out, it must be legitimate to look at the ultimate position which the responsive party (here F&B and their objections) would have to prove in order to succeed. Once I&B have proved that they did in fact, incur legal expenditure, and that they did, in fact, incur that expenditure on proceedings in Guernsey 1 or Guernsey 3 (or, indeed, any other aspect of their trusteeship, although those which are not within the terms of Paragraph 14 of the December 2019 Order are not within the scope of this particular Application), then it is for F&B to prove that those actual costs incurred were either unreasonably incurred (on the particular matter) or unreasonable in amount (for the particular matter). This gives rise to two further point.
119. Fifth (therefore) *Alhamrani* emphasises, as do all the authorities, that a trustee’s indemnity is in principle an entitlement to a “*full*” indemnity for his costs incurred in connection with his trust (always subject to reasonableness). It was said at [39] that:

“As a matter of law 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 indemnity, 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.”

I note the words “*on behalf of the trust*” in the second sentence, which was obviously appropriate to the facts of *Ahamrani*, but the same policy principle applies to the indemnity afforded to a trustee or former trustee for expenses incurred because of, (i.e. “in connection with”) the trust, and as this second sentence is clearly intended to be a restatement of the first sentence, I do not read the use of these words as having been intended to connote some limiting distinction.

120. In other words, and subject to arguments as to misallocation of costs, or as to misconduct, which are not under consideration at this point, the trustee’s entitlement starts from the proposition that he will recover all his expenditure, and it is for the objector to establish a good argument to reduce the recoverable amount on the grounds of unreasonableness. Therefore, whilst the test for unreasonableness may be stated in the same words as are applied to a taxation of costs under an indemnity costs order, the test itself is not the same. Indemnity costs orders have nothing to do with the principles of a trustee indemnity. They are not a full indemnity. They are part of the system of “costs shifting” which is peculiar to costs incurred in court proceedings, and which is laid down by statute. “Indemnity” costs are a convenient label, but largely a misnomer. An indemnity costs order simply provides a more generous basis for a successful party to recover costs against an unsuccessful party than does a “standard” or “recoverable” basis order. The point of a costs taxation in court is to determine the “right” figure for a successful party to recover towards his costs of success, in line with the procedural policy of costs shifting, but the standards set and the approach adopted by this policy do not reflect a “full” indemnity. Thus, whilst the same rubric of “reasonable costs, reasonably incurred” is applied, its content and effect differ because of the

different context. It is perfectly possible for a trustee reasonably to have incurred all the costs he has in fact incurred, but that will rarely, if ever, be the result on an indemnity costs taxation.

121. Sixth, and following on from this, the objective of an *Alhamrani* assessment of a trustee's proper indemnity for legal costs is not the same as that of a court costs taxation; it is not an exercise in finding the "right" level of costs for a particular matter or matters which the claiming party "ought" to be permitted to recover. The exercise is that of deciding whether the costs which the trustee has in fact incurred are reasonable (or more accurately: not unreasonable) costs for the trustee to have incurred in all the circumstances, and, importantly any doubt on that question is decided in favour of the trustee: see *Alhamrani* at [66] (iv) and (v), and note at [66] (iv):

"It is only if something falls outside the band of reasonable actions that it should be disallowed."

Thus, in my judgment, the effect of this is that it is only if the costs in question fall, on an objective view, outside the range of costs which it appears possible that a hypothetical litigant, in the actual position of the trustee or former trustee in all the circumstances, could reasonably have incurred, that the costs in question will be disallowed or cut down. With the benefit of the doubt being allowed to the trustee, the effect is that this will only happen where the costs are found beyond reasonable doubt to be unreasonably incurred or to be too high.

Decision

122. Therefore, when considering whether any particular objection made by the paying party (F&B) passes the threshold test, the question becomes, in my judgment: does the objection which has been raised suggest that there is a real (rather than fanciful) prospect of F&B's establishing that the costs in question were, *without the benefit of any doubt* incurred unreasonably by the trustee? Put another way: is the objection raised by F&B obviously bad, or does it really require further investigation, having regard to the fact that F&B will ultimately have to establish beyond doubt that the costs incurred were unreasonably incurred or unreasonable in amount? As a matter of practical effect, F&B do have to show only that it is "arguable" that their asserted objection can be made out (as I accepted in my judgment of 30th April 2020), but that arguability has to be evaluated in the context that the objection will ultimately have to be proved, in effect, beyond reasonable doubt.
123. This is not, I emphasise, mistakenly to apply the "high hurdle" to the threshold test itself; it is to apply the ordinary threshold test to the actual parameters for the "cause of action" which F&B would be required to establish at a trial. It does not amount to applying an initial hurdle of "real concern" that the costs were too high, although I do accept that the effect, in the end may look somewhat similar. It respects and applies the test laid down by the Jersey Court of Appeal, but recognises how that test must practically and realistically apply to the case which would have to be proved, in all the circumstances.
124. Of course, whilst the threshold test does not itself require matters raising "deep concern" that the costs in question are unreasonable to be shown, that point is not irrelevant. If and insofar as any matter does, or could, raise such deep concerns that "something has gone wrong", that will be very material in deciding whether the arguability of achieving the ultimately required high standard of proof of unreasonableness has been made out.
125. I should also record the following further points. Advocate Robison submitted that it was not necessary for F&B to prove that the challenged expenditure was incurred in breach of trust. He relied on the fact that in *Alhamrani* the court dealt only with objections as to

reasonableness, whilst referring to breaches of trust as a different hypothetical case which would properly be referred, by the Greffier, to the Royal Court (see above). The proposition may be correct, but I do not find it of much help. First, it seems to me that for an incumbent trustee to incur unreasonable costs on trust administration matters (such as appearing neutrally in proceedings) must, logically, itself be a breach of trust, in any event. Second, insofar as the indemnity relates to expenditure incurred after the trustee left office, there is no concept of breach of trust to apply. The problematic case is where a trustee, whilst in office, expends money on legal advice or representation with regard to its own position. Where that expenditure relates to a matter which is subsequently litigated, then the outcome of the litigation may well affect the position, just as it retrospectively affects the position as regards expenditure spent by a former trustee on defending himself, once he proves successful. As I have said previously, the question what is reasonable expenditure for which the trustee is entitled to claim reimbursement where there has been no legal determination to decide the matter one way or the other in principle will be very highly fact sensitive, and the concept of breach of trust is not particularly helpful. In all cases, the test of eligibility for indemnity is that of reasonable expenditure, reasonably incurred, on qualifying matters. Whether or not ineligible expenditure can also be classified as having been made in breach of trust adds nothing.

126. Advocate Wessels' point in this context was, rather, that, if read properly, *Alhamrani* shows (at [60]) that to qualify as sufficiently cogent, an objection has to be capable of being “*the subject of proceedings*”, such that vague allegations of “inadequate particularisation” of costs incurred would not surmount the hurdle of disclosing an arguable objection. Advocate Robison’s riposte to that point is that the particularisation is inadequate because I&B has not chosen, nor been compelled, to provide further detail, beyond the narratives behind the bills and the information which I have referred to above, which would enable the objection to be properly evaluated and formulated as “the subject of proceedings”. This dispute, he urges, is properly considered in conjunction with all the facts. I do not need to make any ruling on this point, because it is dealt with later, at the level of the objections themselves.
127. Finally, and importantly, I remind myself that it is with regard to matters going to “reasonable costs, reasonably incurred” (i.e. broadly Questions (5) and (6) above) that the trustee gets the benefit of the doubt, and hence the application of the “high hurdle” which has the practical effect on the threshold test which I have been discussing. These were the matters which were being focused on in *Alhamrani*. Where the issue goes to a factor affecting the availability of the right to indemnity *at all*, that issue would be decided on balance of probability, and the threshold test for strike out/summary judgment will therefore apply in the ordinary way. This is because the special *Alhamrani* threshold test under discussion is a specific application of the more general threshold test, applied to particular issues where the claimant is (unusually) deemed to have the benefit of the doubt.

The shape of further arguments - Overview

128. The evidence of I&B’s claimed expenditure takes the form of 749 (still in dispute) Invoices from Mourant and from Macfarlanes, each of which is then supported by a print out (the “**narrative**”) listing the individual elements which go to make up such bills, by fee-earner, work description and time spent, with additional disbursements, where claimed. In the case of Macfarlanes, these have included English counsels’ fees, and their fee notes have been provided. Not unnaturally, as this is a retrospective exercise, the Advocates’/solicitors’ invoices have not neatly related to all, and only, work on the particular matters of the Guernsey 1 and Guernsey 3 litigation which are the nominal subject matter of this Application. Time records for fee invoicing purposes were allocated in whatever way seemed to the firms in question to be appropriate or convenient at the time, and this has not fitted directly with the later analysis now being undertaken. The Invoices and/or narratives

have therefore been redacted, in places, to remove some material relating to charges which are not being claimed here. In other cases, the method of allocation and the relation of narratives to Invoice figures, especially in the case of Macfarlanes' bills, have had to be explained in evidence.

129. The basic pattern of the materials before the court is that in respect of each relevant Invoice, F&B have produced a sheet, usually a single page, identifying the Invoice by a specific "Issue" number, and setting out F&B's objections to that particular Invoice under the each of the three general categories already mentioned, namely "Insufficient Particularity", "Unreasonably Incurred" and "Unreasonable in Amount". They also maintain certain arguments of law and/or causation, the effect of which would be to invalidate certain sections of I&B's claim entirely, and the impact of those as an answer to this strike out/summary judgment application can and will have to be considered separately. By and large, though, they argue that so long as their objections are not struck out - as they say they should not be - then in order to give proper consideration to their objections the Court (or other final tribunal) is going to have to go through each of these remaining Invoices and consider and determine their objections to them on the basis of whatever evidence is, or ought through future directions to be, made available to do this, and there is no short cut for such an approach. They do accept that there are some objections with a common theme as to particular aspects of the charges, such that, as I think they would accept, my dealing with the theme objection may well assist in narrowing the basis of valid objections, but ultimately, it seems to me, they adopt the approach that there is "no shortcut through the woods", and an exercise similar to the conduct of a party and party taxation is necessary, even if the principles being applied might be a bit different. I did rather get the impression, however, that this conclusion was not at all unwelcome.
130. Advocate Wessels' case on this particular hearing is, bluntly that as regards all but a handful of the objections, the court can adjudicate on what he termed their "viability" (meaning thereby, whether they surmounted the necessary threshold) in a compendious way; the Court should not be diverted, as he submitted was the objective of F&B, into pushing the process off long into the future, and making it virtually unmanageable, by requiring the Court to undertake a long and very expensive line by line examination of the 750 or so bills, with many and multiple entries, which remained within F&B's total of challenged bills.
131. To assist the court to manage the evidential materials for the purpose of their strike out/summary judgment Application, I&B, through Advocate Wessels, produced a Master Schedule, shortly before this hearing, listing all the 961 Invoices by Issue Number and with the references in I&B's own evidence. There are five sections to the Schedule, listing, respectively,
- (i) Mourant's Invoices (first main section),
 - (ii) Macfarlanes' Invoices (second main section),
 - (iii) specific Macfarlanes' "Receivership Costs",
 - (iv) I&B's remuneration schedule, and lastly
 - (v) a handful of "Further invoices" which had been produced later than the original bulk production.

The Schedule then tabulated, under column headings, matters which could be identified as either the self-same, or a common theme, objection, so that the validity of these objections could be considered by column *en bloc*. The objections to a handful of invoices were "uncharacterised" by this methodology, and were allocated their own column and dealt with separately and individually, and a further column identified the accepted Excepted Objections as previously mentioned. The Invoices as to which no objection was made naturally emerged as those with no column entries. Insofar, therefore, as column entries could be expunged as a result of I&B's arguments being accepted, it was intended to bring

yet more Invoices into this last state. It was also emphasised that by this method, where several separately identifiable objections were made in relation to a single Invoice, the number going forward with regard to that Invoice would still, also, be reduced.

132. F&B objected to the production of this Schedule, but as this is I&B's Application, I&B are entitled to produce whatever written aids their Advocate thinks helpful for his presentation. I accept that it was not an agreed schedule, and I note that F&B consider it to be "over-reductive"; they are approaching this whole matter on the basis that nothing much short of individual examination and explanation of all charges listed on each invoice is what is required. However, it did not seem to me that F&B took any fundamental objection to the actual classifications made in the Schedule in practice, or drew attention to any mistakes. It was a useful document, and it provides convenient topics for consideration of I&B's case that at least some of F&B's stated objections should be struck out at this stage.
133. However, beyond dealing with the case advanced by I&B on this basis, F&B made other arguments which went not so much to the unreasonableness of charges claimed under particular invoices (Questions (4), (5) and (6) identified in [100] above), but were more generic, going to the basic questions of the availability of indemnity at all in relation to matters in identified descriptions or categories i.e. (Questions (2) and (3)). These latter arguments only emerged in clear form at the hearing itself, in what was described by Advocate Robison as a "Speaking Note" which he was proposing to use, and had sent to Mourant on the Friday evening before the Monday start of the hearing, and which he distributed in court for convenience. They were apparently the arguments which I had refused to admit in the guise of affidavit "evidence" from Ms Whitford, but which I had said could be made as a matter of submission at any future hearing, provided that references were to documents which were, in themselves, admissible evidence. It would have been more convenient for the disposal of the current hearing if the usual orderly form of evidence bundles and production of skeleton arguments in advance had been adhered to, but we are where we are.
134. Although I appreciate that this is I&B's application, I find it most convenient to deal first with these more recent, but generic, arguments of F&B as to why their challenges on these grounds get over the threshold of not being obviously bad, such that the fee charges to which they relate should be allowed to go forward. I will then move to the way in which Advocate Wessels advances I&B's Application as to both general and more specific arguments, and finally deal with any points still remaining. In the discussion which follows, I will, for convenience, use "the TDT" as a shorthand reference to the Trustees of the TDT at the relevant time, which will therefore be either GTC (then known as Rawlinson & Hunter) or F&B.

F&B's objections to generic ("block") aspects of I&B's claim to indemnity

135. At the hearing in October 2020 I decided the specific point that where a trustee successfully defends proceedings brought on behalf of the trust against him, then he is entitled, under his indemnity, to recover his reasonable costs of defending himself, and that therefore I&B were not, as a matter of principle, to be deprived of their indemnity on the basis of an argument that they had still been negligent (even if not grossly negligent) and that this negligence amounted to misconduct which must therefore deprive them of their indemnity. This principle can be satisfactorily analysed as one of causation as I have held. It is, however, also driven by the strength, in favour of the trustee, of the underlying policy consideration of protecting ordinary reasonable trustees from being financially disadvantaged through having been trustees.
136. At this hearing whilst necessarily having to accept that decision, F&B has therefore now made several arguments seeking to narrow, or distinguish, or even to use, the principle of

that decision to argue that I&B could and should still be deprived of their indemnity in specific, more limited, identifiable respects, and that these are arguments which cannot be dismissed summarily in respect of the relevant Invoices. I will now consider these further arguments.

(a) Costs of advice obtained by I&B from Mourant and Macfarlanes under personal retainers

137. This issue goes to Question (2), above. In other words, it is really an “allocation” challenge, even if (as usual) it is presented in terms of criticising I&B’s conduct.
138. At the time of the BVI and the English Somerfield Proceedings, whilst I&B were still Trustees of the TDT, I&B had instructed Quinn Emanuel (English lawyers) both to act on behalf of the TDT in defending those proceedings and also to give personal advice to I&B as to their own position as trustees. It had emerged, and been accepted by I&B, that certain charges from Quinn Emanuel which were properly addressed to I&B personally had in fact been billed to the TDT and paid out of the TDT assets. Quinn Emanuel had investigated and found that £128,901 was wrongly so paid. I&B therefore paid this sum back to the TDT on 14th February 2011.
139. Advocate Robison submitted that although Mourant and Macfarlanes had also admittedly been instructed in this dual capacity by I&B, there had never been any similar reconciliation conducted by Mourant and Macfarlanes. This was despite the fact that at least the former investigation was stated to be being conducted in an affidavit of Mr Luis Gonzalez made on behalf of I&B on 14th September 2011.
140. Advocate Robison therefore submitted that the Court could (and should) infer that there could well be charges in relation to I&B’s personal retainers improperly included within the costs now being claimed by I&B in these proceedings, and that the principle that these could not be recovered had been accepted in the evidence of Mr Gonzalez, and in a later 2nd Affidavit of Mr Pritchard-Jones of Macfarlanes of 25th August 2017, referring to this earlier incident.
141. He submitted that the amounts could be significant. His team had examined the narratives behind Invoices dated between 27th July 2009 and 4th June 2010, rendered by Mourant and to some extent (but less) Macfarlanes and had compared these with the narratives of the invoices from Quinns (which F&B exhibited in their latest electronic bundle) which had been accepted to be for work for I&B personally. They had identified a set of 15 charges, totaling £25,250, where the narrative showed clear correspondence with that work (for example by being mutual telephone conversations, or common attendance at meetings), and a further set of 30 charges, totalling £35,984.60 where such correspondence could be the case.
142. Somewhat bizarrely, they went further, and listed work which Quinns had accepted as being personal but which did *not* show any corresponding charge in Mourant's or Macfarlanes’ Invoices. Obviously, therefore, no such personal charges were in fact being included by Mourant or Macfarlanes in these respects, but Advocate Robison invited the court to treat that fact as evidence supporting the likelihood that the Mourant and Macfarlanes’ Invoices which had been rendered might inaccurately contain charges for personal work. I entirely fail to see the logic of this contention, which strikes me as disconcertingly extreme.
143. Advocate Robison relied on two further facts in support of the cogency of the challenge raised in this regard. The first was the fact, already mentioned, that after having included them in their claim for indemnity, I&B had recently found that 13 of the early invoices dated between September 2008 and September 2009 had in fact been paid out of the assets of the TDT whilst they held them. I was told that the total of these payments was some

£553,469.53. From the relevant Invoices, the figure looked to me to be more around £338,000, but there may have been further adjustments on account of previous payments from other sources such as the TFT, or under previous costs orders. The precise detail does not matter for present purposes. The point is that this therefore cast doubt, Advocate Robison submitted, on the reliability of any evidence where the court was invited to take I&B's word. The recent production of extra invoices only late in the proceedings, on 28th July 2020, supported this want of reliability.

144. However, F&B had also carried out an analysis of invoices rendered by Quinn Emanuel, from which they had been able to identify, from the narrative on those invoices and in comparison with the narratives on Mourant/Macfarlanes' invoices of the same period, corresponding pieces of work which either clearly did (according to the detail), or which might (where the detail was less clear) include work on matters personal to I&B, which (it was submitted) would therefore not be recoverable. Advocate Robison stated that the identified fee charges in these two categories amounted to £66,701, although the total of the two categories in his Schedule only appeared to amount to £61,234.90. They had also carried out the exercise referred to above on invoices rendered by Quinn Emanuel which one would have expected (he submitted) to show corresponding charges from Mourant or Macfarlanes, but where there was none. This was relied on as supporting the unreliability of the written records, and hence showing a basis for real doubt as to possible mischarging.

Discussion

145. This is a strike out/summary judgment application, and no question of reasonableness of costs enters into this topic, so the ordinary test of an objection which is "not obviously bad and requires investigation" applies with regard to the fact that eventual proof of the allegation would be required only on balance of probabilities. The challenge must be examined on that basis.
146. However, on examination, both the ambit and consequences of this objection seem to me to be more limited than Advocate Robison urges. First, and most importantly, this argument can only apply to the time when I&B were Trustees of the TDT. After they were removed, any work which was instructed by them was *ex hypothesi* instructed in their personal capacity, and as it was all occasioned by their having been Trustees of the TDT (leaving aside any instances, dealt with elsewhere, where there is reference to any possible other capacity or matter), it was all validated in principle for indemnity purposes by the Privy Council's decision in April 2018. This imposes an end time limit of 2nd July 2010 on any challenge in this respect, in any event.
147. Second, though, this point seems to me to have been asserted against I&B expressly in support of a claim for damages or an account for breach of trust (as it would in principle be) in Guernsey 3 - see Paragraph 19(b) of the Cause in that case - and to have been expressly denied, in Paragraph 115 of the pleaded Defences, in which I&B

"admit that due to an oversight some legal advice relating to their personal position in relation to their trusteeship of the TDT was paid for out of the trust assets. The former Trustees have taken steps to account for all such costs".

148. Both these pleadings were served in 2013, and thus at least 18 months after the affidavit of Mr Gonzales acknowledged the mistaken allocation, confirmed (as was the case) that it had been rectified in the case of Quinn Emanuel, and stated that the position with regard to Mourant's fees was being investigated. Paragraph 19 of the Cause mentioned only Quinn Emanuel and Mourant as having made such improper charges, and did not refer at all to Macfarlanes, even though the present allegation seeks to include claims as to their charges as

well. It is to be noted, though, that the denial of any such outstanding improper charges in Paragraph 115 was made by I&B on an entirely general basis.

149. Subsequently, the whole claim in Guernsey 3 was dismissed or struck out for either disclosing no reasonable cause of action, or being an abuse of process because it could and should have been brought within the counterclaim proceedings in Guernsey 1. I infer that, as to this allegation, it was the latter. But on either basis, in my judgment, the issue which is sought to be raised here as the basis for the contention that I&B should be deprived of any indemnity in such regard, is whether (some of) these charges had been charged to the TDT in breach of trust, and that issue was subsumed in and adjudicated upon in the Guernsey 3 dismissal/strike out, which effectively held that any issue as to improper charging to the TDT of legal fees incurred personally by I&B should have been raised in Guernsey 1 - as it clearly could have been by the time of the counterclaim raised by GTC in July 2011.

Decision

150. To raise it now as an objection to I&B's indemnity in respect of that self-same legal expenditure is a collateral attack on the decision in Guernsey 3. I conclude, therefore, that it is not open to F&B to make such challenge, and that I can and should strike it out.

(b) Costs incurred in defending and/or settling the BVI Somerfield Proceedings

151. This challenge is a Question (3) challenge, i.e. an assertion that I&B can and should be deprived of their indemnity in respect of some identifiable aspect of their costs claim because of their wrongful or unreasonable conduct. This is conveniently called a "misconduct" challenge. This particular misconduct challenge is directed at I&B's claim to indemnity in respect of its costs in connection with the BVI Somerfield Proceedings, which took place in 2008-10 ("**the BVI Somerfield Costs**").
152. I have found it extremely difficult to disentangle this argument. The points made are necessarily somewhat intricate, and their clarity has been hampered by lack of precision of language, and in particular failure to distinguish between the BVI Somerfield Proceedings and the English Somerfield Proceedings when this distinction is highly material. First, while this section in Advocate Robison's Speaking Note beginning at para 27 is headed "*Costs incurred in settling the BVI Proceedings*" (emphasis added), this becomes extended, in the narrative of the section, to the costs of "defending" proceedings, - but this then appears to proceed to refer to the English proceedings. In para 51, the intended extension is stated to be to the costs of defending the "Somerfield Proceedings" without reference to "BVI". In Paragraphs 57 and 58, however, it appears that this general reference was intended to be a reference to the "Somerfield BVI Proceedings". The confusion is compounded by the fact that the settlement of which the TDT Trustees (whether GTC or F&B) have complained has always appeared, from the detail given, to relate to the *English* Somerfield Proceedings, effected on 14th June 2010, on the eve of the potential English trial. By that time, the original BVI proceedings had long been stayed, (since September 2009) when it became clear that the essence of the dispute between the combatant factions (the Kaupthing camp and the TDT camp) was whether there had been a breach of the Framework Agreement, and that Agreement contained an English law clause. The complaint made in Guernsey 3 only expressly complained at the conduct and settlement of the *English* Somerfield Proceedings because it defined this set of proceedings as the "Somerfield Litigation" in Paragraph 39 of the Cause, and made its complaints by reference to this defined term. The term "Somerfield Proceedings" was not used. It referred to the *BVI* Somerfield Proceedings in Paragraph 38, but these, therefore, were merely a recited fact.
153. The argument made by Advocate Robison at this hearing appeared in Para 38 of his Speaking Note, in which it is submitted that

“...in Guernsey 3 the Court was only asked to consider whether I&B’s conduct of and subsequent settlement of the Somerfield Proceedings [sic] had been grossly negligent. F&B are not seeking to “go behind” that decision. Nonetheless it remains the case that the cost of I&B’s defence and subsequent settlement of the Somerfield Proceedings are included among I&B’s Proof of Debt; and it is therefore open to this Court to consider whether I&B’s defence and settlement costs of the BVI Proceedings (but not their defence costs in the G3 claim) were reasonably incurred” (emphasis added).

154. I do not find the last sentence at all clear. It is clear that in upholding the dismissal/striking out of the cause in Guernsey 3, the Privy Council was endorsing the proposition that the complaints made in Guernsey 3 were either unsubstantiable or could and should have been raised in Guernsey 1, presumably as part of the Counterclaim brought by the TDT through GTC, and it was therefore simply too late (and an abuse) to seek to litigate them. I infer that what is being said by Advocate Robison in this argument is that there is a distinction between the two sets of proceedings (BVI and English) and also between the conduct and the settlement of each, and that whilst the successful application for dismissal/strike out of the Guernsey 3 proceedings did (it was accepted) mean that F&B could not now challenge I&B’s right to an indemnity in respect of the costs of defending and settling the English Somerfield Proceedings, (those criticisms having been the subject matter of the Guernsey 3 action), that strike out decision did not encompass the BVI Somerfield Proceedings, so that a misconduct challenge remains available to F&B in respect of the indemnity claimed by I&B for the costs of defence and settlement of the latter.

Discussion (1)

155. First, though, the settlement of which the TDT complained in Guernsey 3, that of 14th June 2010, in fact settled the BVI Somerfield Proceedings as well as the English Somerfield Proceedings, as the text of the Agreement shows. Given that the BVI proceedings were stayed, I find it difficult to see how there could realistically be any separately identifiable costs of settling the BVI Proceedings, as contrasted with and separated from, the English proceedings.
156. Second, the BVI Somerfield Proceedings were commenced on 2nd December 2008, and the English Somerfield Proceedings were commenced on 27th February 2009. I am told that the BVI proceedings were stayed from at least September 2009, but whilst this may have been the formal position, nothing in F&B’s detailed chronology suggests any substantive step being taken in those proceedings after February 2009. It follows that any costs incurred in the defence of the BVI Somerfield Proceedings must have been incurred between December 2008 and February 2009 (and indeed, the entries in F&B’s own chronology mentions only the TDT Defence and Counterclaim in those proceedings being served on 21st January 2009 and evidence from Mr Clifford of I&B being given in the BVI Somerfield Proceedings on 12th and 24th February 2009.) There are no invoices from Macfarlanes in this period, and only four from Mourant, (Issues 5 - 8) - but those four are amongst those which have been found to have been paid, and are therefore no longer the subject of this Application.

Decision (1)

157. It follows, in my judgment, that I both can and should refuse to allow these challenges to go forward on the basis that they have no potential substance.

Discussion (2)

158. However, in case this is wrong, or contestable on the facts, I turn to look at the analytical arguments. As indicated, Advocate Robison submits that the BVI Somerfield Costs do not fall within the actual subject matter of the Cause in Guernsey 3 which was summarily dismissed or struck out for being an abuse, and he is therefore entitled to challenge I&B's right to indemnity in respect of those under a blanket "misconduct" challenge. Thus, his argument has to be aimed at the costs incurred in the BVI proceedings. He would have to argue either that the very incurring of these was a breach of trust, or that they, or at least some part of them, ought not to have been incurred because they could reasonably have been avoided, and it was some "misconduct" by I&B which caused them not to be avoided.
159. However, in explaining his argument as to how the foregoing principle applied, Advocate Robison's case turned out to rest, not on the nature of such costs themselves (as I expected), but on the fact that I&B had not obtained the court's blessing (i.e. *Public Trustee v Cooper* relief: see *Public Trustee v Cooper* [2001] WTLR 901), or *Beddoe* relief (*Re Beddoe* [1893] 1 Ch 547), in respect of either the TDT transactions, or defending and counterclaiming in the BVI Somerfield Proceedings (or the English Somerfield ones, for that matter, although it appears that they may have done so from 19th May 2010 in Guernsey 2), or of settling those proceedings, such that they had not obtained the benefit of the *prima facie* "shield" which would arise from their conduct having been endorsed by the court as being reasonable. Moreover, this failure was compounded in its unreasonableness, he submitted, first by the fact that I&B had ignored advice from Quinn Emanuel that they should do so, and second, by the fact that this failure must have been improperly motivated by their own personal self-interest, because in making such an application to the court, I&B would have had to make full and frank disclosure to the court, and thus to the TDT beneficiaries, of their own previous negligent handling of the affairs of the TDT. Advocate Robison argued therefore, that this was unreasonable conduct, and, if proven, would provide good grounds for arguing that TDT had incurred the costs in the BVI proceedings unreasonably, such that those costs ought not to be recoverable from the TDT assets, by parity of reasoning with the *Albany* case (above).
160. In answer to the point that reliance on this particular matter must, by clear analogy, also be precluded by *Henderson v Henderson* estoppel (see *Henderson v Henderson* (1843) 3 Hare 100), such as had grounded the dismissal/striking out of the Guernsey 3 Cause, Advocate Robison's answer was, first, that that had not happened in practice and second, that it did not apply to the current position because *Henderson v Henderson* depended on the principle that the impugned allegation not only could, but should, have been brought in the earlier proceedings and that did not apply here because the TDT had not been dealing with a claim to a trustee's indemnity previously, so that this point was not material. Furthermore, F&B were currently defendants (to the claim for indemnity) such that the greater flexibility allowed to defendants as regards the *Henderson* principle applied.
161. However, his further explanation of the practicalities was somewhat opaque. I tried to ascertain what aspects of the BVI costs (or was it all of them?) Advocate Robison submitted were unnecessarily incurred because of the absence of a *Beddoe* application. When pressed, he did not suggest (nor do I think he could have done) that they all would have been, but only that the costs would have been reduced. It was suggested that if such relief had been obtained, then the fraud allegation made against I&B in the BVI proceedings (which, it is to be noted, was not made in the English proceedings) would have been impossible to maintain, and therefore the costs of defending this would have been avoided. However, even if the logic of this were correct (and it presupposes not only that *Beddoe* relief would have been granted but, more importantly, that the opposing parties in the BVI proceedings would have known that *Beddoe* relief had been granted and would have cared about it) this argument is getting a very long way from the actuality. Whilst it is fair to say that this point came up only as a theoretical illustration of Advocate Robison's argument, it is also fair to say that no

other aspect of the costs of the BVI proceedings was suggested by him as being arguably avoidable if there had been *Beddoe* authorisation.

162. To support his argument in general principle Advocate Robison went on to refer to all the allegations made against I&B in the second section of Guernsey 3, i.e. bad management of the English Somerfield Proceedings and negligence in commencing the Guernsey 1 action. He argued that these were done in I&B's own interests but contrary to those of the TDT itself, - but this was not so as to rely on these matters, but only to show that the failure to obtain *Beddoe* type relief was not part of that pleaded case, and remained, therefore, available to be relied on now. He emphasised that the settlement of the Somerfield Proceedings, as a "drop hands" settlement, could not be regarded as "success" in the BVI proceedings so as to vindicate I&B and entitle them to recover all their costs of the relevant proceedings; it was not an actual decision in their favour. Finally he took me to passages in Lewin on *Trusts* 20th Ed, paras 48-115-118, emphasising that:

"where a trustee has pursued or defended an action unsuccessfully without having the protection of a Beddoe order it is likely to be only in exceptional circumstances that he will be able to establish that he falls within his statutory right to indemnity. And so the costs of the litigation will be disallowed if the litigation was occasioned by his own negligence or was improperly instituted by himself".

He submitted that the same principles applied to defending litigation, and referred to the citation from *Re Beddoe* [1893] 1 Ch 517 where Lindley LJ said

"I am of the opinion that if a trustee brings or defends an action unsuccessfully and without leave, then it is for him to shew that the costs so incurred were properly incurred."

He submitted therefore, that it was eminently arguable that the facts set out above fell within this principle.

163. Advocate Wessels, with limited time available, argued that this point could really be considered and dismissed at a high level, because in reality it amounted to litigating the issues which had been raised, at least implicitly, in Guernsey 3 and which F&B had been barred from litigating. He summarised this argument as being that once it was held to be an abuse to take such points because they could have been taken in Guernsey 1, that was an end to the matter; it was no less an abuse to try to take them now. Advocate Robison's argument that the situation was different because his clients were now defending a claim to an indemnity, whereas before they had been attempting to pursue claims for damages, was an illusory distinction as the points were really the same.
164. I am not entirely convinced that the matter can be disposed of quite as simply as Advocate Wessels suggests. Advocate Robison's analytical argument requires more consideration. Superficially, it seems attractive, but on examination, I think it owes much to forensic sleight of hand. It skillfully reintroduces, by reference, the prejudice of the allegations of negligence regarding the overall defence and settlement of the Somerfield Proceedings, whilst conveniently overlooking that reliance on the substance of those allegations is ruled out because raising them otherwise than in Guernsey 1 has been held to be an abuse, and that this is why F&B's argument has had to be founded on only the failure to obtain *Beddoe* relief as the claimed operative misconduct.
165. The consequences of this limitation on Advocate Robison's argument, though, are not just to be glossed over. First, I am not satisfied of the justification for the argument that F&B are entitled to rely on the complaint of misconduct constituted by failing to obtain *Beddoe* relief, at all. *Beddoe* relief is obtained for the protection of the trustee; I can see no basis for a

beneficiary to argue that there is a positive duty owed to him by the trustee to seek it. Next, I cannot help thinking that if that argument of negligence had been appreciated at the time of the drafting of the Guernsey 3 Cause, then that further allegation of negligence would surely have been pleaded, and would have come within the umbrella of the abuse ruling. Even if GTC were not aware that the failure to seek *Beddoe* relief had been contrary to advice given by Quinn Emanuel, they were obviously aware that no *Beddoe* relief with regard to either the TDT Transactions or the taking of steps in either the BVI or the English Somerfield Proceedings had been sought by I&B, since the TDT beneficiaries would have had to be convened in any such proceedings. It seems to me to be purely fortuitous that this allegation apparently remains technically available now, and it also seems to me that an application to bar it from these proceedings on the same basis as succeeded in Guernsey 3 would be more than likely to succeed. I am just not persuaded by Advocate Robison's argument that this situation is distinguishable from that of Guernsey 3.

166. However, assuming that the above is wrong, and accepting the statements in Lewin on *Trusts* and *Re Beddoe* cited above, the principles there set out must, it seems to me, be carefully applied; they do not operate on the basis that a proven allegation of misconduct loses the trustee his indemnity generally. Any such deprivation must be related to the consequences of the relevant misconduct: see *Re Beddoe* itself. The arguments put forward on this point seem to me to be no better than speculation.

Decision (2)

167. In reality, F&B's complaint is a general complaint (Mr Tchenguiz clearly feels very bitter) that the TDT should never have been allowed by I&B to get into the situation in which the BVI Somerfield Proceedings happened, but that is a case which they are plainly precluded from making, because it would involve circumventing the Privy Council's decision in Guernsey 3. Their case has therefore had to be narrowed to one that I&B should be deprived of any indemnity from the TDT against the costs of having done so, at least as regards the BVI Somerfield Proceedings, within the above constraints, on the indirect (*Albany*) principle that certain of those costs were caused by, and/or could (but F&B must in fact show: would) have been avoided but for I&B's unreasonable failure to seek *Beddoe* type blessing for the actions giving rise to the BVI proceedings and their defence. The argument only has to be formulated to show that it bristles with necessarily self-serving assumptions as to causation, counter-factual scenarios, the existence of duty, and suchlike, and this is even before the input of any counter-arguments resting on a wider appraisal of suggested relevant facts (such as, for example, whether, if I&B were being accused of fraud, and the involvement of others who were more closely identified with the TDT beneficiaries advising or recommending courses of action at the time) rather than just the narrow compass of the facts picked out and relied on in F&B's argument. In practice, this would enlarge the enquiry, it seems to me, into, in effect, litigating the very matters which the Privy Council has determined could and should have been litigated in the context of Guernsey 1, but were not. This likelihood is underlined by the fact that the very arguments on this point have themselves slipped, at times, into assertions founded on the facts in the English Somerfield Proceedings, even whilst necessarily asserting that the focus really is on the BVI proceedings.
168. In the circumstances, therefore, taking I&B's asserted case at face value, I dismiss this objection on either one or both of two grounds. I bear in mind that this is a strike out/summary judgment application, and the test is therefore that F&B's objection only has to be better than "obviously bad". However, I take the view that the quantum of points which would require to be found or decided in I&B's favour to achieve success in this objection is so great that the prospects of such success are fanciful. The objection is, therefore, obviously bad. That is enough to dispose of the matter, but I also take the view that this

objection can and should be dismissed on the grounds that it would, in practice, amount to a collateral attack on the decision of the Privy Council in Guernsey 3.

169. I have considered whether a further ground for such dismissal ought to be that the eventual trial of this particular objection would be so utterly disproportionate to the benefit that could be achieved to the TDT as against I&B that it should be prevented from going ahead on that ground alone, but I have concluded, on balance, that that would not be a proper exercise of my discretion. The allegation on which F&B's case relies is, in effect, an allegation of breach of trust causing damage to the trust assets, i.e. a loss (an increased indemnity liability) occasioned by having to meet an unjustifiably inflated obligation to indemnify the Trustees. In my judgment it would not be proper to dismiss an otherwise viable allegation of breach of trust (as I am here assuming) solely on the grounds that it will prove disproportionately expensive to try it. The strong policy of holding trustees accountable must, in my judgment override any such consideration; it is appropriately dealt with when considering costs orders in any relevant action. Whilst the relevant allegation here would, of course, once again, have to confront the argument that it would be necessary to establish *gross* rather than *mere* negligence, and whilst I might view the prospects of surmounting that hurdle as poor, it does not seem to me that this ought to take the matter outside the qualifying realm of "arguable" if I otherwise so regarded the point. I prefer, therefore, to rest my decision on the grounds previously stated.
170. In summary, I conclude that (i) whilst it is not necessarily abusive (I have not heard any arguments on peremption) to require to try a claim of breach of trust/misconduct by a trustee some 10 years or more after the event, it is *Henderson* abusive for F&B to seek to do so in this case, and that also (ii) in any event, the prospects of any such argument being upheld are so remote as to make this blanket challenge sufficiently obviously bad as not to require further investigation, and not to surmount the threshold test at this stage.

Subsidiary "allocation" objection

171. It is convenient to record, here, a further point which arose in consideration of this argument. It is a separate "allocation" objection raised by Advocate Robison in respect of these costs, although it is a point which applies to other particular costs claimed, as well: see "Allocation to Headings Objections", below at [234]. The point is that I&B's proof of debt expressly refers only to the costs incurred in connection with the proceedings in Guernsey 1 and Guernsey 3 (and also, but not relevantly for this point, costs incurred in respect of the Receivership, and remuneration claims). Costs claimed to have been incurred in respect of specified other proceedings were expressly omitted from this Application by Paragraphs 14 and 15 (as subsequently amended) of the December 2019 Order. Costs incurred in connection with the Somerfield Proceedings do not, therefore, fall within the description of I&B's costs which are being scrutinised in this Application and must, therefore, be disallowed, at least for the moment.
172. This is, to my mind, though, simply a procedural point. It does not go in any way to the availability of I&B's indemnity as a matter of principle, but only to the delimited scope of this Application. It is tantamount to a pleading point. It may be that I&B requires to amend the descriptions of the breakdown of the claim which it has given in its proof, but in practice it has been obvious, from the evidence provided, what its claims were generally relating to, so that I cannot see that any such inaccurate or incomplete description in the proof has caused F&B any prejudice. If necessary, I would have no hesitation in giving any necessary leave to amend the proof. There is, therefore, nothing in this objection.
173. The objection may have been prompted by the approach taken by LB Talbot QC in dealing with the costs recoverable in the Guernsey 2 proceedings, in which I understand, the costs which he disallowed were disallowed on the basis that if claimed costs could not be

identified as being attributable to one of the many Guernsey 2 applications, he was not going to make an order awarding them. However, that was not the same thing as disallowing those costs entirely, which is the purpose for which Advocate Robison appeared to be seeking to deploy this point. LB Talbot QC was not making a final decision on the scope of costs recoverable by I&B, but simply ruling that they could not be recovered under the umbrella of the particular exercise which he was undertaking.

(c) Costs incurred in pursuing the Declarations Applications in Guernsey 1

174. This is another “misconduct” challenge, but instead of relating to matters extraneous to Guernsey 1, its viability depends on separating out disputes within Guernsey 1, and arguing that, since I&B’s indemnity for their legal costs is established only by their ultimate success against the TDT in the action, it does not extend to issues where there was no such success; it is therefore open to F&B to argue that I&B should be deprived of their indemnity in respect of the costs of those issues because of misconduct. The particular aspect which F&B seeks to separate out in this way here are the “Declarations Applications” made in Guernsey 1.

175. The argument runs thus:

- (i) Guernsey 1 was commenced by I&B making applications to the Guernsey Royal Court for four declarations, two to the effect that the BVI inter-company loans were not recoverable from the Trustees of the TDT at all, and two to the effect that, if they were recoverable, I&B were not personally liable for those debts, but only to the extent of the TDT assets held by them, either on the grounds of Art 32 of the JTL or on the true construction of the Loan Arrangements.
- (ii) The need to make those applications arose (it is asserted) only because of I&B’s previous negligent failure to ensure that its records were properly kept and that clear documentation reflected the intended position within the TDT inter-company structure (i.e. no liability on the TDT itself).
- (iii) A trustee who applies to the court for directions arising from a problematic situation which he has created by his own fault will be deprived of his indemnity from the fund in respect of the costs of such application: see Lewin on *Trusts* 20th Ed at 48-005 and the *Albany* principle (above). The same principle must apply to a trustee who is similarly compelled to make an application against third parties.
- (iv) The ultimate decision that I&B were not guilty of gross negligence, which enabled them to defeat the TDT’s hostile claim against them for damages in Guernsey 1, did not constitute “success” in respect of these other applications, on which I&B failed.
- (v) Therefore I&B should be deprived of the costs of those applications because they were only necessitated by I&B’s negligent conduct, as stated.

The argument in Advocate Robison’s Speaking Note, however, is not confined to pre-Guernsey 1 conduct, (including the previously rehearsed matter of no prior application for *Beddoe* relief) but adds complaints about decisions in I&B’s conduct of the Guernsey 1 proceedings themselves, albeit framed as relating to the Declarations Applications. It is alleged that those decisions were taken in the selfish interests of I&B rather than the interests of the TDT. In the end, put very simply, Advocate Robison’s argument was that in launching the Declarations Applications, I&B made an application which did not need to be made, and the costs thus incurred were therefore wasted costs and accordingly were unreasonably incurred.

Discussion

176. I have already considered some aspects of the principles of this argument when considering it in relation to the costs of the BVI Somerfield Proceedings, but I now have to apply these in a different context.
177. First, the declarations regarding the validity of the loans were not the only declarations sought at the outset of Guernsey 1, and I&B did succeed, in the end, in obtaining the declaration that Art. 32 precluded their personal liability and confined liability for the loans to the assets of the TDT. Even if this was not, in form, a hostile application between I&B and the TDT, (it was initiated against the BVI companies only), it took on the character of such a hostile application, as their respective interests were opposed, and GTC was later convened in the proceedings to make the case for the TDT beneficiaries. The ultimate decision in this respect vindicated I&B's position, and therefore, in principle, vindicated the costs they incurred in pursuing at least that particular declaration. The fact that I&B were unsuccessful in resisting personal liability for the loans at first instance in front of LB Chadwick does not (as Advocate Robison suggested) deprive the ultimate outcome, in which they did succeed, of the character of "success" for the purpose of retrospectively validating I&B's claim to be indemnified for *all* their costs of getting to that result.
178. It is therefore only in respect of the costs attributable to the *unsuccessful* claim for the declarations that the loans were not recoverable (at least up to the time in July 2011, when GTC entered on the matter by formally bringing the TDT counterclaim) which could be a candidate for this argument. I take note of the fact that I&B in fact conceded at the trial that the loans were recoverable; it was GTC, on behalf of the TDT, who continued to push the point that they were not recoverable, albeit, I understand, conceding some arguments about their original validity. But at the time, the declarations as to irrecoverability, (whether original irrecoverability, or based on an assertion that they had been novated) were originally sought just as much in the legal interests of the TDT beneficiaries as in I&B's own interests, since, if those claims were upheld, no possibility of liability falling on either of them would arise. On that basis, without more, I&B would, in my judgment, be entitled to their indemnity for those costs even though they had ultimately "failed", because, again in my judgment, it could not have been sufficiently obviously unreasonable to launch those claims on their merits for the benefit of the TDT, in all the highly charged and complex circumstances of the case.
179. In fact F&B do not appear actually to allege this particular narrow point. They are alleging only that it was unreasonable to launch these applications without previously seeking *Beddoe* relief, a point which I have previously considered, and which I regard as lacking any causative force in this context. Moreover, since it appears that the TDT, when subsequently represented by GTC, pursued these arguments, rather than concede the underlying recoverability of all the loans as I&B did, I think it would be unacceptably inconsistent for them to try, without more, to assert that narrow point now.
180. As to what might be the necessary "more" required to begin to give this argument any force, whilst I accept that there was no *Beddoe* relief sought at the time, (the granting of which would probably have defeated the argument beyond doubt) I can give no weight to the only matters actually relied on as having made it culpable, in the circumstances, to institute proceedings for such declarations. These are said to be, first, that doing so would and did irresponsibly provoke a claim for payment from the claiming creditors; I&B should, rather, have simply sought to correct the position with the Kaupthing entities, which they did not do, but which would have been successful. Second, it is said that launching those claims would and did irresponsibly expose the TDT to reputational risk by revealing its precarious financial position. I regard the first point as totally flimsy; the outstanding debts were pretty obviously going to be pursued before long on any basis, and the possibility that this could have been avoided by negotiation is pure speculation (see below). I am sceptical about the second point, but in any event a decision to institute proceedings rather than wait to be a

defendant is tactical or strategic - there are often tactical advantages in being Plaintiff. The decision to take the initiative would therefore be a matter of possibly finely balanced commercial/litigation judgment, and even noting F&B's argument that I&B had a conflict of interest in this regard, I consider that the prospects of F&B proving, at the end of the day, that the decision to commence proceedings was outside the range of reasonable decisions which a completely innocent trustee in I&B's position could reasonably have made in the interests of the Trust itself strikes me as being fanciful.

181. However, one cannot in fact even take such points at face value. First, raising them must, in my judgment, amount to an allegation of breach of trust - it is essentially made with respect to the time before I&B's removal as Trustee of the TDT on 2nd July 2010. As such it would be met with the argument that there is no such liability unless this amounted to *gross* negligence. This would, in my judgment, render the argument that it was to be treated as a breach of duty vanishingly tenuous. Second, and in any event, as regards both these particular points and, so far as I can see, any others which could be prayed in aid as arguably amounting to misconduct which either caused the costs of the Recoverability Declaration to have to be incurred, or prevented their being avoided (and F&B has shown itself quite adept at perceiving these), I find it to be an unavoidable conclusion that the conduct in question is either the same as, or is amongst, the matters which will have been canvassed in TDT's unsuccessful claim for negligent breach of trust against I&B in Guernsey 1, or constitutes or closely overlaps with, the allegations of breach of trust and misconduct made against I&B in Guernsey 3 which were struck out as abusive. To allow these arguments to go forward would, therefore, amount to permitting a re-run of the litigation in Guernsey 1 in respects adjudicated upon under the previous decision in I&B's favour, and/or permitting in effect a collateral attack the decision in Guernsey 3. Neither of these is permissible.
182. The other way in which F&B puts this argument is that the need to launch the Declarations proceedings, even if doing so was not intrinsically culpable, only arose out of I&B's original, earlier, negligence in putting forward an asset warranty to Kaupthing, when it took security for its lendings in late 2007, which was inaccurate in its treatment of the inter-company loans, thereby apparently giving Kaupthing greater security than had in fact been intended - and this was a windfall, because Kaupthing obtained, as security, shares in companies which in fact had claims against the TDT without having any expectation of this. It was this problematic position which I&B's conduct had thus created which caused the need to seek, unsuccessfully in the event, the relevant Declarations.
183. Advocate Wessels argues that it is just not as simple as that. For the causation of loss which is simply assumed under this argument, it is necessary to assume either that Kaupthing was actually operating under the same mistaken belief as that under which I&B/the TDT (and in particular Mr Tchenguiz) were operating, and/or that Kaupthing would have agreed, at the time, to lending on the same terms even if the position (which amounted to giving them less extensive security) had been drawn to their attention, and also that they would have agreed, or could have been forced to agree, to rectification of the documents when the claimed mistake was later drawn to their attention. None of this has been proved, and indeed these assumptions were actually rejected in the ultimate judgment in Guernsey 1. It also needs to be recognised that I&B's case with regard to the inaccurate warranty was that insofar as fault in this regard might have been laid at the door of I&B, Mr Tchenguiz and R20, his appointed advisors to the TDT, were complicit in allowing, and indeed (I think) pressing, for the Kaupthing lending agreement to be entered into without delay and thus without correcting the inaccurate warranty. And again, all these accusations were gone into previously as part of the Guernsey 1 litigation.

Decision

184. I agree with Advocate Wessels. This argument simply does not run. Advocate Robison's attempt to separate out the factual situation which he wishes to rely on as constituting misconduct on I&B's part which has supposedly *not* been adjudicated on, expressly or implicitly, in Guernsey 1, and which he is therefore entitled to rely on now as "misconduct" entitling F&B to resist I&B's claim to indemnity for these costs on the grounds that these were brought about by such misconduct, does not work. First, Advocate Robison tries to distinguish this item of claimed "misconduct" from the claim of negligent breach of trust, which was the basis for the counterclaim in Guernsey 1, on the grounds that "misconduct" for present purposes does not have to be a breach of trust, it can simply be - "misconduct". I have previously considered the limitations on this argument in principle, but in applying it here, it seems to me that, like it or not, the allegation *is* asserting a breach of trust, and this cannot be avoided simply by using alternative language. Second, whilst this is a strike out/summary judgment application, that does not mean that F&B need only assert facts and these must be taken as givens when assessing whether the arguments founded on them have any real prospect of success, or constitute objections which are not obviously bad. I am entitled to look, also, at the availability of any process by which those facts might actually be proved. The moment one does so, it becomes perfectly clear that this argument is, in substance, litigating again some of the very issues which were argued in Guernsey 1 on the TDT's counterclaim in negligence against I&B. It makes no difference that this is now expressed with a different focus; the character of the dispute, and its substance, is the same. It also makes no difference, and in fact is a further reason for disallowing this as abusive, that this second litigation would now apparently be with further materials, not least because much of these would seem to be materials which F&B were not permitted to adduce, late, in Guernsey 1 itself, although I accept that I have not investigated this point directly. I am satisfied, even so, that the whole exercise is simply impermissible.
185. That is enough to dispose of the availability of this particular topic of challenge, but there is a further point which also strongly mitigates against its being allowed to proceed.
186. First, and as is admitted in Advocate Robison's Speaking Note, there is no practical possibility of ever accurately separating out the costs of pursuing the only claim available as the potential subject of this argument because it was unsuccessful, (i.e. the claim for a declaration that the loans were not recoverable) from the other claims in Guernsey 1 on which I&B *were* successful. On any basis, Advocate Robison's argument could only justify depriving I&B of its indemnity in respect of any *additional* costs incurred in the pursuit of that unsuccessful claim. This is not a case where this matter can be properly dealt with by an apportionment of charges across various claims, on some conceived broad brush basis. The additional costs would have to be proved as such, and they just cannot be. In my judgment, in order to deprive a trustee of his *prima facie* right to indemnity (here established by his general success in the relevant litigation, i.e. Guernsey 1), it would be necessary to establish clearly what particular additional costs were caused by the (assumed) available matter of proven misconduct. This applies, in my judgment, because it would be fundamental to the inherent righteousness of depriving a party of an otherwise rightful claim, and it is slightly different from (although it reinforces) the recognised principle that as regards any judgment of reasonableness, the trustee is entitled to the benefit of any doubt. It is a matter of the standard, rather than the burden, of proof, and I do not see how F&B could ever come up with the requisite degree of causative clarity in respect of any particular payments. I consider it hugely doubtful, therefore, whether F&B could ever sufficiently prove any actual sum by which I&B's claimed indemnity should be reduced under this head, even if it were sustainable in principle.
187. F&B have frequently complained that such inability is not their fault, but arises because of "lack of particularity" on I&B's part in explaining their costs claims. This arises, they complain, either because I&B have declined (and not been compelled) to provide them with more information as to exactly what work was being done under which elements of the fee

charges made to and accepted by I&B which F&B could then scrutinise, or because the narratives provided by the relevant firms are too skeletal, and thus opaque, as to the detail of their work. F&B argue that it is therefore unfair that they should be prevented from raising what might be very viable challenges to fees charged, or their reasonableness, simply because of lack of information which is not their fault and/or more within I&B's control than theirs. I do not accept that argument, certainly with regard to this particular point. It seems to me that this argument is, effectively, an invitation to the court to draw adverse inferences from such lack of information, and I do not think it would be appropriate to do so, for reasons which will later become apparent. There is the issue of proportionality with regard to permitting any such further investigation or claim, and also the issue of practicality, given the length of time which has, inevitably, elapsed since the matters in question took place. The evidence is what it is, and, in my judgment it is proper for me to evaluate it as such, even in the context of a strike out/summary judgment application, provided I apply the appropriate tests.

188. For all the above reasons, therefore, I dismiss this particular claimed grounds of objection.

(d) Costs of preparing unused evidence in Guernsey 1 - Proofing witnesses not called

189. This is a further "misconduct" challenge, i.e. a Question (3) point. In its first presentation, as listed in Advocate Robison's Speaking Note, it is in respect of the costs of evidence obtained from witnesses who were, in the event, not called to give evidence by I&B in Guernsey 1.

190. At an early stage in the Guernsey 1 proceedings, I&B proofed Mr Louie Rabie, who had made the accounting entries which were argued to provide evidence supporting the argument that the burden of the inter-company loans from the BVI companies had, in fact, been novated out of the TDT and into the Oscatello structure. They also proofed his line manager and several other staff members of I&B engaged in the administration of the TDT. However, in the end, I&B did not call these witnesses at the trial; they called only the evidence of Mrs Lydia Bleasdale and Mr Robert Clifford. Advocate Robison submitted that this fact gave F&B arguable grounds for claiming disallowance of the costs incurred in proofing those other witnesses. He provided a Schedule (Schedule 3 to his Speaking Note) divided into four sections, of which Sections 3 and 4 identified entries relating to work which did, or might, relate to proofing witnesses other than Mr Robert Clifford, who was dealt with separately in Sections 1 and 2, and comprising £38,268 and £51,696 - although thus apparently including Mrs Bleasdale.

191. He confirmed (on being pressed by Advocate Wessels) that he was not attempting to argue that the result in Guernsey 1 must have been different if those witnesses had been called, and I agree that that argument is not open to F&B. Advocate Robison's argument was, rather, that proofing witnesses and then not calling them was a waste of money, such that I&B could not, now, claim to be indemnified in respect of the wasted costs of obtaining that evidence.

192. Again, on being stated quickly, this argument appears to have a superficial logic, but on proper examination, in conjunction with certain indisputable facts, it simply does not run.

193. Advocate Robison accepted that the costs of proofing these witnesses were reasonably incurred at the time this was done - as, indeed, he must do having regard to his later arguments that it was unreasonable not to call them because their evidence was favourably material. His argument had two alternative forms.

194. The first was that it would have been improper and unreasonable to proof those witnesses without any intention to call them. He accepted that establishing this would require investigation of I&B's motive and intention when proofing the witness but submitted that

that was the kind of enquiry which should therefore be allowed to go forward as against a strike out application. I consider that this argument is so absurd and contrary to common sense that it is obviously bad. Why would any client or lawyer set about proofing witnesses with an intention not to call them? I suppose it might be suggested (it was not actually argued) that there could be some tactical advantage in getting a witness's evidence into one's own camp so as to hinder (it could not prevent) their being called for the opposition, but that is fictional speculation. There is not shred of evidence to support the substance of this contention. It is totally fanciful.

195. The second, alternative, argument was that these costs *became* (though Advocate Robison corrected this to the more indeterminate "*were*") unreasonably incurred when I&B decided not to call these witnesses. He submitted that even on an indemnity costs taxation, the costs of preparing witness evidence which was not ultimately used would not be allowed.
196. I am not even sure about this latter point, but in any event, as I have already found, the test for striking out costs on an indemnity costs taxation and the test for striking down a trustee's right to indemnity for trustee expenses is not the same, and the former is not relevant.
197. As to the main, more general, assertion that costs can be converted retrospectively into being unreasonably incurred, I cannot see how anything short of a court order or decision can have such retrospective effect. The test of reasonableness is applied at the time. In fact, this suggestion shows that it is not really the decision to proof the witnesses (which occasioned the costs) which is being complained of as "unreasonable", but the subsequent decision not to call those witnesses. That decision, though, cannot be brought into any category of "misconduct", because it was a decision taken in relation to the conduct of the proceedings, and it was taken at a time, and in a context, in which I&B owed no duty to the TDT other than the duty of any litigant to conduct its case honestly, and sufficiently co-operatively, to further the Overriding Objective. I&B's decision not to call these witnesses was no breach of any obligation it then owed to the TDT.
198. The position is even clearer because at the time of the decision not to call that evidence, the interests of the TDT in the Guernsey 1 proceedings were being pursued and protected by GTC, as the TDT's then Trustees. Insofar as it might have been beneficial to the TDT to call these witnesses, this was a course which GTC could and should have perceived, and followed up as effectively as possible. I accept that it might well not have been so easy for GTC to elicit co-operative assistance from those witnesses, but that is simply one of the hazards of litigation. It does not create any duty on another party either to procure or encourage the availability to other parties of witnesses whose proofs they have obtained, or actually to call those witnesses to give evidence, if that other party does not otherwise wish to do so. A party who assumes that an opposing party will call a witness whom it may wish to cross-examine does so at its peril. I am not sure that even the service of a witness statement necessarily operates as a warranty that the party serving that statement will actually call that witness, but even if it did, then the time to object that a particular expected witness had not been called was at the trial itself. Otherwise, it is up to the party wishing to get the witness's evidence into the trial to take steps to ensure that this happens, if necessary by such enforcement procedures for witness attendance as are available. Of course this is not as satisfactory as being able to cross-examine a witness, rather than having to lead unknown and possibly hostile evidence in chief, but that is simply one of the facts of life in litigation.
199. Advocate Robison submitted that I&B did owe duties to the TDT at the time of the Guernsey 1 trial because they had retained assets of the TDT after their removal, (I believe in support of their assertion of a lien over such assets as security for potential personal liabilities, but the exact reason does not matter) and that therefore calling witnesses to best effect in Guernsey 1 was part of their residual fiduciary duties to protect and preserve such TDT

assets. I reject that argument. I&B were not, at that time acting as trustees of the TDT, and their duties in respect of property retained by them were merely the duty of the holder of security, to preserve the relevant assets in the sense of protecting them from damage. It probably does not even import a duty to act positively to maximise their value, and it certainly cannot, in my judgment, extend to requiring a security holder to conduct litigation with regard to any interests other than his own, (always within the bounds of proper litigation conduct).

200. To have the effect contended for by Advocate Robison on this application, the failure to call these witnesses would have to be capable of being

“[an] allegation that could properly be the subject of proceedings”:
see *Alhamrani* at [60].

201. I have already commented that I cannot see how that could be formulated. If a claim could be formulated, then it might be that, as an alternative to the measure of damage by reference to the consequences of the alleged fault, an alternative measure by reference to wasted expenditure could be applied, but that is to put the cart before the horse. This is because it is necessary, first, to demonstrate that there actually has been such actionable conduct. In my judgment the allegations made here simply do not disclose any cause of action, nor any thing capable of being characterised as misconduct on I&B’s part of which the TDT is entitled to complain in law. This objection is therefore, obviously bad.

(e) Costs of the evidence of Mr Robert Clifford

202. F&B’s next objection was to the costs of the evidence of Mr Robert Clifford, who did give evidence in the Guernsey 1 trial, and in earlier interlocutory applications. The complaint here was that, when Mr Clifford’s evidence was reviewed over time starting from what he said in initial applications and ending as far down the line as what he ultimately said in cross-examination in the Guernsey 1 trial, the tenor of his evidence changed (it is alleged), from initially purporting to have a detailed knowledge of the affairs of the TDT to ultimately claiming not to have any detailed knowledge of the affairs of the TDT. The fee charges in question, relating to Mr Clifford’s evidence were identified in Categories 1 and 2 of the Third Schedule to Advocate Robison’s Speaking Note, dividing, once again, into charges asserted clearly to be in respect of preparing Mr Clifford’s evidence (£37,319), and those which might be (£4,044).
203. Obviously, the mere fact of Mr Clifford’s evidence being what it was could not, on its own, provide any grounds for complaint. There has to be something more, and it has to be something capable of being seen as misconduct. When pressed, Advocate Robison agreed specifically that his prospective case was that I&B should be deprived of any indemnity in respect of the costs of Mr Clifford’s evidence because these had been incurred for the purpose of tampering with Mr Clifford’s evidence, or alternatively massaging Mr Clifford’s evidence in a way which was perceived as being favourable to I&B, because it distanced them from embarrassing aspects of their conduct of the TDT’s affairs.
204. Even put on the alternative basis, I regard this as an allegation of improper conduct. Advocate Robison suggested that he did not have to go that far, but I cannot see how anything short of impropriety of some sort could begin to qualify as any form of misconduct. I am not, though, prepared to allow the potential inference of any such likelihood as Advocate Robison invites. It is no more than opprobrious speculative assertion. However, even if I were to accept it as an arguable possibility, this is an argument about the conduct of and evidence in the Guernsey 1 case itself, and, in my judgment, the place for such points to be taken was at, or on appeal from, that trial, and doing so now must be a collateral attack on the Guernsey 1 and Guernsey 3 decisions.

205. For the above reasons, but principally the fact that I regard the basic assertion itself as fanciful, I find this head of objection to I&B's indemnity to be obviously bad, and I dismiss it.

(f) Failure to support GTC's application to adduce late evidence from Kaupthing

206. This is a further "misconduct" challenge. GTC made an application to the Court of Appeal in 2014, under the principles of *Ladd v Marshall* [1954] EWCA Civ 1, to introduce fresh evidence on the TDT's appeal in the shape of evidence from Mr Gunnerson, a senior employee of Kaupthing, to the effect (I understand) that Kaupthing would, if asked to do so, have agreed to the novation of the inter-company debts into Oscatello to rectify their mistaken omission. This application was opposed by I&B. Advocate Robison submits that this opposition could be sustainably argued to be misconduct on I&B's part because (he submitted) it was contrary to their residual duty to preserve the value of the TDT trust assets which they were still holding, as mentioned above.

207. On any basis, this argument must, it seems to me, be limited to the very minor costs of opposing the particular application. However I do not accept the initial premise that mounting this opposition could be characterised as any form of misconduct on I&B's part, or anything which could give F&B the right to complain of a breach of duty recognised by law. There was no such duty, for reasons already discussed. This objection amounts to no more than a complaint that support which might have been forthcoming was not. Since there is not even any evidence that any such support would have had any material effect on the result, the complaint is reduced, even further, to a complaint about lack of solidarity. That simply goes to underline its absurdity. I therefore find that this objection is also obviously bad.

(g) Costs incurred in "liaising" with the Serious Fraud Office and Grant Thornton

208. F&B has produced and relied on a whole raft of documents in relation to this limb of their case, which stems from an entirely tangential matter, namely the interventions of the Serious Fraud Office in investigating Mr Tchenguiz' financial affairs (and also those of his brother Mr Vincent Tchenguiz) commencing in November 2009, and ultimately concluded, insofar as Mr Tchenguiz was concerned, only in October 2012, when the SFO discontinued its investigation. Apparently after attending the Guernsey 1 trial in June 2012, the SFO had compiled a note in August 2012 which recognised the distinction between Mr Tchenguiz personally and the Trustees of the TDT as protagonists in the particular transactions which had aroused their interests, and it accepted that Mr Tchenguiz was not personally culpable.

209. Partners in Grant Thornton were, as I understand it, engaged by the SFO as investigating accountants for them, and they were seeking information including, apparently from ITG Ltd personnel. (This challenge is directed at conduct by ITG Ltd - whom I will refer to as "Investec" - although it can be treated as being on behalf of both components of I&B.) Other partners in Grant Thornton were the Joint Liquidators of the relevant BVI companies, pursuing, therefore, the repayment of the inter-company loans in Guernsey 1. It is also possible that Grant Thornton were involved in other ways in the investigation of the financial difficulties and insolvency of Kaupthing. The accuracy of my understanding is not critical; on any basis Grant Thornton were involved in sharing, or wishing to share, information with the SFO. I do not need to recite all the milestones in the SFO investigation which, unsurprisingly, was very confrontational, with consequent proceedings. Broadly, Mr Tchenguiz took immediate proceedings against the SFO to quash search warrants for being illegally obtained. There were other ancillary or spin-off applications to the court such as with regard to seeking information under Letters of Request, and/or restraining the use of information obtained by Grant Thornton in one capacity from use by them in another

capacity or in other proceedings, or, conversely, for permission to do so. Advocate Robison took me through the general course of all this, including complaining that, when approached by the SFO for information which could have helped clear Mr Tchenguiz' position in about February 2012, I&B responded through their lawyers that they could not deal with this request at that time, because they were too busy preparing for the Guernsey 1 trial, although this did not take place until June 2012.

210. Just to complete the overall picture, in January 2013, three months after his name was ultimately cleared through the SFO's reviewing the evidence in the Guernsey 1 trial, Mr Tchenguiz commenced proceedings against the SFO for damages, based on various complaints of breach of duty and suchlike, including wrongfully obtaining search and/or arrest warrants against him. These proceedings were eventually settled in his favour at the end of July 2014, with a payment of £1.5Mn to him in damages plus costs and an apology. He also, later, in August 2015, took proceedings against Grant Thornton and others, including an individual associated with Kaupthing, for damages for unlawful arrest and malicious prosecution. These proceedings were settled as part of a confidential settlement in 2018.
211. This, then, is the context of this challenge to I&B's indemnity. Advocate Robison explained that F&B had identified, in the Fourth Schedule to his Speaking Note, invoices for chargeable time by I&B's lawyers' in (i) "liaising" with representatives of the SFO (£24,518), (ii) clearly "liaising" with Grant Thornton "during the SFO investigation period" (£119,247) and (iii) possibly "liaising" with Grant Thornton during the SFO investigation period (£9,278). It was these charges which F&B contended should be disallowed under I&B's claim to indemnity.
212. Being aware that some argument was to be advanced against the recoverability of the costs of Mourant's and Macfarlanes' dealing with, or advising about, I&B's contact with the SFO and Grant Thornton, and since the description was that of "liaising" with these entities, I had expected this argument to be that such work or liaison was to be regarded as not done "in connection with" the TDT at all, because by its nature it could only be regarded as relating to I&B's personal affairs, in the same way as, for example, it would obviously be reasonable to argue that a trustee's taking legal advice about his personal tax liability could not be regarded as advice taken "in connection with" the trust just because the relevant income was his trustee remuneration. Such an argument would be an "allocation" or Question (2) type argument. However, this was not the argument made. The argument actually advanced was another "misconduct" or Question (3) type argument, namely that those costs, and any others which might be similarly identified in the further course of the Application, should be disallowed for being disqualified because of misconduct by I&B. The operable misconduct was asserted to consist in I&B's

"elect[ing] not to attend interviews with the Joint Liquidators (Grant Thornton) and/or the SFO prior to the Guernsey 1 trial, and/or provide full and candid disclosure of the extent of their involvement in the transactions with Kaupthing under investigation ... to protect their own personal interests at the expense of the [TDT]."

213. This allegation was elaborated as being that I&B had avoided complying with requests for information and assistance from the SFO and from Grant Thornton prior to the trial in Guernsey 1, because doing so would have inevitably led to revelations with regard to the knowledge of Mrs Bleasdale and Mr Clifford, and would therefore have affected their evidence in a way which would have assisted the TDT's case to establish the claimed novation of the inter-company loans, but would have been damaging to I&B for exposing their gross negligence and even wrongful trading. Such assistance would have caused the SFO to appreciate Mr Tchenguiz' position at an early stage, might have avoided the issue of arrest warrants against him and would have brought the investigation to an end earlier than in

fact occurred, as evidenced, it was suggested, by the fact that the SFO enquiry into Mr Vincent Tchenguiz was discontinued in June 2012. I&B's failure to co-operate with the SFO and/or Grant Thornton in this respect thus furthered their own interests at the expense of the TDT and damaged the TDT (a) because the decision in Guernsey 1 with regard to the novation was adverse to TDT and (b) because Mr Tchenguiz' arrest and investigation "*caus[ed] substantial reputational and financial damage to a beneficiary of the TDT*". This conduct was, therefore, misconduct.

214. There is one immediately striking high level problem with this proposition. If it is to be argued that a trustee should be deprived of expenses incurred in connection with the trust for misconduct, then, in my judgment, there must be some causal nexus between the misconduct alleged and the costs which are challenged. Otherwise, the complaint is nothing but an assertion of impressionistic "unfairness". No such nexus is immediately obvious in this complaint and, indeed, in the Speaking Note, it was submitted that it supported disallowance of the costs of the Declarations Applications as well, (on what possible basis is not immediately apparent) although this argument was not pursued at the hearing.
215. The logical sequence of this argument was difficult to extract from the Speaking Note because, on examination, the charges which I&B were claiming should be disallowed for this misconduct appeared to comprise all charges (176 narrative elements in total) which mentioned either the SFO or Grant Thornton or personnel known to work for those entities. The fee charges were either for I&B's lawyers attending on the SFO, or doing work internal to the I&B team which referred to the SFO, between 14th December 2009 and 17th December 2014, or similarly for attending on, or doing work internally with regard to, Grant Thornton "during the SFO Investigation period" (in fact between 27th November 2009 and 31 August 2012). However, it was not actually alleged that these items of work were carried out unnecessarily, or that they were not carried out in connection with the trust, only that the costs of them should be disqualified from indemnity because of the alleged ulterior, or possibly ulterior, motives of I&B referred to above, or because of the consequential effect on Mr Tchenguiz' work on behalf or for the benefit of the TDT. Furthermore, no evidence factually linking even the alleged non-co-operation with the SFO and/or Grant Thornton, and the alleged damaging effects was actually referred to; such damage was simply asserted.
216. Advocate Robison unsurprisingly blamed the lack of such evidence on the fact that I&B had not been obliged to give more information or explanation for scrutiny than the narratives behind the bills for which they were claiming reimbursement. It would not be possible, therefore, to present such evidence until there had been the fuller examination of all the lawyers' charges which he was submitting, all along, was required, because it could not be said that the high level allegation was obviously bad without such investigation. However, in my judgment, unless there appears to be some reasonable likelihood of such evidence emerging from any further investigation at a greater level of detail, the allegation is nothing more than a fishing expedition.
217. Advocate Wessels dismissed this section of F&B's argument quite shortly, pointing out, first, that it depended on multiple levels of speculation. It was also a second attempt to litigate complaints about I&B's contact with the SFO when this had been sought to be introduced into Guernsey 1 and had failed. Third, it was in essence, not a complaint about misconduct related to the work actually charged for, but a complaint about something else *not* being done, in the course of work actually charged for; it was therefore, in substance, a breach of duty claim, and it involved re-running matters which had effectively been canvassed in Guernsey 1. It is fair to say that he argued this all in reference to the allegations regarding the SFO, and did not expressly apply the same arguments to the Grant Thornton situation, but the arguments are obviously the same in principle.

Discussion and decision

218. I accept Advocate Wessels' arguments on a broad basis. Taking the allegation at face value, the first element of stated consequent alleged damage (that the non-cooperation could have indirectly brought about the adverse result of the Guernsey 1 trial for the TDT in regard to the recoverability of the BVI loans) is totally speculative, but second, and more importantly, as I read the judgment of the Privy Council in Guernsey 1, this precise argument was advanced, both in the applications to adduce further evidence in Guernsey 1 itself, and also in Guernsey 3, and it was rejected, not just for being *Henderson* abusive, but also for being hopelessly without substance on its merits.
219. The second alleged matter of damage to the TDT, i.e. the enduring damaging effects on Mr Tchenguiz' reputation, is not only speculative, but is misconceived on its face in the Speaking Note, where it is expressly an allegation of damage to Mr Tchenguiz, the principal beneficiary of the TDT. Advocate Robison did not (rightly) argue that Mr Tchenguiz could somehow be considered the equivalent of the TDT, although I find the fact that this argument was initially advanced by F&B without appreciating this point rather revealing. Instead in oral argument, Advocate Robison put the case as being that there was considerable consequential damage to the TDT, because the reputational damage caused to Mr Tchenguiz, as the TDT's known advisor, adversely affected his work on behalf of the TDT, thereby damaging it. That, however, makes the causal link between the suggested misconduct and the consequent damage to the TDT (necessary to begin to justify depriving the Trustees of their indemnity in any regard) even more speculative - and in fact so tenuous, in my judgment, that it should be dismissed for being nothing but self-serving speculation.
220. The above is enough to dismiss this objection as obviously bad, but there are other difficulties in its way, even apart from the points above. First, as mentioned, the argument of misconduct is, in essence, an allegation of breach of duty. It is founded on an alleged duty on I&B to co-operate and be fully candid with the SFO and/or Grant Thornton - though obviously somewhat bizarrely in relation to the latter, given that Grant Thornton, as the Joint Liquidators of the BVI companies, were effectively the opposition in the first part of Guernsey 1. This throws up a timing point, however. Any such duty could only arise whilst I&B remained Trustees of the TDT, i.e. up to 2nd July 2010. There is no basis either alleged or capable of being alleged to found any such duty after that time. (I have rejected Advocate Robison's attempt to extend the existence of any fully comprehensive trustee duty to include the time during which I&B still held assets of the TDT after their removal as Trustees, for reasons previously given). This time limit rules out all but the first two items of the 30 charges listed in respect of the SFO (Advocate Robison's Schedule 4 Category 1) the first 52 of the 131 charges listed as clearly relating to Grant Thornton (Schedule 4 Category 2) and four (items 166-169) out of the 13 charges listed as possibly relating to Grant Thornton (Schedule 4 Category 3). That reduces the challengeable claims to indemnity considerably.
221. Second, for any such charges to be disqualified under this argument they would, as I have said, have to have at least some arguable nexus with the matter of misconduct even though, here, that is "non-co-operation" by not (reasonably) providing information. The mere mention of the SFO or its personnel, or of Grant Thornton or its personnel, or even of contact with those entities cannot, on its own, give rise to any sufficient such inference. I have reviewed both the narratives of the 176 items of charge which are listed as being arguably disallowable. I have also reviewed the timeline of events in relation to the affairs of the TDT, the Guernsey 1 litigation, applications in relation to this, the SFO's attitude, the involvement of Grant Thornton, investigations of Mr Tchenguiz and matters concerning the TDT, insofar as I can glean these from the papers, and in particular the chronologies supplied by the parties and the documents in F&B's electronic bundle. Given the general state of affairs this review discloses, I find it perfectly unsurprising and indeed reasonable that Investec should have consulted I&B's lawyers, both Guernsey and English, with respect to

their position, both as Trustees of the TDT and personally, with regard to such matters as approaches by the SFO or Grant Thornton and their developments. The narratives are unremarkable in that they are perfectly consistent with what I would have expected to have been going on, on consultations, work and communications which would have been squarely within the scope of what I&B would be entitled to be indemnified for - very probably in any event (they were in a difficult position, reasonably requiring legal advice and assistance, whether or not they had been negligent) - but certainly retrospectively, following the ultimate decision of the Privy Council. Even though I accept that the descriptions of the work involved are high level and give no detail of exactly what was being considered and dealt with, I cannot find anything which would begin to justify an inference that these charges had anything to do with furthering some kind of policy of damaging the TDT by not co-operating with the SFO or Grant Thornton, as opposed to a perfectly reasonable approach to dealing, probably (but quite acceptably) cautiously, with those entities, under legal advice. I therefore regard these allegations as being so hopeless on the facts that they could not justify further investigation of the relevant charges in this context, even if any allegation of misconduct were in principle available to be pursued (which I have held above, there is not).

222. I should mention one further point for completeness. It is my understanding that in fact, I&B did provide some voluntary co-operation to the SFO and/or Grant Thornton after the hearing in Guernsey 1 was over, but before judgment was given. If so, this would, in my judgment undermine virtually entirely the basis of the allegation of misconduct through there being an ulterior motive behind I&B's earlier non-cooperation. Although GTC's subsequent attempt to introduce further evidence and raise this point after the hearing failed in practice, I&B could scarcely have been confident that this would happen, and the timing of their providing such information would suggest a lack of concern or guile. The timing of their giving information would fly in the face of their suggested previous ulterior motive. However, my recollection of this timing point may be incorrect, and my decision does not depend on it.
223. In summary, therefore, I can see no facts which even begin to suggest that there could be any substance in the various allegations of misconduct and consequent loss to the TDT, based on alleged non-co-operation with the SFO or Grant Thornton, even considering them on their merits. I would not, therefore, be minded to let this challenge go forward to a hearing or further investigation even if I were free to consider the merits of it. In fact I am not so free, as it is also not open to F&B to raise, now, the points founding such challenge. For all these reasons, therefore, this objection is obviously bad.

Remaining matters - Costs incurred in Delivery Up proceedings and Other Proceedings.

(1) Delivery up proceedings

224. I&B unsuccessfully resisted applications by GTC for delivery up of TDT documents in 2011 and in 2017. It is accepted as a matter of principle that a trustee may be deprived of his indemnity in respect of costs of proceedings in which he was unsuccessful against the trust, or if he was guilty of unreasonable conduct in causing them, or bringing them, or his manner of conducting them: see Lewin on *Trusts* 20th Ed at 48-007. This has already been discussed above.
225. For present purposes, therefore, I&B have conceded that the objections made by F&B to the costs claimed by them in relation to the above "Delivery Up" proceedings are not obviously bad and cannot be struck out. Costs which they have incurred in respect of a contentious hearing against the TDT on which they did not succeed would have to be justified by showing that it was not unreasonable for the TDT rather than I&B to have to bear those costs despite the ultimate outcome. I&B accept that this applies to 32 (apparently) identified Invoices which I&B themselves allocate to costs incurred in those proceedings. F&B have

identified a further 184 individual time charges on other Invoices, totalling about £206,000, which they say are either clearly, or possibly, referable to the costs of the Delivery Up Proceedings.

226. As regards these latter, Advocate Wessels had not had time at the hearing to consider whether they fell into the same class as the admitted invoices. The matter was therefore left that this would be done after the hearing. Insofar as these further charges are accepted to stand or fall with the 32 admitted Invoices, then they can all be dealt with together, at the inevitable later hearing. Insofar as any do not, then further directions will have to be given as to how the relevant issues can be progressed.

(2) Other matters or proceedings

227. This issue comprises three sets of costs. The first (totalling £15,420.94) comprises costs, (but also, possibly, remuneration charges, as some items bear references of Investec personnel) incurred between August 2009 and January 2010, and said to relate to a proposal devised by Macfarlanes to effect a protective transfer of Iver Resources Ltd, (the company which owned the Royal College of Organists which was the London family home of Mr Tchenguiz) into a new “Tchenguiz” trust, possibly the NS1 Trust. The second relates to I&B’s claimed costs incurred in the “NSI Proceedings”, an English action, which followed this. The third comprises I&B’s costs incurred in Beddoe proceedings related to the NSI Proceedings, and is enigmatically described to “*includ[e] payments already made by the Joint Receivers in relation to their costs*”.
228. The basic reason for these challenges appears to be that the costs are claimed to have been wasted or unnecessarily and unreasonably incurred because the proposed transfer of Iver Resources Ltd was not followed through and did not take place. Whilst this would relate directly to the first set of costs, it seems that the latter two must be being challenged as being consequential, although I cannot see the connection, as presently advised.
229. Paragraph 15 of the December 2019 Order expressly carved out from the present exercise the costs of the “NS One Proceedings” (there defined), pending the possibility of obtaining determinations as to costs from the court seised of those matters. The question therefore arises whether some, or all, of these costs ought to be deferred and dealt with, either within the excluded NS1 Proceedings, or for being so closely related to them that the same principles are likely to apply, so that they are conveniently added to the NS1 Proceedings. It may well be, therefore, that they can and should be hived off for separate consideration in any event, by similar reasoning to that pertaining to the Delivery Up costs.
230. On any basis, I simply do not feel that I have heard sufficient argument directed at this aspect of the costs. I am not familiar with the content, the reason for, or the course of, the NS1 Proceedings to be able to make such a decision. I do not, therefore, propose to make an order or decision about these particular costs until I have heard further submissions. In those circumstances I make no observations at all about their apparent merits. I will not strike out these challenges.

Issues in the main Application Approach

231. This brings me back now, therefore, to the present main Application itself. As noted, the original objections by F&B focussed on actual Invoices, and I&B have analysed their nature, from the narrative, for common themes and into various sub-headings. Their arguments as to why F&B’s objections should be struck out at this preliminary stage, based on this framework, therefore range from resisting generalised complaints, through resisting challenges on particular but recurrent grounds, to resisting individual challenges, generally

made at the level of Invoice but also in places by reference to items of charge on that Invoice. I&B observe that F&B have not necessarily, (nor I think even usually) identified the actual charges which their challenges would strike out, but have simply referred to some such being included amongst the charges on a particular Invoice, and, on occasions, with examples.

232. Ultimately, as I have said, it is individual charges which build up the final figure of I&B's indemnity, but practicality requires, if possible, identifying issues which apply to many individual charges and dealing with these on principle; the actual charges to which the result is applicable can then be identified later and the result applied appropriately.
233. I have already considered above, and dismissed, the challenges or objections identified by subject matter raised in F&B's Speaking Note arguments at the hearing. I now find it the most convenient approach to consider, first, the general class of objection identified by I&B which goes to the correct allocation of charges. This is a different kind of objection (it is a Question (2) point) from "reasonableness", (Questions (5) and (6) points), and is a matter more of fact than impression. I will then consider the two other general topics of objection going to the "Insufficient Particularity" category of objection made by I&B, followed by the objections made by F&B in their "Unreasonably Incurred" category and submitted by I&B to be capable of consideration as "themed" objections. That will again narrow issues, by identifying how far points of principle, or clear types of charge, require further scrutiny (or not) before approval or rejection. I prefer to deal with the generalised objections made by F&B under their "Insufficient Particularity" category and under the "Unreasonable in amount" category, which I&B classify as being in relation to "Nature of work undertaken" at the end, as the previous discussions will then have helped to focus on material principles and considerations for that purpose. Finally, I will try to identify and deal with any further matters outstanding.

(1) Allocation to headings objections

234. This is a class of objections which I&B identify within F&B's "Insufficient Particularity" category. It goes to Question (2) in the sequence of questions (see [100]) above, i.e. were these charges actually incurred in connection with the trust (i.e. the TDT) at all? It is therefore an issue which falls to be decided on its own merits, by which I mean that it is not an issue to which the *Alhamrani* threshold test is to be applied having regard to giving the trustee the benefit of any doubt, as discussed above.
235. In the paradigm case, it will apply to the issue of whether the costs in question were incurred "in connection with" the trust or not, discussed above. I should therefore allow any dispute to go forward which raises a real possibility that the particular charge has not been incurred in connection with the TDT, but on some other matter. Thus, where it appears that there are charges referring to attendances or work involving, for example, the "TFT" (Tchenguiz Family Trust), the "TS" (Tchenguiz Settlement), the "TDAT" (the Tchenguiz Discretionary 'A' Trust, a different trust) or even, as is raised in one instance, "Liza Tchenguiz' divorce", those references would, in my judgment, raise an arguable issue as to whether the particular charges in question had been correctly allocated to the TDT.
236. There is a further potential objection of this type, which is specific to this Application. This arises from the procedural limitations on the subject matter for the current adjudication as to being within I&B's indemnity entitlement pursuant to (a) the December 2019 order (as later amended) and (b) I&B's proof of debt.
237. As to the former, the December 2019 court order as agreed between the parties carves the costs of certain specifically identified proceeding (in particular, Guernsey 2, the TDT Documents proceedings and the NS1 Proceedings) out of the present assessment. Therefore,

any indication that any such costs actually have been included within the Invoices will take those costs out of the scope of this Application, and that provides a proper objection to their inclusion. Such costs will have to be adjudicated on and claimed in other proceedings.

238. As to the latter, I&B tried to be helpful in explaining the content of their Proof of Debt when submitted, by relating it to their costs incurred under broad subject headings. Proceedings in Guernsey 1 and Proceedings in Guernsey 3 are major component sections. The Invoices, however, have related to times prior to the commencement of Guernsey 1 (in itself not necessarily a bar to inclusion, since proceedings require preparation) but also in particular during the period of overlap with the Somerfield Proceedings. I have already noted and dealt with arguments as to such charges being disallowable on the grounds of misconduct, but there is the further point that they might fairly be regarded as misallocated, and not within the ambit of this Application.
239. In my judgment, the above aspects of an allocation objection are technically valid, but not sufficient to strike out the charge in question from recovery. This is for the obvious reason that I&B's indemnity as Trustee or former Trustee of the TDT is not confined to the costs of Guernsey 1 (or Guernsey 3) but is an indemnity in respect of all their costs reasonably incurred in connection with the Trust. In my judgment, any such objections would and could reasonably be cured by permitting I&B to amend the terms of its Proof to include reference to any such claimed costs extraneous to Guernsey 1 and Guernsey 3, and not specifically catered for elsewhere in their Proof in a class which still awaits determination. The submission of Proofs is an aid to identifying proper claims, not an obstacle course in pleading accuracy.
240. I conclude, therefore, that within the various objections identified under the heading of "Allocation to headings in I&B's Proof" in the Master Schedule, there are at least some which may well be valid objections. These therefore require identification and none should be struck out pending this. I am also aware that during the course of these proceedings, since about April 2020, there have been some amendments and acceptances by I&B that certain objections made by F&B do have some *prima facie* justification. I believe this may include some objections in this class (Allocation) which I am considering, and which I have described above, but I do not know the detail.
241. In the circumstances, and subject to any further submissions from counsel, I will direct that F&B should identify all the charges in the Invoices identified by I&B as containing objections relating to "Allocation to Headings in I&B's Proof", and which are said to be charges properly directed at other client entities, or to matters not included in the scope of this present exercise (stating which), together with the actual objection being made to each such charge. This identification must be positive, as it is for F&B to make the argument that any such charge relates to some such other matter; I do not regard an objection such as "unclear how this relates to Guernsey 1" as being sufficient without more. The parties should then seek to agree the validity (or not) of any such potential objections. Insofar as they remain in dispute, the parties should then identify the particular disputed charges and seek to agree directions as to how the disputes should be resolved. They will do this bearing in mind what they will have gathered, from the whole of this judgment, to be what I regard as the appropriate approach.
242. I have deliberately confined the above exercise to such charges as are identified by I&B in their Master Schedule, because F&B should have raised all their objections in their very lengthy Schedules of Objections on which the Master Schedule is based. However, if F&B consider that I&B have made a mistake in omitting any such allocation objection(s), these should be similarly identified, but separately, and treated in the same way.

(2) Basis of redaction

243. This head of objection is again raised with regard to Invoices as a whole, rather than individually identified charges. It is raised against about 40 Mourant Invoices and about a dozen of Macfarlanes'. It is not an objection to the charges on the Invoice, but to the fact that some parts of the Invoice or supporting narrative have been redacted; the complaint is that the

“basis for such redaction is unclear since redacted material would, under previous orders, be accepted to remain privileged with F&B’s rights therefore remaining reserved pending furtherer information”.

244. The explanation given by I&B is that the material has been redacted because it refers to fees which I&B are *not* claiming, but which happen to have been charged on the same Invoices or narratives as charges which I&B *are* claiming. Thus it has nothing to do with the indemnity actually claimed.

245. I accept this latter point. It is not even alleged that the redacted material would have any bearing on assessing the reasonableness of the charges contained in the unredacted material, which is the kind of objection I would have expected, although I would probably not have accepted it. But the supporting rationale for this form of objection does not even purport to, and cannot, amount to an objection to any actual charge. It is in fact an application for disclosure of further information with a complaint that there is no good reason not to give it. It is therefore misconceived as an objection to any fee charge claimed, and I note that its inclusion in this form tends to suggest (as I&B have complained) that F&B’s whole approach in this matter of quantifying I&B’s indemnity entitlement has been continually to demand more information hoping to ferret out some point which can then be lighted on as a possible case for objection which should require yet further investigations.

246. I find that there is nothing in this class of objection at all, and I will strike out all objections in this form.

(3) Counsels’ fee notes

247. This is a further objection or complaint about the material supplied or not supplied by I&B in the “Insufficient Particularity” category, rather than against the substance of any charge. The complaint has been that F&B either could not locate a pertinent fee note from counsel, or that one had not been supplied. It therefore relates only to Macfarlanes’ invoices

248. The responsive explanation given by I&B in relation to fee notes allegedly missing was similar to that regarding redaction; if the fee note was missing it was because it was for work for which no claim was made.

249. As regards F&B’s inability to locate fee notes, this argument was raised previously, at the hearing in April 2020, when I refused F&B’s demand that I&B should go through all claims made under Macfarlanes’ Invoices including disbursements for counsels’ fees and cross-reference the counsel’s fee note to them. At that time, Advocate Wessels explained how it was both possible, and not particularly difficult, to identify relevant counsels’ fee notes supporting particular narrative charges in the documentation supplied and explained by Mr Simon Day in his First Affidavit. The process required a degree of common sense, and an ability to retain in mind the relevant fee figure so as to identify the counsel’s fee note which was in that sum, and which was supplied in support of the relevant charge. Occasionally this required an ability to recognise that two figures on counsel’s fee notes added up to the sum claimed. This did not strike me at the time as being a difficult exercise, and I came to the conclusion that it was not reasonable to require I&B to do it (at their expense) in order to

provide information for F&B which they could just as easily work out for themselves. I take the same view now.

250. Objections raised on the basis of inability to locate counsel's fee notes, if they were to succeed in procuring the disallowance of the claimed fee, would, in my judgment, have to be made on the basis of F&B's themselves indicating the attempts they have made to do so, and their fruitlessness, so as to give possible force to a claim that the fee charge has been incorrectly made. No such evidence has been given; there has simply been a complaint that information which would do the job for F&B has not been provided at low level.
251. There is therefore, I find, no evidence to suggest that any viable objection to the right of I&B to claim indemnity in respect of the Invoices upon which those claims are founded is available to F&B on the present state of the evidence and argument. I will accordingly strike out those particular obligations for being obviously bad. However, if, having read this judgment, F&B consider that they can and do make out a positive case in some instances that some counsel's fee has been included in the indemnity claim when there actually is no supporting evidence that it was actually charged, then I will hear them as to whether I should give them liberty to apply, with particulars.

Themed subject objections

252. I now turn to considering the themed objections. As a preliminary point, though, it is important, throughout, to bear in mind how the application of the relevant standard of "unreasonably incurred" (and, indeed, "unreasonable in amount") may differ in any particular situation and at any particular time. I have previously touched on this at [87]-[94] above, when considering "Proportionality", but it is convenient to reiterate those conclusions here as a more general set of principles.
253. When considering the standard of reasonableness in relation to particular charges, there is, in my judgment an important distinction arising from the situation at different times, which was not particularly examined in the argument before me. Most of the relevant invoices are rendered in respect of charges incurred after I&B were removed as Trustee, i.e. after 2nd July 2010. The effects of this important distinction, in my judgment are therefore that:-
- (i) From 2nd July 2010 onwards, reasonableness is to be judged on the basis of being within the range of what a hypothetical litigant, in the position and circumstances pertaining to I&B, could have regarded it as reasonable to incur;
 - (ii) The same test will apply to legal expenses incurred prior to 2nd July 2010 where those charges have been determined to be indemnifiable expenses, notwithstanding they were for I&B's personal benefit, because of the fact that there has been a judicial decision vindicating I&B's expending money on its own legal costs, in connection with the trust, in that regard;
 - (iii) Where there has been no such determinative judicial decision, however, the usual rules as to the incurring of expenditure by an incumbent trustee must apply. Whether an incumbent trustee is entitled to an indemnity for expenditure fairly regarded as incurred in connection with the trust/his trusteeship, but advising on his own personal position, depends on
 - (a) whether it was reasonable for him to consider he had to make such expenditure,
 - (b) whether this need occurred without any fault or unreasonable conduct of his and,

- (c) since he had, *at the time*, a duty to take the interests of the trust into account in incurring expenses which he would expect the trust to pay, then, also, whether the expenditure was reasonable, judged along the same lines as incurring trust administration expenses. This means, and includes, acting fairly and even-handedly between all the interests (trustee's and beneficiaries') involved, and may include considerations both of proportionality and of a trustee's duty of care.

It will be immediately seen that the considerations affecting expenditure in this third situation are highly fact-sensitive. I will call this a "**Class (iii)**" situation where convenient.

Unreasonably Incurred

254. I now turn to the classes of themed objections identified in I&B's Schedule, starting with those under F&B's category of "Unreasonably Incurred".

(4) Costs of legal research

255. Certain narrative entries supporting various invoices refer to fee-earners' charges for "legal research" under this or a similar description. F&B object to these across the board, on the grounds that time spent considering law and procedure is, as a general rule, non-chargeable because legal knowledge is the tool of the lawyer's trade. Advocate Robison cites *Perry v Lord Chancellor* (1994) *The Times* 26th May 1994 in support of this proposition;

"Time spent considering the law and procedure is usually non-chargeable - and the higher the expense rate, the more law and procedure the fee earner is expected to know."

He argues that there is nothing to take the situation here out of this general rule, or at least that this is an objection which cannot be said to be obviously bad, and it does require further investigation.

256. As to the law, Advocate Wessels argues that the general rule relied on by F&B has only been applied in the context of an *inter partes* assessment of costs, and in fact only in the UK. He argues that it is not a "general rule" in any event. Also citing *Perry v Lord Chancellor*, he argues that there is, at least, a distinction between "discovering" the law and "applying" the law, with the latter being recoverable even if the former might not be. He submits further that, even then, there is an exception to any such argument of non-chargeability where the legal issues are highly complex and unusual, and the law is consequently unclear or is refined, as he submits had been this case. He makes a distinction between "generic" legal research - i.e. as to legal principles - and specific legal research into the matter of how such principles might be applied to the facts.
257. He further argues, as to the particular facts, that examination of several examples given by F&B shows that they have been provoked simply by the use of the word "research" in narratives, whether or not that is legal research, and that the context of several such entries shows that they were a reference to research into documents in the case rather than into law, in any event.
258. I prefer Advocate Wessels' arguments. The argument that legal research is not reasonably chargeable is based on the proposition that knowledge of the law is supposed to be a lawyer's stock-in-trade, such that it is not reasonable to charge a client - and still less a client's opponent - for looking up or learning the law itself. I also accept that this is a common reason for taxing down the quantum of *inter partes* costs, but, as previously

discussed, the quest there is to find the right amount which a successful party should be entitled to recover against an unsuccessful party as a matter of costs shifting policy; it is not to give him a “full indemnity” as a matter of statutory or contractual entitlement. I am not dealing with a costs taxation, and the question here is whether I&B, as clients, paid fees for work which no reasonable client in their position would have accepted.

259. I also find, as a general point, that the argument relied on by Advocate Robison could only apply in this context at a very rudimentary level of legal principle, and hence research, even according to its theoretical rationale. Once one moves from the basic principles of law learned for legal qualification purposes, one moves into the area where the law which may need to be researched will often, and even usually, be far from the kind of law which a lawyer is expected to have at his fingertips, or it will concern intricacies in considering the application of such law. It seems to me that it is actually quite difficult to draw a clear and satisfactory distinction between “discovering” and “applying” the law, or between generic or specific research, because the law often gets “discovered” by seeking to apply previously ascertained principles to more intricate factual situations. The crossover from one to the other is just not a clear divide.
260. Furthermore, when faced with a particularly complicated or momentous situation even an experienced lawyer may well, and quite reasonably, feel the need to begin consideration of the problems perceived by going back into the textbooks to refresh his or her memory on relatively basic principles, and the authorities cited in support of these, so as to be able to reason his way through an elaborate factual situation more reliably. Indeed, in my judgment, especially in a complex case, it would be part of a lawyer’s duty of care to check the accuracy of his knowledge of the relevant law, rather than just presume it. Many a legal negligence case has arisen because a lawyer thought he knew the law and did not check it. It does not seem to me that such work, even if classified as “legal research”, is time spent for which no reasonable client could be expected to, nor would, pay.
261. Advocate Wessels reminds me of the complexities of the legal issues in this case, the amounts at stake, and the novel and difficult points of law raised in both the various substantive proceedings with which I was not involved, (but have had to look into for the purpose of this Application) and the subsequent proceedings with which I have been involved. He submits that it could scarcely be argued that this was a routine piece of litigation as to which research on the law could only have been on matters properly expected to be within the ordinary knowledge, even, of senior practising lawyers. I agree.
262. Various specific objections are cited as examples in Advocate Robison’s Skeleton Arguments of 14th September 2020 and in correspondence. Advocate Wessels has refuted all those examples, either on the grounds that they were not legal research at all when considered carefully, rather than superficially or on the basis of self-serving assumption, or on the grounds that, where matters are mentioned, they would plainly, reasonably, fall within appropriate specialist or fact-related specific research, (obviously for example, a Guernsey lawyer could not be expected to know BVI law) or simply for the general point that they were incurred in the context of a very complicated and unusual situation. I have found these specific refutations convincing.
263. In my judgment, certainly in relation to any purported charges for “research”, legal or otherwise, incurred after 2nd July 2010 the prospects of F&B demonstrating that any charge identified as being attributed to legal research must without doubt have been charged in respect of Mourant or Macfarlanes’ personnel learning up law which they ought already to have known (as opposed to carrying out appropriate research into law which was, or might, be going to be applied in their conduct of, or advisory role in, the currently relevant proceedings for I&B), is fanciful. The objections of “unreasonably incurred” on this ground

during this period I find to be obviously bad. I find this to be the case simply on an objective review of the nature of the challenges themselves.

264. But this goes further, in that the test is actually not whether the court itself would assess any such charges as reasonable, but rather whether a non-lawyer client could, reasonably, have accepted to pay for those stated items of research work, or must reasonably have queried and challenged them *and* succeeded in striking them out or getting a reduction in the bill. That scenario is just so unrealistic in the context of major litigation such as took place here that it further reinforces my finding that these challenges are so obviously bad that they do not require further investigation as to their validity in principle, at all.
265. As regards any research charges incurred before 2nd July 2010, the position would only be different insofar as this arose from the fact that I&B were then the incumbent trustee; see [253] above. There therefore appear to me to be three arguments theoretically available namely (i) that the charge was purely personal to I&B's interests such that it could not be viewed even as being incurred "in connection with trust", (ii) that it was occasioned by some misconduct other than those arguments which I have dismissed above or (iii) the "Class (iii)" argument, i.e. that the costs had been unreasonably incurred in the light of I&B's duty as trustee not to be extravagant with Trust funds in respect of legal advice which they were entitled to take at the expense of the Trust. If it ever got to this last argument, then this would probably only be with regard to quantum.
266. With the cut-off date being 2nd July 2010, the relevant Invoices are Mourant Issues Nos 1 - 24 (part) and Macfarlanes, Issues Nos 1 - 7. Within these there are 12 Mourant Invoices as to which this objection is made (Issues Nos 1, 4, 6-10, 13 - 16. and 24) and one Macfarlanes: (Issue No 4) In fact, seven of these are within the Invoices (Nos 2 - 14) which have been withdrawn for having been paid, so that technically only five objections remain, but I have nevertheless checked the narrative of these objections. Mourant's Issue No 15 does not, so far as I can see, in fact contain an objection to legal research for being "ordinarily disallowed", which is the common form objection. With regard to the actual narratives where the subject of the challenged legal research is given (Mourant Nos 6-10, 13, 14, and 16, and Macfarlanes No 4), these do not strike me at all as matters which could be regarded as over-basic research into matters which ought to be regarded as a lawyer's stock-in-trade. I see no reason to suppose that where either the legal research or the objection itself is unspecific, this would be likely to hide an unjustifiable subject for research.
267. Standing back, this head of objection appears clearly to have been based on applying arguments which would or could be made on an *inter partes* costs taxation. I have already said that this is misconceived. Combining this with having reviewed the evidence, I am not satisfied that these 13 objections have any real prospect of succeeding if pursued further.
268. I will therefore strike out objections made on the grounds of a charge for legal research which is "ordinarily disallowed". I do not think it appropriate to give liberty to apply as I cannot see any situation in which such an objection might be likely to be sustainable on a more focused basis.

(5) Costs of dealings with insurers

269. Certain entries on the invoices for which I&B claim indemnification relate to lawyers having meetings or dealings with I&B's insurers. Advocate Robison argued that the time charged by lawyers for "liaising with insurers" must automatically and *ipso facto* be held to be outside the scope of the trustee indemnity as a matter of general principle, for being expenditure which was not incurred "in connection with" the TDT on a proper interpretation of that phrase; it will have been incurred solely for I&B's own independent interests and business purposes, outside the Trust.

270. He argued that insurance is an overhead of a professional trustee's business. Whilst a trustee is in office, insurance would have to be met from the trustee's income and could not be charged as a separate expense. This showed the character of the expenditure, and that character did not change just because a trustee ceased to hold office. Any dealings with insurers were therefore simply for I&B's benefit and must be characterised as such, and therefore not within the scope of the indemnity.
271. I&B's response was that there were three problems with this analysis. The first was that the costs claimed were not claimed with regard to insurance cover (premiums) or the routine question of dealing with that, but with the costs incurred by I&B to their lawyers for the latter's dealing with I&B's insurers or their lawyers, with regard to the claims made against I&B by the TDT in the relevant proceedings. Both common sense and the fact that the evidence is clear that the insurers had an interest both in the proceedings themselves, and the prospects of their insured's liability, and the actual fees being incurred which they could well have to meet, make it perfectly likely and reasonable that I&B should have involved their own lawyers in correspondence or meetings with their insurers about such matters. The second was that those costs were incurred directly as a result of those claims being made, and were therefore obviously "in connection with" the trust within the meaning of Art 26 (2). The third was that the relevant insurance was not, in practice, solely for I&B's benefit, but also for the benefit of the TDT; their potential interest in I&B's insurance could be surmised to be the reason why the claims had ever been made in the first place.
272. The last proposition would, of course depend on the terms of I&B's insurance, and whether it merely excluded cover for actual fraud, etc, but not for the "gross" negligence which the TDT would have to prove against I&B. It is also somewhat of a "jury" point, since any such benefit to the TDT lies in the existence of the insurance itself, and not in I&B's lawyers discussing the merits of the case and/or the fees being incurred by I&B with I&B's insurers. It is therefore far from being a determinative consideration. I prefer, and accept, Advocate Wessels' arguments based only on his first two points.
273. I of course accept that the costs incurred by a trustee in the routine general matter of obtaining and renewing insurance cover are not incurred "in connection with" any particular trust. They are indeed part of the overheads of the trustee's business, and therefore cannot be recovered under a trustee's right of indemnity from any particular trust client. (The matter could be different if a trustee took out special cover for the purpose of dealing with any particular trust, but that is not an issue in this case.) It follows that if legal expenses were incurred in and about that activity, they would not be incurred "in connection with" the trust, and would not be recoverable under the trustee's right of indemnity.
274. However, and whilst I have not seen the relevant insurance policies, it is perfectly obvious that I&B had to involve their professional indemnity insurers with regard to the claims made against them, and justifiably, in my judgment, even from the point where such a claim appeared possibly likely to arise. Judging from the chronology provided by F&B, this would have been significantly earlier than I&B's actual removal in July 2010; there was already a dispute arising from before March 2010, being the date on which Mr Tchenguiz and the then Protector of the TDT, Mr Hillier, sought injunctions against I&B in the Royal Court asserting that I&B had a conflict of interest and were about to embark on a course of action which was adverse to the interests of the TDT beneficiaries.
275. Insurers might be providing cover to I&B as regards either substantive liability or legal costs or both, but in either case, they would have had a legitimate interest in the progress of the litigation and the legal costs being incurred by or on behalf of their insured. Indeed, it would not be unusual, I think, for a policy to entitle an insurer to require information and probably even involvement in such disputes and the conduct of relevant litigation. Even if

this were not a requirement, it would not seem to me to be unreasonable for the trustee/insured to wish to keep its insurer informed and to be co-operative with the insurer, and that it could very reasonably instruct its lawyers to participate in this. Any legal costs thereby incurred would, in my judgment, certainly be incurred by the insured trustee “in connection with” the trust within the meaning and intention of Art 26 (2). They would only have had to be incurred because of the trustee’s function as a trustee and the situation he had consequently found himself in. They would therefore possess the basic qualification for indemnity.

276. It follows, therefore, that where any particular charge is shown to relate to lawyers dealing with I&B’s insurers, I can see no sufficient prospect, in all the circumstances of this case as revealed by the various pleadings, chronologies and other documents which I have seen, that they could relate to disallowable communications or activities, and I will strike out these objections.

(6) Media updates

277. Certain charges within the relevant bills from Macfarlanes relate to “media updates” and Google alerts, with regard to media attention to events or litigation of concern to the TDT, or relating to Mr Tchenguiz. All but one (Mourant’s Issue No 311, which was in 2014) are Macfarlanes’ invoices. A few are from 2011, but most from 2010, the earliest being January 2010.

278. Advocate Robison submits that these activities are not matters which it is necessary for a law firm to spend time on, or to deploy senior personnel upon, and/or that they related to I&B’s own public reputation and managing the media’s attention, and as such they are a business overhead of I&B, and not properly recoverable as charges to the TDT.

279. Advocate Wessels submits that this latter point is a misunderstanding of the charges. They were not charges for lawyers doing media management. He suggested that they were principally from 2010, when there were matters being noted in the media which were of serious and reasonable concern to I&B as Trustees. As is shown by the descriptions of such charges as “alerts” or “updates”, they relate to a lawyer reading alerts of media attention to high profile matters of concern to the TDT, such as Kaupthing and its commercial difficulties, the Somerfield actions, the SFO investigation of Mr Tchenguiz, and his subsequent damages action against them. He submits that it is perfectly reasonable for a party involved in litigation or likely litigation to instruct or authorise lawyers to keep themselves updated with media comments about other parties potentially interested or involved. He points out that the charges themselves are generally very small in amount, typically totalling less than £100 in a month. He also submits that the level of these objections demonstrates the totally pedantic and petty attitude of F&B in resisting their indemnity obligation in general.

280. The argument here seems to me to be one of fact and impression. I do not find much force in Advocate Robison’s argument. It has to be founded on one of two propositions, namely that reading media updates was an unreasonable cost to incur at all, because it was unnecessary, or that this activity could and should be taken to be for I&B’s reputational benefit, alone.

281. I do not accept the former argument. The timeline of the various events and proceedings going on is verified by the chronologies supplied by both I&B (Scheduled to their Skeleton Argument of 6th October) and F&B itself, the latter being prepared for the October 2020 hearing and being very, very much more expansive and detailed as to contemporaneous events. From before the time of these charges, the SFO investigation into Kaupthing into which Mr Tchenguiz and the TDT were likely to get embroiled had been announced, and this

continued, with its attendant contests about legal process, until October 2012. As from at least May 2010 and probably before March 2010, there had been a rift with Mr Tchenguiz which was all too obviously likely to result in contentious legal proceedings between I&B and the TDT, - but in effect, Mr Tchenguiz as the principal beneficiary of the TDT. The subsequent “SFO Damages Proceedings” once Mr Tchenguiz was exonerated, from January 2013 to July 2014, occurred during the period of attempts by the TDT to re-open the Guernsey 1 hearing, and pursue Guernsey 3.

282. I am perfectly satisfied that when involved in high value, hard fought litigation such as this, a party and its lawyers would wish to look out for any information or intelligence about the opposing parties which might be valuable as regards litigation strategy or tactics, and that such intelligence could be gleaned from the media. I have no doubt that a typical client in such matters could think it worth paying its lawyers to set up and follow up such information, provided the costs were not unduly large, in context. This is not mere extravagant prurience, and, with the caveat mentioned, for a client to accept such charges would not, in my judgment, be plainly unreasonable. I therefore accept that these kinds of charges can be indemnifiable, and are indemnifiable in principle in this instance.
283. As for Advocate Robison’s second proposition, namely that this activity was for I&B’s reputational benefit, there is no evidence supporting this directly; it can only be argued as a matter of inference. The far more likely, and in fact obvious, inference is that it was for the purposes suggested by Advocate Wessels.
284. Even if there were some duality of purpose, that would not be sufficient, in my judgment, to take these charges out of the scope of being incurred “in connection with” the trust, and reasonably so. In fact, even if the charges had some relationship to media management of I&B’s reputation, which I judge to be unlikely in view of their amount, I would not regard that as necessarily, or even probably, ruling them outside the scope of I&B’s indemnity entitlement. This is because such media management would only have been required as a consequence of I&B’s trusteeship, as to which their conduct has now been generally vindicated. The likelihood of any further investigation changing any part of this apparent position is, I judge, vanishingly small.
285. I have also examined the charges referred to. Apart from the single Maurant Issue (311), (which included a claim for 1 hour (£280) researching media reports of the SFO proceedings which does not appear *prima facie* unreasonable), they all appear to be very small amounts and indeed almost all of them are not even separate charges, but part of a narrative of general work going to make up composite elements of charge, usually itself in the £100s but sometimes only even in the £10s. They strike me as quite insignificant. I judge them to be well within the range of what a reasonable litigation client could think it worth paying in the overall circumstances here.
286. Whilst that point goes more to the question of such charges being reasonable in amount, it underpins my impression that it would seem more likely than not that the costs of these charges going forward for a full trial would exceed their amounts, with this value itself being insignificant in the scheme of this whole dispute. Whether or not Guernsey customary law formally recognises the maxim *de minimis non curat lex* - “the law does not take account of trifles” - that also seems to me to be a principle of common sense with which Guernsey customary law is redolent.
287. Advocate Robison has urged that, ultimately, the value to F&B of successful challenges to I&B’s indemnity claim of around £28Mn even if only as to a small part, could, and in all likelihood would, still be significant in absolute money terms, and that because of the nature of the case, such “success” would necessarily be made up of small component parts. I do not think that that is material to the present point, which is a comparison of money value

against costs of examination at the level of such component parts. However, I accept that it is the case that, taken at any level, the exercise I am undertaking is a quantification of I&B's right to indemnity and not the discretionary award of a compensatory sum. It could therefore be argued that the relativity of the costs of investigation to the value of sums in issue is just not relevant, because that factor is a discretionary, or case management, consideration, rather than one going to substance.

288. Having noted this point, I do not need to decide it. I would incline to the view that in an extreme case, according to circumstances, this Court could decline to try an issue, including an issue as to the quantification of a trustee's indemnity, on the grounds that the costs were obviously very significantly disproportionate to the value of the dispute. I do not need to decide the point here, however, because my decision does not turn upon it. It rests on the reasons previously given.
289. I will therefore strike out the objections as regards lawyers spending time on reading media alerts, on the basis that they have no substance sufficient to justify investigation.

(7) JCPC costs assessment costs

290. This is a specific argument raised by F&B with regard to some 42 Invoices, in respect of charges for the preparation of bills of costs for the purpose of pursuing detailed assessment of I&B's costs of the Appeals to the Privy Council in Guernsey 1 and Guernsey 3, in respect of which it had obtained costs orders against F&B and, indeed, others. The objection is that this expenditure was "superfluous" (i.e. unreasonably incurred), given I&B's decision to pursue their costs under their right to indemnity, which F&B argue was a decision made even in January 2019, because I&B included such costs as a claim within their Proof of Debt. Preparing bills of costs for the purpose of a court costs assessment in the Privy Council was thus a waste of money. Claiming these costs therefore contravenes the principle that where a trustee has incurred costs which it need not have incurred, and indeed should have avoided, those costs cannot be an expense reasonably incurred which should be paid by the trust.
291. Advocate Wessels accepts the last general proposition as a correct statement of principle, but argues that it does not apply here, because (a) these were costs which, in practice and in the circumstances, were not avoidable, and (b) because it rests on the false assumption that I&B are obliged to (and did) elect between seeking to recover this part of their expenditure either under a taxation ("assessment" in England) of costs, or under their indemnity, and that they elected for the former. He submits that there is no such obligation to elect - although of course insofar as I&B were to recover their costs by one route, they could not recover them again by the other - and that I&B have not elected, but have merely (and reasonably) kept their options open, so as legitimately to protect their position.
292. He points out that I&B's costs orders can only be enforced after a detailed assessment. This requires the filing of prepared bills of costs, and that procedure is subject to time limits. Uncertainty hung over the possibility of I&B's recovering their costs under their indemnity in full. This uncertainty was caused by F&B's taking the assignment of the BVI companies' judgment debts and running the priorities arguments for *pari passu* distribution of inadequate assets, which would obviously reduce the possibility of I&B getting recovery in full. It was therefore necessary and reasonable for I&B to protect its position by keeping open the possibility of enforcing its claims under its costs orders. However, F&B refused, in June 2020, to grant I&B any further extension of the time limit for filing the necessary bills of costs in the Privy Council. I&B therefore had to seek an extension from the court itself, and file the necessary bills of costs (even though already prepared) within time, in order to keep this possible course of action alive. I&B did no more than was necessary for this purpose and it is submitted that, there being no obligation to elect, they were entitled to take that

course. It was a course which a former trustee in I&B's position *could* think it reasonable to take.

293. In a previous skeleton argument in July 2020, Advocate Wessels also argued that there was an important distinction between the two routes to recovery of I&B's costs expenditure, in that the claim for indemnity was against the trust assets, whereas the claim for recovery of costs under the court costs orders was a claim against F&B personally. This point did not appear in his latest skeleton argument and was a mere unexplored assertion in the oral argument. I am not sure that it could be right, in the light of Art 32 of the JTL; I am also not sure that I&B's right to recover anything under its costs order would have any different priority, as a claim on the TDT assets, from that of I&B's trustee indemnity claim, as the two claims themselves do not seem to be of any different legal character. Neither this point, nor any implication from its not being further advanced, was argued before me. It also seems to me that there must be great doubt as to whether there would be any real prospect of recovering under costs orders against the other parties in the Privy Council, although this is conjecture on my part. I have concluded, though, that in the end this does not really matter, as it does not impinge directly on the relevant test.
294. In my judgment it is correct that I&B are not under any obligation in principle to elect between the two routes to recovery as a matter of general law. It is only if they were to take some step required by one route which was inconsistent with proceeding by the other route that they could be held to have done so. They have not done that; their two courses of action are capable of proceeding entirely separately and independently of each other, in parallel, without any inconsistent steps being taken. It is only where it comes to the point of possible double recovery that they would, in effect, have to elect. Neither are I&B under any separate and particular obligation to the TDT to make an election arising out of the facts of the case, as they owed no duty to the TDT to do so.
295. The real question reverts, therefore, to the usual one, namely whether what I&B did was within the range of what a former trustee in their position, now defending their own interests against the trust as a litigant, could reasonably have done. The test is not, therefore, whether I&B actually thought or deliberated that there would be a particular benefit in pursuing their rights under the costs orders as compared with pursuing their indemnity which required to be sustained, but, rather, whether a non-lawyer trustee in their position could reasonably have thought that there might be sufficient such benefit, so as to justify taking the steps needed to keep that option alive, viewed in all the circumstances of the time. Moreover, it has not been denied that F&B refused their consent to continue extensions of time for filing bills of costs in the Privy Council in June 2020, so as to keep that option available in such a way that costs would have been avoided.
296. In my judgment, it was, in those particular circumstances, within the range of reasonable actions by a litigant in the position of I&B for this expenditure to have been undertaken, but I conclude this, in particular, because of F&B's refusal to co-operate in enabling the requirement to file bills of costs to be avoided. It might have been unreasonable for these costs to be incurred without first seeking F&B's co-operation to enable them to be avoided, but that is not the situation, as F&B did not co-operate. I find, therefore, that these costs were not unreasonably incurred and, once again, I cannot see that any further investigation could alter this position. The objections in respect of these charges are therefore obviously bad.

(8) Receivership costs

297. These objections relate to Invoices claimed by Mourant, being 25 entries on I&B's Schedule, although these relate only to 17 separate "Issue" Nos, and also to six Invoices claimed on the separate "Receivership Schedule". They are claimed by I&B for being the shortfall between

their actual costs incurred and costs which they have previously been awarded (and presumably have been paid) pursuant to a mechanism contained in an Order of this Court of 18th September 2014 (“**the September 2014 Order**”). The objections are identical in each case, being made under the “Insufficient Particularity” and also “Unreasonably Incurred” categories.

298. On 23rd December 2013, after his judgment delivered in Guernsey 1, Lt-Bailiff Chadwick appointed Joint Receivers over certain (most) of the assets of the TDT for their preservation pending appeals. I&B then made an application to the court in June 2014 seeking payment of some costs, called their “Outstanding Costs”, out of the assets of the TDT. In the September 2014 Order of Lt Bailiff Chadwick, these Outstanding Costs were defined as being in respect of three matters labeled the “Information Costs”, the “RCO Costs” and the “NSI Costs”, the identification of which was obviously understood by the parties. The incumbent Trustees (GTC) were not convened to that application, although it could be argued that as Receivers of the TDT assets, the Joint Receivers would be representing the interests of the TDT in the preservation of those assets. By the September 2014 Order, I&B were to provide the Joint Receivers with copies of all the fee notes rendered to them in support of the Outstanding Costs (Paragraph 2). The Joint Receivers were then to identify to I&B the items contained in those fee notes as to which they required further information, or to which they objected, and the two parties were then to seek to agree the amount of the Outstanding Costs to be paid to I&B out of the assets of the TDT (Paragraph 3), with I&B giving credit for any sums which they might recover in respect of the NSI Costs in certain English proceedings (Paragraph 4). The Joint Receivers did not agree to pay I&B’s claim in full.
299. I&B therefore now claim the shortfall between the expenditure which they incurred and the amounts which the Joint Receivers agreed to pay under this Order.
300. F&B object to this shortfall being recovered by I&B on the grounds that the Joint Receivers’ refusal to agree to pay such charges in 2014 must inferentially have been because they regarded them as either unreasonably incurred or unreasonable in amount. F&B therefore submit that their objections have obvious potential substance, and must be allowed to proceed; they cannot be struck out without investigating, at least, further evidence by having production of the correspondence between I&B and the Joint Receivers which resulted in this refusal, and which I&B have declined to produce. They also submit that the September 2014 Order made recovery of these costs conditional on the agreement with the Joint Receivers, so that “*LB Chadwick’s orders provide no basis to claim these costs*”. In any event, they submit that costs incurred to Mourant and to Macfarlanes have been amalgamated so that their reasonableness cannot begin to be judged without a breakdown.
301. Advocate Wessels submits that if this is an argument that I&B are now, somehow, precluded from recovering this shortfall it is erroneous. First, it is perfectly plain that LB Chadwick did not intend that to be the position, because he gave a liberty to apply in Paragraph 6 of the 18th September 2014 order, which would be otiose if the Joint Receivers’ decision was intended to be determinative. Second, this interpretation would involve an abdication of the Court’s jurisdiction to determine the proper scope of I&B’s indemnity to the final decision of lay persons (the Joint Receivers), which was not within the court’s jurisdiction, and could not happen without I&B’s consent - and this was not a consent order on any basis. The assertion that I&B was therefore unable at all, now, to recover the shortfall regarding these costs was simply wrong.
302. Insofar as, in the alternative, it was merely an allegation that this was not the correct procedure to follow, this (he said) was a matter for the Court. I&B could have gone back to the Court under the liberty to apply, but Sir John Chadwick was no longer a Lieutenant Bailiff. The more convenient course was therefore to apply (in effect) in this part of the

proceedings, and to do so as part of their indemnity claim. There was nothing in principle to preclude I&B's taking this course, whilst obviously giving credit for the payment already received.

303. I agree with these particular arguments of Advocate Wessels; I dismiss any objection to the effect that I&B are completely prevented from seeking to make recovery of these shortfall costs, outright.
304. However, that leaves the intrinsic aspects of this challenge. In principle it is the same challenge as is made generally with regard to "Insufficient Particularity" but here it is bolstered by a positive assertion. The argument of F&B is not merely that one cannot tell whether the charges are, or could be, objectionable for unreasonableness through lack of information, but that there is the further evidence of their not having been agreed by the Joint Receivers. That mere fact may not add anything conclusive; there could have been many reasons, good or bad, why the Joint Receivers did not agree to pay over all I&B's costs as claimed. The Joint Receivers are not lawyers and they may not have applied the right test. I just do not know. The point is, though, that these charges have been given some degree of consideration by professional persons on a basis which implies that the consideration was whether they appeared to be reasonable or not, and the result has not been unqualified approval. This is therefore not a case of total absence of evidence one way or the other, and in my judgment it raises an objection which is not sufficiently obviously bad that I can or should dismiss it, even allowing for the fact that I&B are to be taken to have the benefit of any doubt.
305. In addition, if it is correct that these charges are aggregated costs in respect of Mourant and Macfarlanes, it appears to me that this cannot have complied with the terms of my case management orders of 15th December 2019 and 30th April 2020. However, that point was not really argued.
306. In the circumstances I shall not strike out the above objections, and directions will have to be agreed as to their further consideration.

Unreasonable in amount

307. I now move on to consider some separately identified objections within F&B's other general categories.

(9) Use of English Lawyers

308. This objection appears under the Category of "Unreasonable in Amount". It is made in relation to almost all of the Macfarlanes' invoices generally, and in relation to the Receivership Costs schedule. It is also made in relation to many Mourant's invoices, where it appears to be cross-referenced to the fact that Macfarlanes were also making significant charges during the same period.
309. I have already allowed the objections made in regard to "Receivership Costs" for the reasons given above. Where the complaints with regard to the alleged over-use of English counsel are made in respect of the Macfarlanes' invoices on the Receivership Schedule, it seems to me that they are likely to overlap with issues arising under the Receivership Costs objections and I will therefore allow them. I also, in any event, find the evidence regarding the adjustments apparently made to these costs, some by correction of a discovered overcharge (see Mr Day's First Affidavit at paragraphs 45 -51) to be confusing. This requires to be clarified, and this will be achieved in this further process.

310. The other complaints made with regard to the allegedly unreasonable use of English Counsel are made against both Mourant's and Macfarlanes' Invoices relating to the same period/stages in the proceedings. The bills do not show the conduct of different tasks or matters being split between the two firms. The objections are that the fees incurred are so great that there must have been unreasonableness in incurring the cost of English lawyers, presumably on the basis that this was either unreasonable duplication of work or that English expertise was not, or should not have been, required. The objection is typically framed as being that "*the degree of time and resourcing spent on English lawyers is unreasonable*" often with the added words "*based on the relatively little detail given by the lawyers in their narratives*". The objection is reinforced, in relation to the earlier years, by making the point that the litigation was being conducted in Guernsey, and/or suggesting that the matters in question could have been carried out by I&B themselves merely with the support of Mourant.
311. Advocate Wessels, for I&B, argued that this claim really boiled down to a complaint about the use of English lawyers, *tout court*. It was put on a generalised basis with very few, even passing, references to particular items or stages of work as to which it was suggested that the use of English lawyers was unreasonable. He submitted that such an argument was untenable given that (i) all parties - I&B, the BVI companies and the TDT (then acting by GTC) - instructed English solicitors and counsel at all stages to a similar, if not perfectly corresponding, extent, (ii) the litigation was very heavy, complex and high value commercial litigation, with a complicated procedural course, including numerous appeals to both the Guernsey Court of Appeal and the Privy Council, and (iii) Macfarlanes had previously been instructed by I&B for many years in relation to the Tchenguiz family trusts and were familiar with I&B's involvement. He also pointed out that F&B had not stated, as he submitted they should, (and indeed must) with regard to an objection solely as to amount, and not as to character, what amount they accepted *would* be regarded as reasonable.
312. Advocate Robison, in reply to these points, stated that the complaint was not about the use of English lawyers at all, but about "over-reliance" on English lawyers, bearing in mind that I&B were using Mourant throughout. He alleged that, by comparison, GTC/F&B had used English lawyers less, and had ceased to do so at all (except for the proceedings before the Privy Council) after 2014, and that I&B's use of them had been wholly unreasonable.
313. In reply, Advocate Wessels challenged Advocate Robison's factual comparison of F&B's resort to English legal advice, and also pointed out that R20, with Ms Martin having moved to a legal post within that company, had provided services apparently equivalent to those of English solicitors. Their services included many affidavits from Ms Martin. For the relevant services, some £9Mn was being claimed by F&B/R20 in Proofs of Debt against the TDT, a fact which made TDT's overall legal expenses come to a very similar amount to that claimed by I&B. He also pointed out that Advocate Robison's arguments did not deal at all with the point that it was incumbent on F&B, if they were simply challenging quantum and not the reasonableness of incurring the particular charges at all, to specify what amount they *would* accept as reasonable.
314. In his skeleton argument, Advocate Robison's argument was that the use of English lawyers had been an extravagance that was unjustifiable given the financial state of the TDT. There, the whole complaint was argued on the basis of the proportionality argument, which I have previously held cannot possibly apply once I&B had been removed as trustee, and could apply only to a limited degree previously to that (see [253]) and I cannot see that this would make any appreciable difference. In my judgment this argument can therefore ultimately succeed only on the basis that no reasonable litigant could have accepted the charges which have been accepted and paid by I&B, in the particular circumstances.

315. In oral argument, Advocate Robison made more specific points, by reference to examples. He drew attention to the aggregate bill incurred by I&B between Mourant and Macfarlanes, first in the month immediately before the first instance trial in June 2012, and second in the month of December 2013, after the judgment had been given. The former totaled about £800,000 (after deduction of expert's fees of £135,00 as a disbursement) which Advocate Robison suggested was excessive for what was, apparently, preparing trial bundles, and this showed that there must surely have been unwarranted duplication of work between Mourant and Macfarlanes. The latter totaled £264,000 on post judgment matters and principally, he submitted on "Consideration of judgment", although he accepted Advocate Wessels' interjection that there were ancillary issues at the time, including an application to the Court of Appeal for a stay of the judgment. Advocate Robison submitted, however, that this illustrated precisely the kind of further investigation which needed to be undertaken for it to be demonstrated that the charges of all the lawyers involved were justifiable. He agreed that, in essence, his argument was that the use of English lawyers had resulted in too many people doing the same thing.
316. Advocate Wessels repeated his response that F&B simply did not grapple with the point that to sustain a complaint of "unreasonable in amount" through the use of English lawyers, it was necessary to suggest what figure would have been an acceptable charge. He also pointed out that, on reading the narratives, it was clear that the fees charged for the month before the original trial were not even confined to preparing trial bundles, but included charges for preparing also the witness evidence referred to.
317. I have considered the arguments here very carefully. I do not place much weight on Advocate Wessels' argument that these objections should be dismissed outright simply because they do not specify an accepted justifiable sum. I am aware that Advocate Robison's response is all too likely to be that this cannot be done until further particulars of the work behind the narrative descriptions are given. If I were satisfied that these objections ought to go forward at all, I would deal with Advocate Wessels' argument by way of appropriate directions.
318. I therefore go back to the basic position. Advocate Robison accepts that these charges were actually incurred. He also accepts that instructing English lawyers as well as Guernsey lawyers was not in itself unreasonable. He has not objected to the English lawyers' rates, only in places referring to work done (it is suggested) at too senior a level. He has agreed that in the end his arguments are that the very size of the fees suggests an illegitimate duplication of work, though he can point to no direct example of this; he just does not know.
319. The test to be applied is whether the charges were such that no reasonable litigant in I&B's position, i.e. litigating this litigation, and knowing what was going on or having to be done in the course of it at the time, would have thought it reasonable to accept and pay these bills. The question is, do Advocate Robison's arguments satisfy me that he is sufficiently likely to be able to show, beyond the benefit of any doubt, that no reasonable litigant would have done so in some particular respect? I am therefore looking for some indication, apart from the mere size of the bills, that suggests (or refutes) this.
320. I have first, of course, the fact that I&B, with the oversight of its insurers, did pay these bills, and during most of the time up until receipt of the Privy Council's judgment, they (or their insurers) were expending money for which they had no guarantee that they would ultimately be entitled to reimbursement by indemnity. It is not the case, therefore, that they were simply spending someone else's money without any scrutiny or check. It was also, in my judgment, perfectly reasonable to instruct Macfarlanes, first having regard to their historic link with the Trust affairs and second from the point of view of their general status level in the market. They were an eminently reasonable firm to grapple with the requirements of support for heavy commercial litigation in Guernsey, and they were very reasonably retained

when the litigation moved to the UK. With regard to the number of personnel involved at any time, these may in certain instances have been more than were being used by the other parties, in particular respects, but the numbers overall, and the general picture, do not strike me as particularly excessive in context, and certainly not remarkably so. The question of level of seniority is, to my mind getting down to a level of criticism which an ordinary, reasonable litigant engaging advocates/solicitors on heavy litigation would hardly (and not unreasonably) be likely to question.

321. I noted that, with regard to the examples given (which I think I am entitled to assume were thought to be F&B's best ones), Advocate Wessels was immediately able to point to reasons why the argument on the figures was exaggerated, and that there were contemporaneous activities in the litigation which explained and justified why significant costs would have been incurred at the relevant time. I have glanced through some of the other contested charges under this heading. The arguments advanced by Advocate Robison do raise some questions, and are certainly arguments which would have force on a taxation of costs. Complaints about the excessive seniority of personnel conducting particular exercises fall precisely into the kind of objection often advanced, and often accepted, on a taxation of costs but, as I have now said several times, that is not the test. It is far from infrequent for litigants in weighty cases in Guernsey to think it worth employing greater fire power from English lawyers than they would be allowed to recover in that respect on a contested application for an order for payment of such costs.
322. In the end, the crucial question is: Does Advocate Robison make out objections to these costs which are not obviously bad having regard to the circumstances revealed by the evidence and the fact that I&B are entitled to the benefit of the doubt? I have concluded that he does not. I consider that if the extensive task of examining closely all the costs which may be identified under this head were undertaken, the overwhelming likelihood is that I&B would be able to demonstrate that all the costs incurred on English lawyers were reasonable costs, reasonably incurred by the standards which a reasonable litigant in their position would apply to the engagement of English lawyers, and therefore could have accepted that it was right to pay. The highest that could be established might be some marginal doubt, but I&B are entitled to the benefit of that.
323. I will therefore strike out these objections, as well.

(10) Residual general objections based on insufficiency of information

324. I turn therefore, to the residue of the more generalised objections which are identified in I&B's Schedules. With the benefit of having reviewed and evaluated various arguments and points of legal principle in relation to some of the more focused objections, it is now convenient to deal with these. These residual F&B objections come under three headings:
- "Insufficient Particularity" - Nature of Work Undertaken
 - "Unreasonable in Amount" - Lack of detail in Narratives
 - "Unreasonable in Amount" - Nature of Work Undertaken.

All these residual objections have, as their common factor, that they are based on a complaint of lack of sufficiently full or clear (to F&B) information with regard to the description of the work which has been charged. (I am aware that the above "sweeping up" of categories/classes of objection has left out of account objections relating to Collateral Use (in various aspects) and Uncharacterised Objections, as identified by I&B, which I will return to later.)

325. These objections are thus all of similar nature and they overlap between themselves. Given the case which F&B would have to make out to deprive I&B of their right to a full indemnity, they must be viewed as objections that the relevant invoices “should not” have been paid (meaning that they could not have reasonably been paid by a hypothetical reasonable litigant embroiled in this litigation in the position in which I&B actually were) without obtaining and scrutinising further detail as to items of work which were charged on the Invoice in question.
326. Advocate Robison’s argument in support of these residual objections is his core basic case, namely that, in all the circumstances I should not strike out any of these objections at all, but should allow them all to go forward, because the objections made as described above are not sufficiently “obviously bad”, on the evidence as it stands at present, that it is justifiable to strike them out. However, this argument is deployed in support of the proposition that the Court should therefore proceed to examine each of the Invoices thus challenged, line by line, in an exercise conducted like a taxation of costs, even if the tests, or standards, which will apply will differ from a taxation because of the context being the determination of the proper quantum of a trustee’s indemnity. Ultimately, of course, it is certainly the examination of individual charges which would have to be undertaken to fix actual amounts to be paid, but this course would have the effect that many individual elements of charge which are unlikely to be subject to criticism would be held over to be subject to scrutiny, even if that were then cursory in the event. It seems to me that there must be very many such elements, since F&B made no challenges to any of the elements on 212 of the Invoices, at the outset. Advocate Robison stated in argument, however, that in his submission nothing short of such an exercise would be adequate to make a proper determination of the proper quantum of I&B’s claimed indemnity.
327. Originally, F&B’s total challenges in all categories, were to 749 out of the initial 961 Invoices (a few were presented later), which represented a challenge to about 78% of all the Invoices. Approximately 56% of Invoices were challenged under the “Insufficient Particularity” Category, 56% under “Unreasonable in Amount” and 42% under “Unreasonably Incurred”, obviously, therefore, with overlap and many Invoices being challenged in more than one Category. I have considered and dealt above with virtually all the more specific objections identified under “Unreasonably Incurred”, and “Insufficient Particularity” and with the single such identified objection regarding use of English Counsel under the “Unreasonable in Amount” Category. This should have reduced the percentage of Invoices which are the subject of these outstanding generalised objections, but I perceive that there is still a considerable rump of them.
328. Advocate Wessels, for I&B, first makes the general point that making objections in this form, i.e. on the basis that there is insufficient detail in the narratives to enable F&B to decide if they want to make some specific challenge or not, effectively seeks to override the directions which I made in my order of 30th April 2020, when I refused to order further explanations from I&B with regard to the narratives behind the Invoices which were the subject of their claim, apart from details as to the particular fee-earner, their positions and their rates of charge. Those, though were early directions made at an initial case management stage, and if I concluded that, in the interests of correctly progressing the determination of I&B’s indemnity claim according to legal principle, they now required to be moderated, I would do so.
329. Advocate Wessels makes the more forceful point, however, that the materials with which F&B have now been supplied, i.e. the Invoices, the time charge narratives justifying them, and the supporting details of the fee-earners involved, together with the explanatory evidence of Ms Hargreaves and Mr Day explaining material referential fact and context, provide all the materials which were available to I&B itself to judge whether to pay the Invoice or not. I&B, of course, were also fully cognisant at all times of the extent, the state, and the progress

of the litigation for the conduct of which these charges were being rendered. Whilst F&B were themselves not so aware, not having been appointed as Trustees until October 2017, they are really in no worse position, because Babbé, their current Advocates, also acted for the TDT from 2011, when GTC were the Trustees, and have thus been very familiar with the matter from quite an early stage, and F&B also had the continued knowledge, familiarity and input of Ms Nicole Martin as legal advisor, and of R20, and of Mr Tchenguiz. In principle, therefore, F&B (and the Court) have all the material from which it would be fair to judge, objectively whether there can be any sufficient doubt as to whether, at the time, I&B reasonably paid these invoices, to decide whether these objections surmount the *Alhamrani* threshold as already discussed.

330. I accept this last proposition in principle. In my judgment, unless F&B can show from the present collated and admitted materials, either on examination on their own, or considered in the context of other demonstrable facts in the evidence, that there is a real (as opposed to fanciful) prospect of showing that an Invoice, or an item of charge on an Invoice, is a charge which is incorrectly allocated, or is likely undoubtedly to have been unreasonable either in principle or in quantum, then their objection fails to pass the relevant threshold, *Alhamrani* or otherwise. It is insufficient simply to raise general and indeterminate arguments that the bills are (and still less: might be) “too high”. For F&B to be able, and therefore entitled, to make out their claims on further evidence at a further hearing, they must now demonstrate an arguable case that the Invoice or charge could not have been paid by (a) a reasonable trustee in a “Class (iii) case” regarding costs prior to 2nd July 2010, but otherwise (b) a reasonable litigant having regard to his own purse but in all the circumstances in which I&B found themselves - and always bearing in mind that I&B are entitled to the benefit of any doubt.

Scale, supervision and oversight of I&B’s claimed costs

331. In support of his general case, Advocate Robison made several overarching points, which he said must cast sufficient doubt on whether these Invoices could be found to have been properly paid, as a general proposition. He made these submissions on the evidence as a whole, taking into account the highlighted lack of particularity in the Invoice narratives.
332. He first made much of the size of I&B’s claimed costs bill in respect of these two actions, at almost £28Mn. From this, with various supporting points, he submitted that this figure was so vast, and so disproportionately vast, that that in itself suggested profligacy of expenditure, and was therefore evidence generally supporting the view that unreasonable costs must be claimed within it.
333. He invited comparison with costs incurred on behalf of the TDT in respect of Guernsey and English legal costs from the time when GTC took over as Trustees of the TDT in July 2010, up to 23rd April 2020, which comparison was set out in an exercise carried out by Ms Martin (24th Affidavit, 1st June 2020, para 15) on behalf of F&B. Her table apparently showed that I&B were claiming more than twice the legal fees incurred by the TDT to Babbé, and to English advisers, during the same period. This therefore also supported, he submitted, the likelihood that I&B’s costs were unreasonably high.
334. Again on the topic of general extravagance Advocate Robison submitted that the very size of certain invoices - some of which, billed monthly, were individually in the £100,000s, and which were apparently just accepted and paid by I&B - showed that they had adopted a generally cavalier and profligate approach. He submitted that they were not entitled to “throw the cheque book” at the project, and then claim to recover costs on that basis from the TDT. He submitted that it could be inferred that they had done this, at least sufficiently arguably for F&B’s objections to surmount the *Alhamrani* threshold.

335. Advocate Robison pointed out (as was correct) that there was no evidence given by any actual representative of I&B as to procedure followed, or steps taken, to keep the costs of lawyers under control. There was no evidence (he submitted) of any of the bills claimed ever having been queried or contested by I&B. That, he submitted, was not only remarkable but a clear indication that no control of mounting costs had been exerted. He submitted that there was no evidence that I&B had observed the duty on a trustee referred to in *Landau* (above) to have regard to - and this would mean keeping under scrutiny - the appropriateness of both the particular firm of lawyers instructed, as well as the level of the personnel deployed, to both the size of the trust fund and the nature of the matter in hand. He submitted that there was simply no evidence of anyone on I&B's side considering, with regard to whether an Invoice ought to be paid, whether the firm, and the personnel, involved were appropriate, in terms of status or seniority, for doing the work in question, and thus keeping costs in check.
336. Although much of this argument was advanced in relation to Advocate Robison's generally advanced "duty to spend proportionately" point which I have already rejected, I do accept that evidence of overall remarkably high expenditure could suggest that the costs incurred in making up that figure may have been incurred unreasonably, and I therefore consider these points again, now, as part of Advocate Robison's general argument.
337. With regard, first, to the *Landau* test, already referred to, this is, of course, fact specific. Advocate Wessels submitted that it cannot be applied to every piece of work charged in an on-going situation. Once you have selected a reasonable firm, it is reasonable to remain with that firm and the decision does not require constant review. The firm will then allocate personnel as it thinks appropriate. Unless there is something which stands out as being a profligate or inappropriate use of personnel, the client is largely in the hands of lawyers to trust them to allocate work suitably in all the circumstances, with the size and the importance of the matter playing a big part in that decision, and to charge for work they judge needs to be done. It is not unreasonable to trust one's professional advisers.
338. In any event, he submitted, even the *Landau* test is not whether the litigant - whether trustee or former trustee - was right, in the eyes of either the challenging party or even the court, to instruct the firm which was instructed, and to accept the deployment of the relevant personnel, but whether no reasonable trustee/former trustee could have accepted the resulting charges as reasonable in all the circumstances.
339. I accept Advocate Wessels' argument on this topic. The *Landau* test applies, principally, with regard to whether a trustee has been profligate with trust funds in instructing too grand a firm, or accepting the services of too senior personnel when dealing with trust administration matters. There, the trustee is obliged by his fiduciary duties to act *en bon père de famille*, in judging appropriate value for money. In considering reasonableness under a trustee indemnity, its application is much diluted where the trustee has legitimately been acting in his own interests, and particularly by the fact that the question in a contentious situation is whether a reasonable litigant could have made the relevant decisions. And in either case, once a firm has reasonably been instructed and the matter is on-going, that decision does not have to be repeated or reviewed with every bill. To suggest otherwise is contrary to common sense.
340. Returning to the arguments from the size of I&B's claim, I do not even begin to draw any such inference of likely unreasonableness as Advocate Robison urges from the overall costs claim figure itself. Whilst it is obviously very high, and may seem excessively so to anyone who is not familiar with the high costs of major commercial litigation these days, the figure does not strike me as remarkable for a party's own bill, from my experience, and given that it represents a party's costs of about 11 years of heavy litigation, and remarkably active

litigation in terms of interlocutory matters, regarding adverse claims amounting to more than £560Mn.

341. Neither do I place any weight on the comparison made by Advocate Robison of the costs stated to have been incurred on behalf of the TDT, over a similar period. Advocate Wessels submitted that this was not comparing like with like, because much legal work for which I&B had had to employ Advocates had, in fact, been done “in-house” on behalf of the TDT Trustees, because they used the services of R20, which included legal services, and the disbursements in this regard were not included in the comparative figures for their own lawyers. When those figures (which appeared elsewhere in the evidence from proofs submitted) were included in regard to F&B, the parties’ respective costs were quite comparable. This seems to me to be correct, although even then I do not place a great deal of weight on the comparison, since the ultimate question is simply whether the expenditure of this party (I&B) was reasonable.
342. As regards his point about the lack of evidence from I&B personnel, Advocate Robison submitted that there was no evidence of any practices within I&B regarding payment of bills which could enable the court to judge, and approve or disapprove, the decisions taken by reference to a reasonable process being behind them. There was (he submitted) no factual evidence that these bills were paid after a reasonable process of scrutiny by I&B, which could thus be relied on to support the view that the decision to pay was within the range of reasonable decisions as to making such payments. In contrast, F&B would, he pointed out, have produced affidavit evidence as to the process of scrutiny which was carried on behalf of F&B (if I had permitted it), to show, by contrast, what could have been done to ensure that all costs were reasonable.
343. I disallowed the proposed evidence from F&B for irrelevance. A comparison of what another litigant actually did in allegedly similar circumstance would, in my judgment, be a total diversion. This is even if the facts were agreed, as was obviously very unlikely. If they were not, I would have had to allow cross-examination as to such evidence, to test its own reasonableness, to justify placing any weight on it, with the potential exercise thus getting disproportionately out of hand. But in my judgment, in any event, such an omission to call direct evidence is not particularly detrimental to I&B’s case. I&B are, of course, obliged to accept the limits of the evidence which they have adduced in asking me to make the orders which they do, but that is their entitlement. The evidence is simply what it is.
344. I of course accept Advocate Robison’s point that there is no evidence from any representative of I&B regarding their oversight of the costs that were being incurred, which might therefore have been some indirect evidence supporting that they were reasonable. However, such evidence is not necessary. This is not a negligence case. The ultimate question is the objective one of whether the costs being claimed by I&B are (sufficiently arguably at this juncture) outside the range of costs which a reasonable litigant in their position could have incurred on the proceedings in question in the circumstances at the time. Evidence of actual, and apparently reasonable, oversight and control systems may tend to suggest that they will have been, but absence of any such evidence only leaves the question at large.
345. In any event, Advocate Wessels correctly pointed out that there is evidence going to the degree of oversight and control of I&B’s costs, as litigation costs. This is to be found in the Seventh Affidavit (31st January 2020) of Louise Hargreaves of Mourant (in particular paras. 22 - 28) and the First Affidavit (31st January 2020) of Simon Day of Macfarlanes, (in particular paras. 22 - 26). I will not set out the detail, but each gives evidence of the discounts and freezes on charging rates of personnel employed on the litigation which were negotiated and applied by the firms over the years, and reviewed from time to time. Ms Hargreaves testifies that, in the case of Mourant, on occasions bills rendered were queried

and adjustments made. I presume this was by credits against later bills. Mr Day testifies that, in the case of Macfarlanes, draft invoices were sent and any negotiation took place before the final bills, which form the basis for the indemnity claim, were rendered. Whilst this evidence has of course not been subject to cross-examination as to detail, it is eminently credible as to the general position, and I cannot see how potential cross-examination, or further evidence, could significantly alter its general weight.

346. Advocate Robison's riposte was that it would be wholly unreasonable for trustees to abdicate responsibility for an oversight of costs to their lawyers or insurers, but this, to my mind, once again misses the point, as it really goes to negligence. In any event, though, the issue in relation to these costs became, at least from 2nd July 2010, not what a reasonable trustee might have done, so much as what a reasonable litigant (of the class likely to be involved in this kind of litigation) might have done.
347. Advocate Robison submitted, rhetorically, that it must be "beyond the bounds of possibility" that out of a total of over £28Mn in fees not a single charge apparently merited even a question, but that seems to me to distort the evidence. There has been no direction requiring any such interrogating correspondence to be disclosed - a decision made by me with regard to proportionality in the evidence - after consideration of F&B's request for further disclosure such as "draft invoices" known to have been submitted on occasions before the final negotiated and definitive version was submitted for payment, which request I refused, also for irrelevance. There may be such an absence of evidence of actual queries made in such manner, but that is not the same as evidence that they were absent. There is also the general evidence of oversight and control mentioned above. The proposition that there were "never any queries" so as to support a submission that there can have been no oversight of the reasonableness of fees is not supportable.
348. Advocate Wessels submitted that the evidence in fact showed that what I&B had done was a perfectly reasonable approach to litigation costs; it would be wholly unreasonable and unrealistic to suggest that clients such as I&B, involved in this kind of litigation, should themselves have pored over every bill rendered, examining them line by line, with a view to finding points to query or haggle over.
349. First, this would not be a normal, reasonable or expected approach by a client to litigation and working co-operatively with one's instructed lawyers. It ignored the general principle that a client was entitled to expect apparently responsible professionals, themselves, to be acting reasonably in the absence of any evidence clearly suggesting that this was not the case.
350. Second, an ordinary litigant (as I&B was) is not equipped with the expertise to examine and criticise legal bills in the manner which Advocate Robison's proposition suggested they should have to do. To do so, they would have had to employ the assistance of others with such expertise, at yet more cost - which would be absurd.
351. Third, the same arguments as to the degree of scrutiny of bills supposedly required by a duty to keep costs reasonable would also apply to the employment of other professionals, such as surveyors or accountants. Intuitively, the Court would not expect such granular examination of fees from such professionals to be undertaken by trustees or former trustees, and the Court should not be led astray into doing so with regard to legal fees just because everyone discussing them presently in a court case had the familiarity or expertise of being lawyers themselves.
352. Fourth, whilst the strict approach contended for would no doubt be adopted on an indemnity costs taxation, that was a different matter. There, the issue was to find the "right" figure to be fairly recovered by the receiving party towards his costs by applying the standard for

“indemnity” costs decreed by statutory instrument and assessed the Court. Here, the issue was to ascertain the figure which a party had actually paid, so long as not unreasonably when viewed objectively, for legal services rendered to it. The question for the Court was whether I&B could reasonably have accepted to pay the relevant bills at the time and in all the then circumstances (as it in fact had done), and the pointers above showed that this was to be judged at an appropriately realistic, high general level.

353. In any event, he further pointed out, I&B were (obviously) acting in co-operation with their insurers, who could themselves be expected to (and did) monitor work and fee levels. Moreover, up until 23rd April 2018, I&B (and their insurers) could not have been spending money on I&B’s conduct of their case(s) upon any assumption that they would be certain to recover these from the TDT. That would only become the case if they succeeded.
354. I accept Advocate Wessels’ arguments that the evidence does not suggest that, in all the circumstances, there was any lack of appropriate oversight of the costs of the litigation such as would suggest a likelihood that the costs paid will have been unreasonable costs for work done in and about the two actions. Any such assertion will therefore have to be made good on the basis of other matters. The obvious other matters are inferences or doubts arising from the actual contents of the Invoices themselves, reviewed against the known background of the litigation.

Objections at the level of particular charges.

355. I remind myself that F&B repeatedly relies on the “lack of particularity” in the narratives supporting the Invoices as previously mentioned. By this, they mean that the description of the work done by a particular fee-earner, and there recorded for the purpose of charging, together with the time recorded as spent, is insufficiently full to enable F&B to satisfy itself that the particular charge is one which they can accept was apparently reasonably incurred and reasonable in amount. Advocate Robison’s argument is therefore that the whole of these *prima facie* objections (as it were) must be allowed to go forward for further examination of all the relevant Invoices, because of the degree of doubt raised by the absence of (he submits) adequate information about what work was being done to justify the particular charge(s).
356. Advocate Wessels argues first, that this approach is just wrong, because, once one accepts that any valid objection has to be granular in nature, at the level of a particular charge or charges billed, it is immediately obvious that one cannot object to the amount of the whole of a bill on the basis of an objection or objections to part of a bill. On occasions F&B do state the quantum of the particular objection, so it might be possible to extract the figure challenged from those not challenged, but more often than not they do not do so.
357. Advocate Wessels submits, as I understand it, that those forms of objection are simply incompetent and should not be permitted to be made, hence justifying striking out the whole of them *en masse*. He makes this argument, I think, at both the level that an objection to a part of an Invoice cannot justify taking forward the whole of the Invoice for further scrutiny, and at the level that an objection to parts of some Invoices cannot justify taking forward the whole cohort of Invoices which have been selected for such “lack of particularity” challenge, as Advocate Robison has submitted is the further exercise which is now required. As part of Advocate Wessels’ submission, he points out that the challenges now made were originally framed, in effect, as demands for further information and he submits that they have simply now been re-framed as supposedly positive objections to actual charges, rather than general complaints of lack of particularity which go nowhere.
358. He also submits, in any event, that taking the objections at face value on their own account they are not sufficient to pass the *Alhamrani* threshold test, because they do no more than

create a doubt about whether the work which is questioned was reasonably commissioned or done, and the costs charged reasonable in amount - but I&B is entitled to the benefit of any such doubt.

359. Advocate Robison contests this, as having the extraordinary result that I&B can, in effect, obtain the benefit of an indemnity in respect of charges which are completely unparticularised, which would (he submits) be nonsensical. However, I do not accept that. It seems to me that this argument stems from a further general submission of Advocate Robison on this topic, originally in his skeleton argument of 14th September 2020, which was to the effect that the pervasive lack of particularity complained of provided in itself a proper challenge to the recoverability by I&B under their indemnity of their expenses, because they had paid the relevant bills despite having insufficient information to enable themselves to evaluate whether the charges were in connection with the TDT, or were reasonable costs. However, and as Advocate Wessels responded, that is to confuse, on the one hand, the question of I&B's having enough information in all the circumstances reasonably to accept to pay an Invoice on its own account, with, on the other hand, F&B's having enough information to be able to satisfy itself, according to its own perceived standards, as to what the work in question had been and whether this had been reasonable and reasonably charged. This is not the same question, and the appropriate test is the former. These arguments were also, in any event, formulated by F&B early on, and were predicated on the notion that I&B owed a continuing duty to the TDT, as the custodian of someone else's money, with regard to its level of expenditure. These arguments have been dealt with and largely rejected elsewhere.
360. Advocate Wessels further submits that, when one looks at the challenges which are articulated in this context, they are all challenges which one might well uphold and investigate on a taxation of costs, where one is looking to find the "right" figure for an opposing litigant to have to pay, but they are misconceived in the present context of the applicable principles for a trustee or former trustee's indemnity claim.
361. I am inclined to agree with Advocate Wessels. I observe that, in my judgment, he is also entitled, in inviting me to examine the quality of the objections, to rely on the fact that I&B (and their insurers, and advisers who were monitoring the fee position as mentioned above), had contemporaneous familiarity with, and knowledge and understanding of, the actual current situation with regard to the litigation, such that a detailed description of work done by a relevant fee-earner would in all probability have been unnecessary to enable I&B and those others to be satisfied, quite properly, that the work being done was what was currently reasonably required or appropriate. I have to decide whether any absence of particularity or information was such that I do not think I&B (or a hypothetical litigant in exactly I&B's position, which is the same thing) could reasonably have paid the Invoice, notwithstanding the lack of particularity.
362. My inclination is to accept Advocate Wessels' submission, but I hesitate, because I do not think that it would be right to decide this point in I&B's favour across the board, simply on the basis of such high level submissions. This is for the following reason. My view, at this high general level, would be that if I ask myself the question whether, as a matter of impression, I thought that F&B ultimately stood any real prospect of satisfying the court that these Invoices comprised or contained unreasonable costs, on the proper test (objective and beyond the benefit of doubt) my immediate impressionistic answer would be "no". However, if I were to ask myself a different question namely, what percentage would I reckon, as a matter of impression, was likely to be taken off I&B's claim to indemnity in respect of the residue of these general objections if each Invoice were to be examined on an individual line by line basis, with assumed further information but applying the correct tests, my answer would not be absolutely nil; it would be a very small amount as a percentage - up to, say, 1%. 1%, however, is a sum of around £275,000, and I am making a quantification and

not a discretionary award. I therefore need to reconcile these two impressions to take account of the latter. I consider that the answer to this lies in the nature of objections which would justify being taken forward.

Particular examples considered

363. At various points in written arguments, oral argument and correspondence, F&B have given particular examples of fee charges which they object are so lacking in particularity that they found a “not obviously bad” objection (although their further contentions as to the appropriate consequences of this I have found to be over-ambitious in their extent). Many of these Advocate Wessels has refuted, as being really matters of advocacy which are immediately and simply refuted on proper examination. An example of this was his refutation of arguments made by Advocate Robison that the very size of certain months’ invoices were so great (in the £100,000s) that their extraordinary amount, and the fact that they were meekly paid, was suggestive of insufficient proper scrutiny and therefore the likely inclusion of unreasonable costs. Advocate Wessels was immediately able to point out that when one examined such large bills in the context of the chronologies of the litigation, one could see that they related, for example, to the period shortly before substantive hearings when preparations of bundles, skeleton arguments and suchlike would be intense and expected to cause expenses to peak, or that there were ancillary applications, not immediately apparent from the broad description of the course of the litigation, taking place. I found his arguments and explanations, all readily proffered, to be persuasive.
364. Similarly, Advocate Wessels has given examples of particular challenges which he submits are simply inadequate or misconceived, and do not - at any rate in their present form - provide any justification for avoiding summary judgment in I&B’s favour. At the other end of the scale, as regards pinning a challenge to an entire Invoice on claimed lack of particularity as to a small part, Advocate Wessels gave, as an example, Mourant Issue no 62, an Invoice in August 2013 for £18,729 where, under “Insufficient Particularity”, there was an objection to his own attending a meeting with Grant Thornton for which a charge of £1,000 was made, on the basis that it was unclear in what capacity he had attended. However, I note that that was not the only objection; other objections were made under different heads of objection, including suggested duplication of time, disproportionate use of senior staff in collating/bundling documents given the availability of junior staff, charges for researching English authorities when Macfarlanes would have had relevant expertise, and the fact of concurrent charges of about £10,240 also being made by Macfarlanes for the period. This point is therefore not so strong in that case, and a more forceful illustration was his later reference to Mourant Issue No 238, where, in relation to an Invoice for £10,189 in regarding Guernsey 3 in November 2014, F&B’s only complaint is under “Insufficient Particularity” and is of “unspecified telephone calls”. There are actually 11 telephone calls charged over the whole month. Two clearly *are* specified and one was a call between Advocate Wessels and English Counsel, charged at 48 minutes (£400). The remainder were simply billed as calls between Mourant and Macfarlanes and in one instance four separate charges were obviously for a conference call between four members of the Mourant team and Macfarlanes. This was on 27th November 2014, for a whole 12 minutes at a total charge of £280. The total charge for all these calls was £903, which is less than 10% of the total Invoice amount. The “complaint” about “unspecified telephone calls” is in fact either a request for information, or an objection to the effect that no reasonable litigant could have paid that invoice without detail as to the nature of what was going on in those telephone calls. The former is impermissible and the latter I regard that as absurd.
365. All told, in the course of the hearing, I was referred, for examples of challenges which Advocate Robison submitted supported his case, or Advocate Wessels submitted refuted it, to around 40 individual “Issues” (Invoices), mostly in the earliest period and more or less equally divided between Mourant and Macfarlanes. Quite a number of these went to the

“Insufficient Particularity” type of complaints which I am now dealing with, although some illustrated the identifiable themed objections which I have dealt with separately. I am not going to recite the detail of all of these examples and make specific findings about them, but I have looked again at these, and randomly at some of the other Invoices and the complaints made in relation to them, and I will set the points which I take from these, which are the explanation for my ultimate decision.

366. Many of the F&B challenges raise the objection of the “*relatively little detail*” of the work given in the corresponding narrative, as grounds for maintaining that there is a good argument that I&B ought not to have accepted this lack of detail and ought therefore to have refused to pay the Invoice, thereby justifying further scrutiny and avoiding a strike out. This argument, as noted, depends on the assertion that no reasonable litigant would have accepted the Invoice in question.
367. The narratives themselves are varied as the fee-earners have different styles of time recording. Advocate Wessels’ early style, up to about the end of 2010, is laconic, to put it kindly. Frequently his entries are simply “corr/memo/file notes” with a time charge (usually small in this instance) or “perusal of documents” or “attendance” or “Research”, with nothing more. It became somewhat more informative in later years. His colleague Advocate Abel Lyall, by contrast, always tended to put full and clear descriptive detail into his time recording. Other Mourant personnel were somewhere between the two. The Macfarlanes style of time recording was generally brief, but a bit more informative than Advocate Wessels’, throughout. However, the issue is not whether Advocate Wessels’ time charges (or anyone else’s) could be justified for recovery on a taxation, but whether paying invoices including such thinly particularised time charges was such an unreasonable thing for I&B, or its insurers, to sanction, acting (generally) in their own interests and with their own funds at risk as was the case when most of these charges were incurred, that they should not be permitted their right to indemnity out of the assets of the TDT.
368. I have concluded that it was not obviously outside the range of reactions of a reasonable litigant, in the situation of I&B, to pay the Invoices notwithstanding the lack of detail as regards the minutiae of work being done, which is what has been lighted on. It would have been perfectly clear to a litigant in I&B’s position, knowing, or having informed itself, about the work required to make a good job of conducting heavy litigation, that Advocate Wessels, for example, (he being the main target of this criticism) was likely to be spending, quite reasonably, a very great amount of time on the case on which he was the lead Guernsey Advocate and which he was preparing to argue. I simply do not see that the only reasonable course for the litigant client would have been to demand further detailed information about exactly how he had spent his time and what he had been doing. I accept the argument that it is not unreasonable for a litigant to trust its own professional advisers to be charging correctly and reasonably in the circumstances, in accordance with fee agreements previously made, in the absence of anything which ought to have raised suspicions that this was not the case. I should make it clear that this is not to condone the pretty flimsy early time recording style of Advocate Wessels, which I would not regard as adequate, even allowing for the fact that standards will, I think, have changed in the last 14 years (and I have acknowledged that Advocate Wessels’ style became gradually more informative from 2011 onwards), but this exercise is not that of scrutinising Advocate Wessels’ conduct, but scrutinising whether a reasonable litigant with full knowledge of the situation could, in all the circumstances, reasonably have paid his claimed fees, as I&B did. I do not find it generally arguable that they could not reasonably have done so, nor did I see any particular example which was so egregious as to make an exception (subject to one point mentioned later).
369. I have had very much the same general reaction to the further and other objections which I have seen, namely that when the Invoice is looked at, in the context of the known state of the litigation at the time, its complexity and enormity, none of these generalised complaints

about lack of particularity goes far enough, at the level at which they are pitched, to justify the view that they are evidence of an unreasonable incurring or paying of costs for which no reasonable litigant could have paid, so as to justify further investigation of the whole Invoice, and still less the whole cohort of Invoices in question. I will not, therefore, permit such objections to be taken forward on the kind of general, blanket basis for which Advocate Robison argues.

370. That, however, is not the end of the matter. Consistently with my treatment of the more focused or themed objections which have been identified and which I have dealt with individually above, I am of the view that the appropriate test for deciding whether to strike out objections or give summary judgment for charges claimed is at the level of the individual charges rendered on any particular Invoice. F&B simply have not done this. They have insisted on contesting the Invoices at that level; their objections are formulated on that basis. They have then pursued the matter from the perspective that they are entitled to see such information as would enable them to satisfy themselves that all the charges made under an Invoice are proper (rather than merely that they are not patently improper), and they have also done so on the apparent assumption that there should have been a universal regard to the proportionality of the costs to the trust estate, which I have held to be wrong, and, most importantly, that the standard for disallowance of charges is that which would apply on a court taxation of costs, which I have held to be the wrong test. I have been struck by the fact that almost all the objections I have looked at in detail, or have randomly looked over, have the flavour of being matters which I might indeed expect to give rise to “taxing down” on a taxation of costs *inter partes*, but which do not seem to be obviously outside the realms of reasonableness viewed from the perspective of a hypothetical litigant using his own money to defend himself, especially in the context of litigation about amounts such as were in issue in these cases. Examples of this are the frequent objections that work was done by too senior a fee-earner, and could have been done “at a fraction of the cost” by someone more junior, or a para-legal.
371. I have also held that the question whether any particular objection can be made out is appropriately decided on the basis of the materials now before the court, those being the materials which were effectively available to I&B at the time when they made the payments, and which F&B is well enough able to judge on that basis, through the knowledge and familiarity of those who are instructed by them or engaged in their team, even if they themselves only became involved part way through. Having now had to consider the basis for the trustee’s right to indemnity in more detail in the course of this hearing, I see no reason to amend that view, on which my April Order was based.
372. The position is therefore, in my judgment, that F&B may possibly be able to make objections which should not be struck out with regard to individual actual charges which have been included in various Invoices, provided they can base the arguments for such charges being unreasonable on the materials contained in the Invoices and narratives themselves, the affidavit and documentary evidence admitted before the court, the agreed or incontrovertible evidence of the chronologies of the litigation, and the knowledge of their own clients, advisors and advocates. However, and apart from applying the wrong tests, they have in general not done so, and although they have sometimes cited examples of individual charges to support their broader objections to the whole Invoice, these examples do not always amount to an objection which I think would pass the *Alhamrani* threshold test.
373. I will illustrate with one example which has arisen, where in fact I do think that has been done. It concerns Mourant’s Issue No 24 of 26th July 2010. Advocate Robison drew attention to an entry there where Advocate Wessels purported to charge for a telephone call of 15 hours on 28th June 2010. This was in the context of charging at least a further 1h 48 mins of work on that day, as well. That telephone charge, is on its face, impossible and therefore unreasonable. It is not a large charge - some £6,300, - but to my mind it must be

investigated as it is *prima facie* likely to be disallowed. If (as appears to be the case) I&B paid this charge, then they clearly paid something which was not apparently reasonable, and I do not feel that the latitude which it is right to allow with regard to the question whether a reasonable litigant could have elected to pay charges which might be dubiously justifiable can extend to such an obviously questionable charge. That is a very clear example of egregious unreasonableness which is apparent from the evidence and which, where it can be pointed out individually, passes the appropriate application of the *Alhamrani* threshold test. Again, in the earlier days in particular, Advocate Wessels was inclined to use abbreviations (such as “CN2”: see again Issue 24) which, though no doubt obvious to him, do not seem to bear any immediately obvious reference to any aspect of the litigation. It may, of course, be perfectly apparent to F&B’s legal and client team what this means, with their closer knowledge of the state of proceedings than mine, but if not, it seems to me that a specific objection to such a charge on the basis that *prima facie* it relates to some other matter would be a reasonable objection, taken from the face of the evidence, which I would be inclined to allow to be clarified or investigated.

374. I will give a further example of a matter which almost reaches the necessary threshold but which, in the end, I would conclude does not. This is in relation to Macfarlanes Issue No 224, of 6th February 2018, for £133,193.00 in total. This Invoice charged work for the month of October 2017. F&B makes the usual complaint that 257 hours of work across all levels of seniority was unreasonable based on relatively little detail given in the narratives (I have already dealt with this form of objection at [310] and [366]) and the fact that the litigation was being conducted in Guernsey. At this time, though, the litigation had in fact very much shifted to the UK, because this was the month before the Privy Council hearing. This rather tends to suggest that this form of objection had become a mantra. In oral argument, however, Advocate Robison pointed out that Mr Daniel Lavender, a partner in Macfarlanes and the leading lawyer working on the case in that firm, had purported to spend between 4.50 and 9 hours each working day for two weeks, between 9th and 20th October 2018, on “Trial Prep”. Advocate Robison argued that this was remarkable and just too much. Mr Lavender was involved in an ancillary capacity; he was not the trial lawyer, and therefore this total of 66.5 hours of unspecified “trial prep” was *prima facie* time extravagantly and unreasonably spent, which it was therefore strongly arguable should not have been paid for.
375. That challenge has been made on the face of the narratives, and as such is good in form. However, on thinking carefully about this, and looking at the context, I would still conclude at the moment that it was not unreasonable for a litigant in such major litigation as this to be willing to pay for the time of the lead solicitor in England, immersing himself in the material and issues for an appeal in the Privy Council, (in which he would be the chief instructing solicitor) which appeal was of the importance and magnitude for the client as this litigation will have been. In saying this, I have observed the simultaneous involvement of other personnel, but it still seems to me that it is not the case that no reasonable client-litigant would be prepared to pay for this time and service. This view is, of course, on the arguments made to me at the hearing, which I accept were in the context of supporting wider and general alleged deficiencies across the Invoice narrative as a whole, and may not have been fully directed at the circumstances of this particular charged item as such, and so I give it as an example of my thinking and not as a determinative finding.
376. I accept that F&B themselves may (as they assert) have been more sparing with their instruction of lawyers, English or Guernsey, and may indeed, have been more conserving of their own funds, possibly even forgoing work suggested by their lawyers. I do not know, but that is in any event irrelevant. I&B are not obliged to be parsimonious, nor to weigh up value for money as F&B, may have done. Litigants can reasonably take different views about how much they are prepared to spend. It is only when such expenditure becomes

undeniably profligate that a party entitled by statute or contract to a full indemnity for his costs would begin to forfeit that entitlement.

Decision

377. The result, therefore, is that I will make an order striking out the remainder of these residual objections as well, but subject to four points.
378. The first is that I will not strike out, but will preserve, such objection as relates to the charge for the 15 hour telephone conversation in Mourant Issue No 24 as mentioned above.
379. The second is that I will give F&B liberty to apply, within a further period (I would propose 28 days from the finalisation of the order on this hearing but I am open to persuasion otherwise) in respect of any objection they feel able and wish to mount in respect of any individual charges claimed in any of the Invoices which have so far been the subject of general “Insufficient particularity” type challenges, as mentioned above: see [324]. To do so, F&B must, however, identify the particular charges in issue, and provide, in each case, particulars of the basis on which they contend that their objection to that particular charge (or group of similar or related charges if appropriate) should not be struck out, i.e. that it passes the necessary threshold test.
380. I need hardly add that the basis of any such objections needs to take account of the principles and approach which I have set out above. These depart significantly from the principles which F&B have assumed to apply when formulating their original objections, as I have observed above (see [370] and [372]). I also probably need hardly add that I am aware that this sets the bar high. It may well confine the further charges proposed to go forward to those which would seem to disclose some mistake, although that is not a limitation which I am making. But I would, therefore, not expect there to be many, and indeed possibly only very few, specific such challenges advanced on this basis. This is because I expect the principles which I have set out, and the extent to which I have indicated that I judge the benefit of the doubt to operate effectively in I&B’s favour, to be taken into account and applied seriously and responsibly by F&B when they come to consider what, if any, individual challenges they can properly mount. This liberty to apply is not to be treated as an opportunity to try to recast swathes of their previously attempted objections in different words. The TDT’s track record in this regard, i.e. taking every point and many bad points at the slightest opportunity, is not very reassuring, so I must make it clear that I would take an exceedingly dim view of anything which I perceived to be an irresponsibly over-ambitious attempt to re-advance objections which it is plain that I have previously, in effect, ruled out. I record though, that I would accept that the incurring of costs prior to 2nd July 2010 would possibly be subject to a stricter approach to the reasonableness of incurring costs under the principles set out in [253] above, than those incurred later, and this may be appropriate to take into account with regard to considering any particular charges during this period on a fact-specific basis.
381. The third matter is on a slightly different point, but appropriate to insert here. Advocate Robison did submit that the uncovered error with regard to the previous payment of Mourant Issues Nos 2 - 14 should cause one to question whether Issue No 1, from even earlier, was still properly claimed. I am inclined to agree with this proposition. I will therefore not allow judgment to be given in respect of Mourant Issue No 1, pending further evidence being filed or drawn to my attention, and submissions made, regarding this Invoice, how it came about that this Invoice can have remained unpaid when the subsequent 13 invoices were paid, and how it came about that the payment of those subsequent 13 invoices was not noticed until after they had been erroneously included in I&B’s original claim.

382. The fourth matter concerns those same 13 Invoices (Mourant Issues Nos 2 - 14) which have been discovered to have been paid or recouped previously. The liberty to apply given at [377] extends similarly to those Invoices, but the effect will be that any objection made will be a claim for return of monies paid.

Miscellaneous further points

383. For completeness I also record the following points relative to the above topic.
384. First, as regards my basic ruling that I will strike out these generalised objections I am aware that I am, in effect, placing reliance on I&B's assertion, by its Proof and its claim, that the costs in question were all reasonably incurred in connection with the TDT, and were reasonable in amount. I had noted, though, that I&B's original claim has been subject to amendment, first by its acceptance that certain objections made by F&B with regard to particular items charged did justify further investigation, such that it would not seek to strike out those objections, and, second, by the remarkable discovery mentioned above at [143] that 13 early Mourant Invoices originally included in the claim and deposed to by Ms Hargreaves, had in fact already been paid, and were therefore withdrawn from the claim along with some further payments discovered to have been made. The matter of the 13 Invoices, in particular, has disturbed me somewhat, as it is a rather startling change. I have also borne in mind the somewhat remarkable inclusion of the claim for a 15 hour telephone conversation in June 2010 which I have remarked on above, and a correction to evidence made only recently by Mr Simon Day.
385. I have therefore asked myself whether these factors should cause me to be sufficiently circumspect about the reliability of the remainder of I&B's assertions and evidence that this lends more general force to F&B's contentions, and that I should therefore refuse to strike out F&B's objections, and should not, basically, give summary judgment to I&B at this stage. As will be gathered, however, I have concluded that these errors, the first two and last of which have been corrected, are not sufficient to cause me to come to a different decision on the appropriate basis for permitting objections from that stated above.
386. The second point is that I had wondered what, if any, assistance I might gain from the two judgments of LB Talbot QC given in Guernsey 2 (Civ 1505/2010) on 27th November 2015 (unreported) and 29th June 2017 (Guernsey Judgment 49/2017). LB Talbot QC was there required to determine, inter alia, the entitlement of I&B under its trustee indemnity to its costs incurred in relation to a number of applications made in the Guernsey 2 proceedings. He appeared, therefore, to be having to carry out exactly the same exercise in that respect as I am required to do here and I was told that he had disallowed some costs claimed by I&B. This was after a set of eight hearings totalling about 16 hearing days, over about 2 years. It therefore seemed to me that his decision might provide some indication of the extent to which some other tribunal had concluded that bills paid by I&B were found to comprise costs unreasonably incurred or unreasonable in amount, after detailed argument, which might provide guidance, or even a template (with the parties' agreement) towards a short way of determining the issues before me. However, on investigation, I learned that the basis on which LB Talbot QC had excluded costs claimed by I&B was where they could not be related to any of the Guernsey 2 Applications with which he was concerned. In other words, this was an "allocation" type decision and not a "reasonableness" type decision. His decision did not, of course, prevent those costs being properly recoverable under I&B's indemnity generally at some other time, if appropriate.
387. I did note, however, and I derive some comfort from the fact, that LB Talbot QC apparently did not disallow any part of I&B's bills of costs on the basis of unreasonableness. It may be that he was not asked to do so, but if so, neither the parties nor he himself formed the impression that such costs were possibly unreasonable, and I find it difficult to imagine that

the format of the bills and narratives which were presented to him will have been any different, in general terms, from those which have been before me. As I mentioned, this lends some support to my general view that the vast part of such charges as are before me are not apparently unreasonable.

(11) Uncategorized objections

388. These are a handful of objections, identified by I&B as possibly not fitting into the various category headings which they had used in their Master Schedule, which they set out specifically, with their comments, in a Schedule to a letter of 4th December 2020 sent to Babbé on behalf of F&B. I am not going to list these. I consider the appropriate disposal, in the light of my decision with regard to dealing with the residue of generalised objections, is to treat them all as struck out, but subject to the liberty which I have indicated that if, on reflection and consideration of the terms of this judgment, F&B thinks it appropriate, they may be included in the objections to charges which I have given them liberty to make on the basis of materials in the case. I therefore make only two comments where new points may possibly be material.
389. The first relates to Mourant Issue No 200-201, and Macfarlanes Issue No 320 and 323. There the objection is that the costs claimed relate to costs for which the Joint Receivers are responsible. By parity of reasoning with my decisions regarding the availability of other routes to recovering costs, it seems to me that I&B are likely to be entitled to recover these costs from the assets of the TDT, but the TDT would then be entitled to enforce I&B's claim against the Joint Receivers by subrogation. I assume they have a personal liability, or else this objection would appear to be pointless.
390. The second relates to a set of eight various Macfarlanes Issues Nos between 25 and 324 which challenge the inclusion of costs relating, in various ways to "billing" and for which it is said that the client should not be liable. I have not heard any argument on this topic, but it does appear to me possibly to provide a new and different potential argument with regard to some basis for disputing the reasonableness of paying costs.
391. The important point, however, is that each of these uncategorised objections will now have to be either abandoned or formulated as an objection to a particular charge, as mentioned above.

Further or omitted matters

392. This hearing has raised a great number of issues, and I have determined, above, the important ones, but I am aware that there may be some minor points outstanding which I have either not dealt with, or which were abandoned, or the argument as to which was so short and hidden amongst the more major issues that I have so far overlooked them. I am aware of at least four such matters.

Late produced invoices

393. I am aware of a set of 28 Invoices apparently served on 28th July 2020 by I&B on F&B, having apparently been only recently discovered. F&B have quickly supplied their objections to these Invoices, under the same three Categories as in their mainstream objections, and supplied in an Appendix (E) at the hearing. They were not considered separately at the hearing. I would therefore propose and expect that the objections be considered and dealt with by parity of reasoning with the decisions I have indicated above, with regard to the contents of the previous main set of disputed Invoices and subject to the liberty to apply in relation to any mounting of supportable objections to individual charges. Without in any way prejudging the particular point, since there may well be further facts as

yet unclear to me, a possible example of what might be a supportable objection would be with regard to the charges for an expert Scots Lawyer, referred to in Issue No 16 of this group of charges. On the other hand, I would make it clear that I do not regard the late service (see objections to Issues No 21 - 27) as an objection which, in itself carries any substantive weight as to appropriate relief.

394. There have been several contentious applications in this litigation regarding the right to make collateral use of documents disclosed in the proceedings (particularly Guernsey 1) in other proceedings. I have noted: NS1, Guernsey 2, Murray Holdings, but there may even be others. These costs are not very great, and I am not at all clear as to the state of dispute about them. With regard to Murray Holdings, I believe that I&B may have accepted that they fall under the same principles as they accept with regard to the Costs of the Delivery Up Proceedings (see [226]) and should therefore go ahead. With regard to NS1 and Guernsey 2, they would appear to be some kind of allocation objection or dispute. I do not, therefore, propose to strike out any such identified objections, and directions for their disposal will be required, but can no doubt be formulated by analogy with those for any similar matter where I have made a decision above.

Remuneration

395. This set of claims refers to some 21 invoices dated between 1st October 2009 and 18th October 2010, I understand as claims for trustee remuneration. The last three are actually dated after the date (2nd July 2010) when I&B were removed as Trustees, but presumably relate to work carried out before that date. Various objections are made, and I did not hear any, or any substantial, argument directed at these during the 8 day hearing.
396. Advocate Wessels submitted in a Skeleton Argument that the court should approach the claim to remuneration on a similar basis to the *Alhamrani* threshold principle, by analogous reasoning, and, in particular, giving I&B the benefit of any doubt. I imagine that this is because I see many objections made on the basis that the claim lacks narrative support and lacks information as to whether I&B was acting as trustee on a basis which entitles it to claim remuneration, or whether it was acting on its own account.
397. I do not accept Advocate Wessels' argument on this point. Trustee remuneration is not analogous to the trustee's claim to expenses. A trustee is entitled to remuneration only in accordance with the terms of any remuneration agreement (which, if I have ever seen, I do not now recall the terms of) and it is, crucially, for the trustee to justify his claim in the normal way. This is quite different from the starting point for a trustee's indemnity, which is that once he proves he has spent moneys or incurred liabilities in connection with the trust, he is entitled (absent disqualifying features) to a full indemnity and the burden shifts to the trust to justify why he should not have it.
398. I&B will not, in my judgment, be entitled, therefore to the benefit of any doubt on the basis of the *Alhamrani* threshold principle. However, if they are facing objections on the grounds of inferences claimed to be drawn from lack of evidence, it may be that they will be able to claim the benefit of doubt based on the lapse of time and hence possible reasonable reasons for such evidence or information no longer being available. I emphasise, though, that I am not making a decision, or even giving any "indication" on that point as I have not heard argument. I am merely indicating and illustrating that the normal rules of evidence, applicable to all the particular circumstances, will fall to be applied when considering I&B's claim to remuneration.
399. I will therefore stand over the claims in respect of trustee remuneration for further argument, although it may, again, be possible that some of the findings which I have made above in

relation to trustee indemnity provide guidance which may help the parties to narrow the issues between them.

Claim for account of assets held by F&B under the Transfer Order of 3rd October 2019

400. As an entirely unrelated matter, I&B also sought, initially in their 28th July 2020 skeleton argument an order for F&B to disclose the current value and liabilities of assets held by them under the above order, on the grounds that, with costs continuing to be accrued in this litigation, and the potential for the TDT to become insolvent and for its assets to require to be distributed *pari passu* if appeals against my previous decision with regard to the basis of distribution of the TDT assets should succeed, there was a real likelihood that the sums transferred to provide security for I&B's further costs in the litigation would prove inadequate, and they would have to seek to exercise their right of further recourse to the assets held by F&B under the Transfer Order. However, that application was expressly not pursued by Advocate Wessels in the event, and I need say no more about it than to record that fact.

Other matters?

401. I am not aware of any other matters or issues which require a decision from me but as mentioned, I may have overlooked some. However, I consider that this judgment has gone as far as it usefully can, and the parties should now take stock and review the position. Any outstanding matters can be restored at a later date or, if preferred and they are short points, I will deal with them on paper.

Conclusions

402. I can now, therefore, summarise my substantive conclusions, and the orders I anticipate making, extracted from the above. I will of course hear counsel's submissions as to this and any further or other appropriate orders.

- (1) I&B should have judgment in principle for the sum of £332,187.93 being the total of the 212 Invoices claimed by them, as to which there has been no objection at all raised by F&B. However, whether such judgment can be enforced may depend on the outcome of litigation with regard to the Priorities Issue which is as yet not determined.
- (2) The following objections by F&B will be permitted to go forward
 - (i) The Excepted Objections (see [16]);
 - (ii) The accepted objections relating to the Costs of Delivery up Proceedings (see [252-6]) and possibly Collateral Use (Murray Holdings) (see [392]);
 - (iii) The Receivership Costs objections (see [306]) including concurrent objections to use of English counsel (see [309]);
 - (iv) Mourant's Issue/Invoice No 1 (see [381]).

There will have to be directions as to progressing the above objections.

- (3) There is to be further argument and submissions as to whether any and if so which of the following objections should be permitted to go forward
 - (v) Disputed objections relating to the Costs of Delivery up Proceedings (see [225-6]);

- (vi) All objections relating to certain “other matters or proceedings” (see [227] - [229]);
 - (vii) All objections identified as “Allocation to Headings” objections, (see [242]);
 - (viii) All objections identified as Costs of Collateral Use Proceedings (see [394]).
- (4) There is liberty to apply if so advised with regard to any necessary amendment of I&B’s proof and/or Application with regard to any costs apparently misallocated to Guernsey 1 and Guernsey 3 but which have emerged as being actually attributable to costs incurred in regard to the BVI Somerfield Proceedings (see [172]).
- (5) There is to be liberty to apply if so advised, regarding objections re counsels’ fee notes, under [251]).
- (6) All objections other than those expressly identified and dealt with above, including those identified as “Uncategorised Objections (see [391]) and Late Produced Invoices (see [393]) are struck out SAVE
- (i) that the objection identified in [373] is permitted to go forward and
 - (ii) that insofar as F&B consider that they can make out an objection to the validity for indemnity of any identifiable item of charge within the ambit of such objections on the basis of support from the evidential materials in this Application, then F&B have liberty to apply within [28] days of the date of the order made on this judgment, to reinstate such objection by identifying
 - (a) the actual charge to which such objection is taken and its amount, and
 - (b) setting out the basis upon which such charge appears to be demonstrably unreasonably incurred or unreasonable in amount based on such evidential materials, and
 - (c) in the case of a charge claimed solely to be unreasonable in amount, what amount F&B do accept would be a reasonable amount.
- (7) I&B are entitled to payment of, and should again, therefore, have judgment in principle for, the amounts of any and all charges which, after filtering out in accordance with the above directions, are not disputable. There will therefore be liberty to I&B to apply for judgment in respect of any ascertained such sum, although the caveat with regard to enforcement mentioned in sub-para (1) will apply.
- (8) I&B’s claim for outstanding remuneration is stood over for further argument.

403. Lastly, I make two final points. The first is that it may well be that the principle of the trustee’s/former trustee’s indemnity as to costs which I regard as correctly operating in Jersey law, and, in effect, also in Guernsey law (I realise that I am applying Jersey law, but as already stated, neither Advocate has – correctly in my view - submitted that there would be any difference between the two) produces a result which will probably seem to give a greater quantum of recovery to trustees or former trustees in these jurisdictions than might appear to be allowed in English cases, as mentioned in the next paragraph. Nothing was made of any such comparison in argument before me, but the point arises from the submissions made by Advocate Wessels with regard to what is properly meant by a “full indemnity” as laid down in the two Jersey cases of *Alhamrani* and *des Pallières* (above).

404. There was not cited to me, nor have I located, any reported English case on comparable facts with the present case. Cook on *Costs* 19th Ed does not cite any such case in Chapter 38, dealing with the costs of trustees/personal representatives. In Chapter 36, dealing with “Costs payable under a contract”, Cook refers to certain cases where costs have been awarded having regard to a contractual right or an indemnity clause, two such examples being *Gomba Holdings (UK) Limited v Minorities Finance Limited (No 2)* [1993] Ch 171, (mortgagee’s contractual right to indemnity for its costs of proceedings) and *Renewable Power & Light Limited v McCarthy Tetrault* [2014] EWHC 3848 (Ch), (counterclaimant in a contractual claim which had been discontinued entitled to an indemnity for its costs under a contractual indemnity clause). However, no such case deals with a trustee or former trustee’s right to indemnity as here, and it appears to me that, as is illustrated by the two cases mentioned, when the English courts have encountered any such contractual indemnity obligation, they have proceeded on the tacit assumption that a taxation of costs (a “detailed assessment” in England) on the indemnity basis will produce the proper amount of the contractual indemnity. They have been content to refer such quantification to an indemnity costs taxation: see the *Renewable* case (above) at [40].
405. Whilst it is possible that costs officers in England make allowance for the basis of the entitlement of trustees at the assessment stage itself (see Cook on *Costs* at [38.6]) the apparent assumption at the court order stage that a detailed assessment of costs is the appropriate procedure to adopt has apparently not been questioned, investigated or discussed, and the point that the familiar rubric (“reasonable costs, reasonably incurred”) may encompass different things in different contexts, and that it is necessary, in the case of contract (or statute), to examine what “indemnity” is really meant to mean in that context, does not appear to have been examined. This may well be because trial judges generally deal with costs at the end of an action, as an ancillary matter, and do not expect to focus closely on either the implications, or the mechanism for implementation, of court costs orders by comparison with contractual rights, nor on the question which particular jurisdiction they may actually be exercising (see [81] – [83] above) in dealing with these. It also seems to me that the assumption that a contractual indemnity and an award of indemnity costs can be equated is a likely effect of those courts’ ordinarily and repeatedly considering costs in the context of the highly intricate and prescriptive provisions as to costs regimes which are contained in the English CPR - far more so (thankfully) than in Guernsey and, as far as I can see, in Jersey. Certainly it does not appear to me that the *Alhamrani* case, close examination of which is what has driven my own conclusions in this case, has featured in any of the English cases which have any kind of parallel to the present, *Renewable* (above) probably being the nearest. For that reason, this possible difference in result between the jurisdictions gives me no cause for concern with regard to the correctness of the conclusions which I have come to above.
406. Second, and leading on from this, I realise that the conclusions which I have come to are to the effect that I&B is entitled to be indemnified in respect of virtually all the costs which it has incurred and paid on these two actions. This is a very large sum, and I also realise that that may therefore give rise to a sense that this is somehow not “right” or not “fair”. If so, I consider that any such sense only arises because lawyers involved in contentious proceedings are intuitively familiar with the restrictive attitude to costs recovery which applies to court ordered costs awards, even when described as “indemnity”. That sense of what is “fair”, though, is in the context of a costs obligation which is being imposed upon the payer, involuntarily. I have been at pains, throughout this judgment, to stress that that is not the relevant scenario, and it is an entirely different situation. The point here is that the contractual (and statutory) arrangements which were put in force through the TDT Trust Deed had the effect that the assets of the TDT were promised to be made available to reimburse any Trustee for its expenditure or liabilities reasonably incurred, without material fault, in, or as a consequence of, its functions as Trustee. Indemnity is a very wide obligation, over which the indemnifier may well have little control. The indemnity

obligation here is doubtless particularly galling to Mr Tchenguiz, after the outcome of the litigation, and from the history which I have had to examine, and what I have gleaned of his attitude. It was and is, however, both a contractual and statutory obligation of the TDT to pay such indemnity, and it must therefore be met. The sooner that position is accepted, the less will there be any further, avoidable, lawyers' fees incurred.