

Approach to quantification of a former trustee's statutory or contractual "full" indemnity out of the trust estate for its costs incurred in successfully defending a claim for breach of trust, and the identification of such costs.

**[2022]GRC003**

**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: 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> November 2021**

**Judgment handed down: 4<sup>th</sup> January 2022**

**Advocate for the Plaintiffs:**

**Advocate for the Intervening Parties/Current Trustees:**

**Mr J M WESSELS**

**Mr N ROBISON**

---

**JUDGMENT (approved)**

---

**Legislation, cases and textbooks referred to:**

## Statutes

### **Guernsey**

*Trusts (Guernsey) Law 2007 S.35 (2)*  
*Royal Court Civil Rules 2007 r 50(2) (f) or (p)*

### **Jersey**

*Trusts (Jersey Law) 1984 Art 26 (2)*

## Cases

### **Guernsey**

*Re: The Tchenguiz Discretionary Trust* (Royal Court 27 November 2015, unreported)  
*Re: The Tchenguiz Discretionary Trust* (2017) Guernsey Judgment 49/2017 (RC)  
*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] GCA 042  
*ITG Ltd and another v Glenalla Properties Ltd & Ors*: (2021) Royal Court [2021] GRC 007

### **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 235

### **England and Wales**

*SPR North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch)

## Text books

Lewin on Trusts, 20<sup>th</sup> Ed at 20-21

## **Introduction**

1. On 23<sup>rd</sup> April this year I handed down a long judgment dealing with aspects of the disputes which had arisen between, the Plaintiff (“**I&B**”), former Trustees of the Tchenguiz Discretionary Trust (“**the TDT**” or “**the Trust**”), and the Fifth Defendant (“**F&B**”) the present Trustees of the Trust, regarding the claim of I&B to be indemnified, as such former Trustees, out of the funds of the TDT, in particular in respect of their legal costs in defending and ultimately succeeding in two actions, respectively known as “**Guernsey 1**” and “**Guernsey 3**”, involving themselves, four BVI Companies, and subsequent Trustees of the TDT. Paragraphs [1]-[19] of that judgment (*ITG Ltd and another v Glenalla Properties Ltd & Ors*: Royal Court [2021] GRC007 - “**the 23rd April Judgment**”), set out a summary of the history of that application. This judgment must be read against the background of the entirety of the 23<sup>rd</sup> April Judgment .
2. I&B’s claim to indemnity with regard to those identified costs was made by reference to 961 separate invoices for legal services raised by their Guernsey Advocates (Mourant, but under previous firm names) and their English Solicitors (Macfarlanes) over the lead up to and the course of the litigation. F&B wished to raise a great many objections to those charges. As the basic principle is that a trustee is entitled to a full indemnity in respect of his expenses reasonably, or properly (which amounts to the same thing), incurred in connection with the trust, F&B’s objections therefore have to be that the charges claimed as expenses against the TDT are not within this description.
3. At para [100] of the 23<sup>rd</sup> April Judgment, I set out a sequence of six questions which require to be answered in order to determine the validity of such a claim and objections to it, and they are a

useful reference point here. They are, in order, (but here stated as principle rather than with specific regard to this case):

- (1) What actual sum or sums are being claimed for indemnity purposes?
  - (2) Were these sums indeed incurred “in connection with” the relevant trust/ trusteeship, both within the meaning of that phrase, and as a matter of fact?
  - (3) Whether there are any grounds (such as misconduct or culpable conduct) for depriving the trustee of his indemnity in respect of any such matter(s) or sum(s)?
  - (4) If not, what was the work for which such payment obligations were incurred?
  - (5) Was that legal work reasonably done? ie 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?
4. The answer to Question (1) is obvious in this case as the claim is defined by the charges set out in the relevant invoices, as claimed in whole or in part.
  5. Question (2) is a mixed question of law and fact, but has given rise to what have been conveniently termed “allocation objections”. These are allegations that charges on the Advocates’ or solicitors’ bills, which are claimed to relate to Guernsey 1 or Guernsey 3 have been misallocated, and in fact relate (or could relate) either (i) to different trusts (there are several “Tchenguiz” Trusts) or (ii) to completely different non-trust matters rather than the TDT, or (iii) to different matters concerning the TDT but which are, by agreed direction, expressly not the subject of this particular quantification exercise, or (iv) to advice taken by I&B in a personal capacity rather than truly “in connection with” the TDT. The objection is that, for any of these reasons, charges being claimed do not come within the scope of the indemnity at present being determined: some will not be claimable at all; others may be claimable but only by a different route from this one.
  6. This is broadly an issue of fact as to which any allegation that such an objection is unsustainable and should be struck out is to be determined on the basis of the usual test for strike out/summary judgment applications, namely whether there is a real, as opposed to a merely fanciful, prospect that the objection can be made good, bearing in mind that the burden of proof at trial will be on the claiming party and not the objector. Whilst various identified objections of this type have been accepted by I&B as being fairly arguable and therefore properly permitted to go forward for full further consideration and argument, (these have been labelled “the Excepted Objections”), they contend that certain such objections do not even pass this “threshold” test because they are obviously bad with no real (as opposed to fanciful) prospect of success. They should therefore be struck out and I&B should in effect have summary judgment. As F&B resist this, these are the first group of objections which I am required to consider. For convenience I shall call them the Red Objections, for reasons explained later.
  7. Disputes under Question (3) were decided at the April hearing. Question (4) is really just a necessary step towards considering Questions (5) and (6).
  8. Questions (5) and (6) comprise the tests for whether the charges claimed are “reasonable costs, reasonably incurred” on such matters by I&B. It is with regard to these latter two questions that the bulk of the objections - those in the second group which I now have to consider - are made.
  9. Procedurally, they arise in the following context. At the earlier hearing, I&B sought to strike out objections made by F&B under the “reasonableness” principles of Questions (5) and (6) and, in effect, sought summary judgment for their indemnity claim in that respect. This gave rise to a

dispute as to the application of the threshold test described in general terms above. I concluded that in formulating their objections on this topic F&B had not taken an appropriate approach, nor had regard to the correct test (see Paragraph [370] of the 23<sup>rd</sup> April Judgment). They had, firstly, formulated their objections with respect to invoices, but these contained many charges, in respect of different aspects of work done, and F&B's objections would need to identify particular items of charge in the bill narratives. Secondly, F&B had not had appropriate regard to the principle that a trustee's indemnity was a true "full" indemnity, and that the trustee was entitled to the benefit of any doubt as to the reasonableness of the charge or expense being claimed (see: *Re JP Morgan 1998 Employee Trust, des Pallières v JP Morgan Chase & Co Ltd* [2013] (2) JLR 235 and *Alhamrani v JP Morgan Trust Company (Jersey) Ltd* [2007] JLR 527). They had formulated objections along lines of arguments which might be raised, and even succeed, upon a costs taxation under a court costs order. This affected the threshold test described above, because the assessment of whether there was a real, as opposed to a fanciful, prospect of F&B's being able to make good their challenges if the matter were allowed to go to a further full hearing, had to be made against the background that, unusually, I&B would be entitled to the benefit of any doubt with regard to whether such charges were reasonable costs, reasonably incurred. I decided therefore that F&B's multiple objections on these grounds should be struck out, (save in respect of one very minor matter, which I held did surmount the relevant threshold), but that F&B should have the opportunity of formulating any objections which they considered did at least pass the relevant threshold test, in the light of the guidance given by my judgment, that guidance being found in my discussion and findings at, principally, Paragraphs [355] – [376].

10. My 23<sup>rd</sup> April Judgment gave rise to a complex Act of Court, (the "23<sup>rd</sup> April Order") giving (in summary) directions for the progress of arguing and determining such objections as I&B had already accepted passed the relevant threshold test or which I had determined did so, directions to enable the resolution of any dispute as to the identification and progress thereafter of "allocation" objections" (being objections which related to whether the charge was correctly allocated) and directions to allow the formulation of such substantive "reasonableness" objections as F&B wished, and felt able, to make on this second attempt, and then for the resolution of any disputes, if they arose, as to whether any of these re-formulated objections should be allowed to go forward to a full further hearing.
11. Unsurprisingly, they did. Paragraph 12 of the 23 April Order adjourned the consideration of such continuing "allocation" and "reasonableness" disputes to a further hearing, and this is now that hearing.

### **Matter for future consideration**

12. I should add, and it is convenient to flag it up here but explain it later, that there is one further point which has been highlighted by some of the contentions put forward on this hearing, although it does not affect my decisions at this time because of the express limitations on the subject matter of this "Paragraph 12" hearing. It relates not only to an aspect of the "Excepted", or allocation, objections, but also appears to have potential wider implications for other costs and objections.
13. As mentioned above at [6], I&B have previously agreed that some objections raised by F&B to costs claimed in their Proof do raise sufficiently arguable issues as to whether those costs should be correctly allocated to identified legal proceedings other than Guernsey 1 and Guernsey 3, which have been agreed to require carving out of I&B's Proof to be dealt with separately. However, there has been no such express carve-out for costs incurred in relation to these proceedings themselves.
14. One of the objections raised by F&B against some of the later charges included in I&B's Proof, which was submitted as at 28<sup>th</sup> February 2020, is that they are in fact costs of these proceedings and as such they cannot properly be the subject of, effectively, a summary judgment application by I&B because there has been no costs order yet made in these proceedings. These proceedings were actually commenced technically, I think, on 5<sup>th</sup> September 2018 by an Application made by

the BVI Companies (who have since dropped out) for the distribution of TDT funds held by the Joint Receivers, following the confirmation of their judgment debt by the Privy Council. The subsequent proceedings have reflected the many issues arising in that context.

15. I&B conceded that this point might have some procedural substance and Advocate Robison offered to write to Advocate Wessels to identify the relevant charges in the Schedules. However, I was only informed of the outcome of this some 12 days after the conclusion of the hearing. Whilst it appears that I&B have agreed that certain charges should indeed be regarded as costs of this “Proofs Application” and therefore ought to be left for determination until after the disposal of the costs of these proceedings by costs orders, this issue has also given rise to dispute about whether some such charges are, indeed, correctly regarded as the costs of these proceedings or as the costs of Guernsey 1 or 3.
16. Obviously, I have heard no argument about that point as this matter only arose clearly after this hearing was concluded. It will have to be deferred to a further hearing. However I had already been considering the implications of the point when dealing with the “Red Objections” matters, mentioned below. It seems to me to give rise to an even more general point of principle, which is:
  - (7) At what point do the costs incurred by a *former* trustee in establishing, defending or enforcing the quantum of his claim to an indemnity for his costs cease to be properly regarded as being costs incurred “in connection with” the relevant trust (and thus be recoverable pursuant to the trustee’s indemnity) and instead fall to be treated simply as costs incurred in personal litigation, thus being recoverable only pursuant to costs orders made by the court.

I will illustrate this point where it arises, and explain it in full subsequently at [82] below.

### **This hearing**

17. There are four separate matters which counsel agreed at the hearing were those on which the parties represented at this Paragraph 12 Hearing sought a decision. They are

- (1) The Excepted or “Red” Objections**

Disputes with regard to the Red Objections (the disputed section of what were previously known as the Excepted Objections) and whether all or any of these should proceed or should be struck out.

- (2) The “Reinstatement Application”**

Disputes as to whether all or any of F&B’s restored, reformulated “reasonableness” objections should be allowed to proceed or should be struck out at this stage.

- (3) The Remuneration Claim**

Whether I&B are entitled to (in effect) summary judgment upon their claim for about £500,000 of unpaid trustee remuneration from 2009/10, which has not previously been directly considered in this context, ie whether the objections now raised by F&B can be struck out at this stage, or are sufficiently arguable that this claim should be adjourned to a later hearing for full argument.

- (4) The Interim Payment Claim**

Whether I&B should be entitled, in the current circumstances, to an interim payment of some significant amount out of the assets of the TDT currently held by the Joint Receivers for distribution amongst the TDT's various creditors, on the grounds that the court can be sufficiently confident that I&B will eventually recover at least such (proposed) amount, even in the face of F&B's objections to any such payment now being permitted.

I will deal with each in turn.

**(1) Excepted Objections – “Red Objections”**

18. These are allocation objections. A large number of them arise from the fact that certain actions or applications have been carved out of the present exercise to be dealt with elsewhere. Eight such separate matters were identified in Paragraphs 3.1 – 3.8 of the 23rd April Order and the ninth is the residual sweep-up category of costs which arguably do not relate to the TDT. (I use this phrase because it has been repeatedly used by the parties, but the more accurate qualification is that they are not costs incurred “in connection with” the TDT within the meaning of Art 26 (2) of the *Trusts (Jersey) Law 1984*.)
19. The disputes have been narrowed down by the parties, because I&B have colour-coded all the allocation type objections in question as Blue, White, Red, or Orange. Blue Objections are “accepted” (and therefore “excepted”) in the sense that they are objections which I&B accept cannot be struck out. This does not mean that I&B accept that they are good objections, but they do accept that they pass the initial test of disclosing a sufficiently arguable case, so that they cannot be struck out and should go to a full hearing. White Objections are objections which had previously been accepted in this sense.
20. I am concerned today only with Red Objections, which are objections which I&B say should be struck out because they can be seen on examination here and now, not to pass the threshold test of disclosing a real (as opposed to fanciful) possibility that F&B might be able successfully to resist I&B's claim that these are costs of Guernsey 1 or Guernsey 3 rather than the other identified subject matters agreed to be carved out from this hearing, bearing in mind that the burden is on I&B to prove this, on the usual civil evidential test of balance of probability.
21. I am not asked to deal with objections colour-coded Orange because the parties agree that they are “mixed” charges (I think of Red and White), and will require directions, which are appropriately dealt with after the outcome of the Red Objections dispute is known.
22. The Red Objections are to be found in the “Red” columns of Schedules numbered 3.1, 3.5, 3.6, 3.7 and 3.9, corresponding to the sub-paragraphs of Paragraph 3 of my 23<sup>rd</sup> April Order. These Schedules have been dealt with between the parties in the way of a Scott Schedule, with F&B stating the basis of their objection and I&B adding their comments so as to define the issue. Apart from one or two examples, in particular with regard to allocation to the “Delivery Up Proceedings” (3.1) and miscellaneous “matters other than TDT” (3.9), the Advocates were content to rely on these written comments and did not advance oral argument. (I should add for completeness that in the further updated bundle of the Objections materials sent to the court with additional comments and page references 12 days after the end of the hearing, there was an apparent reference to a further “Red” charge, under Section 3.2, but when I enquired about this, there was an election not to pursue it in the interests of proportionality.)
23. I give my decisions below.

**Schedule 3.1 – Objections founded on carve-out of costs of Delivery Up Proceedings.**

24. Section 3.1 relates to objections focused on the proposition that certain identified charges could be in connection with other proceedings known as the “Delivery Up Proceedings”. These were a free-

standing application made by GTC on behalf of the TDT on 8<sup>th</sup> August 2011, ie during the preparation period for the Guernsey 1 action, and decided by Lt Bailiff Chadwick on 10<sup>th</sup> October 2011. There are two separate costs aspects of this Order which are relevant.

25. By Paragraph 4 of his Order of 10<sup>th</sup> October 2011, Lt Bailiff Chadwick directed that the costs “of this application” were reserved. There has been no determination disposing of those costs.
26. However, by Paragraphs 1, 2 and 3 of his order, he also directed, first, that I&B make a specified electronic search of certain databases and the results provided to GTC by 19<sup>th</sup> December 2011, second, that they use best endeavours to obtain certain files (“Somerfield” files) from Quinn Emanuel, the English solicitors who had previously acted for I&B when they were Trustees of the TDT, and should produce those to GTC by 31<sup>st</sup> October 2011, and third, that they use best endeavours to obtain certain trust files/documentation from Mourant Ozannes/Ozannes (as they then were), and produce these to GTC, also by 31<sup>st</sup> October 2011. In each case, he ordered that

*“any costs associated with this exercise be borne by [I&B] personally, without prejudice to [their] right to apply to the Court, once the results of this exercise are known to the parties, for an order that they should be indemnified for such costs out of the assets of the TDT and/or that the said costs should be paid by the Applicant personally.”*

No such application was in fact ever made under these final permissions either.

27. F&B therefore argue, and this is accepted, that any costs falling into either of the two categories above require to be dealt with under the orders and procedure laid down by LB Chadwick, at least in the first instance, because that process *might* lead to a cutting down of I&B’s otherwise general right to receive a full indemnity for their costs incurred in connection with the TDT. That is why this allocation objection may possibly have some practical consequence.
28. I&B have, I understand, already accepted the “arguability” (by which I mean: an objection that cannot be struck out on summary consideration) of some objections made on this ground, and F&B have abandoned others, but there remain some which F&B wish to pursue but which I&B say are not sustainable.
29. The Red Objections under this head comprise charges on invoices, one dated in February 2011 and the others between October 2013 and December 2019, (or perhaps February 2020; the Schedule is not clear). Their total value is now some £31,021. They can be dealt with quite briefly, as is appropriate and proportionate.

## **Decision**

30. The question is whether F&B have a real prospect of demonstrating that these identified charges fall, on a fair view, to be either costs of the Delivery Up Application (those are reserved) or costs of any one of the three exercises ordered by LB Chadwick to be completed by 31<sup>st</sup> October 2011 or 19<sup>th</sup> December 2011. I&B’s costs of the Delivery Up application itself, to which they were Respondent, cannot precede the date of that application, which was 8<sup>th</sup> August 2011. There is no suggestion, nor can I find any record on the court file, that the exercises directed by LB Chadwick were not complied with in due time, although I would accept that it might be possible for some leeway to have been granted by the consent of the other party, then GTC. *Prima facie* therefore, any costs of the relevant exercises will have been incurred by 19<sup>th</sup> December 2011, but another three months or so can safely be allowed in case there was any indulgence in this regard. (I understand there was in fact an extension of time to 20<sup>th</sup> January 2012.)
31. None of the charges still objected to by F&B falls within the time span of 8<sup>th</sup> October 2011 to 19<sup>th</sup> March 2012, and all are so far removed from this date span that I am satisfied that there is no real

chance that any could be shown to relate to the “Delivery Up Proceedings” (ie this identified Application).

32. That is enough to dispose of this point, but I should make two further general points.
33. The first is that I&B repeatedly make the comment that the mere use of the words “delivery up” in a narrative do not suffice to show that the charge was related to the Delivery Up proceedings, and that that is the limit of the carve-out which is authorised under this sub-heading. I completely accept this. I also accept further that even a subsequent reference to the Delivery Up Proceedings themselves does not automatically make the relevant charge a charge “related to” the Delivery Up proceedings within the meaning of the exercise here. The test is not “relation to” but being part of the costs of the Delivery Up Proceedings or the exercises ordered to be carried out thereunder. This is because the point of carving out these charges is the fact noted above, ie that if they are dealt with in the context of the actual Delivery Up proceedings, it is possible that they might not be allowed to I&B in full.
34. It is those such situations for which the carve-outs of Paragraph 15 of the 19th December 2019 Order, latterly extended in Paragraphs 3.1-3.8 of the 23<sup>rd</sup> April Order, were intended to provide. The exercise of identifying charges which may arguably fall within such carve-outs needs to be conducted with its objective in mind.
35. The second is that the objections articulated by F&B under this heading frequently include the argument that there are also references to other matters of carve-out, such as Guernsey 2 proceedings, or the TDT Documents Proceedings. My disallowing any charges (which may therefore be possibly classified as “mixed”) through considering them with regard to their qualification in respect of the Delivery Up Proceedings, does not, of course preclude the possibility that they may qualify for being carved out under some other heading.
36. One such objection I have noted, however, and which is apparently first raised as an objection to charges within this Schedule, is that the charges relate to these proceedings themselves, described as the “Proofs Application”, and should therefore be allowed to go forward and should not be subject to summary judgment at this hearing because there has as yet been no order with regard to the costs of this phase of the proceedings/applications.
37. This is an illustration of the point which I foreshadowed at [12] – [16] above. It is not an objection which falls to be dealt with under this particular heading, because that is confined to whether F&B should be permitted to support an objection on the basis that the identified costs claimed in fact appear to relate to the Delivery Up Proceedings. This objection is therefore off the point. However, it flags up the point of substance which I have mentioned and deal with further at [82] below.

### **Schedule 3.5 – Objections founded on carve-out of costs of Guernsey 2 Proceedings.**

38. “Guernsey 2” was not a single discrete matter, but a set of some 36 or so separate trustees’ directions hearings made under the umbrella of the first “founding” application, being applications for directions, or for trust administration matters, or preservation of assets, which made it appropriate for these to be put before a different judge (Lt Bailiff Patrick Talbot QC) from the judge in Guernsey 1 or Guernsey 3. This began in 2010, shortly after the commencement of the Guernsey 1 action. LB Talbot was eventually asked to deal with applications for costs in those matters to be paid out of the Trust, in favour of all four of the then parties, namely the BVI companies through their Joint Liquidators, I&B as former Trustees, GTC as current Trustees at the time of Guernsey 2, and Mr Robert Tchenguiz (“**Mr Tchenguiz**”) as Protector of the Trust. LB Talbot delivered two such costs judgments, on 27<sup>th</sup> November 2015 and 29<sup>th</sup> June 2017.

39. The former judgment (*Re: The Tchenguiz Discretionary Trust* (Royal Court 27 November 2015, unreported) dealt with the principles as to the entitlement of each of the four separate protagonists to have their own costs of such matters out of the TDT funds. Importantly, LB Talbot concluded (see [20]-[22]) that I&B, as the then former Trustees who had still retained TDT trust assets as security for their claim to indemnity for their costs when embroiled in Guernsey 1, had acted in a fiduciary capacity in the Guernsey 2 matters and were therefore entitled to claim their legal costs in full with the benefit of the *Alhamrani* principles.
40. The latter judgment (*Re: The Tchenguiz Discretionary Trust* (2017) Guernsey Judgment 49/2017 (RC)) decided the results of the various objections made by any of the parties to another party's claimed costs. The complaints levelled at I&B's claimed costs in those matters were centred, similarly to many raised here, on arguments as to the "over-resourcing" of the legal advice and assistance engaged, although it was emphasised that this was with regard to there being too many lawyers, and in particular too many English lawyers, and not any objection that the lawyers' charging rates had been unreasonably high. This consideration of extravagant resourcing was argued to be significant, in particular, in the context that the potential "insolvency" of the TDT was then apparent. However, in the end, and adopting a summary approach which he considered to be justified as a means of conducting an *Alhamrani* assessment (although even that resulted in there being 8 separate further hearings totaling 13 days) LB Talbot was satisfied that none of I&B's actual claimed legal costs could be held to be unreasonable in either nature or amount. He did disallow some costs, (as he also did with similar costs claimed by other parties) on the grounds that they were described as "non-application specific" costs and, in particular, that about £150,000 worth of these could not be identified as applicable to any particular application within the Guernsey 2 umbrella. This was, therefore, an application of his remit, which was to allow (or disallow) costs claimed to be the costs of Guernsey 2 matters, and it did not necessarily mean that such actual costs could not be claimed elsewhere under the trustee's indemnity, if that route were available in other contexts.
41. In this second judgment, LB Talbot sought the co-operation of the parties to agree an Order comprehending the entirety of the costs and remuneration issues in Guernsey 2 (see [61]). It would seem to be a reasonable inference from this that it was believed, at the time (ie 2015-2017), that Guernsey 2 matters had been concluded, and all costs of relevant parties, including I&B had then been adjudicated upon and (apparently) allowed. It would seem to follow that the present carve-out for Guernsey 2 costs is only intended and apt to include costs which were somehow overlooked in the previous Guernsey 2 costs proceedings. (I have noted that on 18<sup>th</sup> January 2018 LB Talbot apparently delivered a judgment with regard to the "costs of the costs" proceedings in Guernsey 2, but no-one has referred me to this and so I assume that it does not contain any matters of any potential relevance on this application with regard either to specific fact or general principle.)
42. The challenged charges in question are some 13 charges levied between January 2015 and May 2019. Two objections were subsequently abandoned, leaving the grand total of £7,659.40. The six smallest are items of £112 or less.
43. Once again, the challenges include, and are in fact largely, objections that these charge narratives refer to "G2" and so *could* be the costs of Guernsey 2 amongst other possible candidates. As well, there is a complaint that the later items (charges dated May 2019) are really costs of the Proofs Application itself (see [12] above). Once again, the response by I&B is that these costs were incurred 5 – 7 years "*after the Guernsey 2 Proceedings were commenced*", that the objection is made on the false reasoning that any mention of "G2" raises the possibility that this is a charge for work on Guernsey 2 matters, and that in fact when the whole of the relevant invoice is considered as context, it is apparent that these charges were for work on some other matter (either GTC's appeal from the Guernsey 1 judgment, or the Guernsey 3 claim) with "G2" merely being a mention of subject matter reviewed in such context.

## Decision

44. I dismiss this cohort of Red Objections as well. Whilst the key timing point is not so much when the Guernsey 2 proceedings *commenced*, as when they effectively *finished* (which, apart from dealing with their costs, was obviously before 2015), I consider that I&B's general response that the narratives are clearly explained as being references to work concerning what had happened in Guernsey 2 for other purposes rather than work on Guernsey 2 matters themselves, appears to be borne out, and is so to the extent that I am not satisfied that F&B would stand any real chance of demonstrating otherwise.
45. The only objection as to which I have had any mild concern about this is the very first, a charge of £1,152.00 for work of Ms Hargreaves in January 2015. This is only because its timing comes within the effective window. However (and opaque as the narrative is), if this work had really been directed, at all, at preparing materials for the imminent first costs hearing in Guernsey 2 (as F&B suggest) then I find it inconceivable that it would have been recorded in the form in which it has been, ie along with references to other actions and applications in precisely similar and abbreviated terms, and also under a wrongly headed overall matter. I am satisfied that this shows that the reference to Guernsey 2 was not for anything singular in Guernsey 2 itself, but was, indeed, what I&B contend – a reference to Guernsey 2 as one subject among several subjects of a review conducted for the purposes of progressing Guernsey 1 matters.
46. However, there is a further reason why, viewed as a separate group, I would also dismiss all these objections and refuse to allow them to be investigated further in any event, and that is simply disproportionality, in context. The total of these challenged costs is £7,659.40. The time and effort spent on even extracting, considering, collating and arguing about them must exceed their worth several times over already. The “carve-out” in respect of Guernsey 2 matters was agreed between the parties, the reason being recognition of the principle which I had previously indicated, that the disposal of any costs incurred in proceedings ought first to be dealt with by the judge in the case, as s/he would have a better acquaintance with any matters which might affect the specific costs disposal in a different way from that which might be applied under the general law on trustee indemnity.
47. That principle would, indeed, indicate that if costs currently being claimed by I&B in their proof were in fact incurred on Guernsey 2 matters, then the decision on such matters should in the first place be put before LB Talbot. However, in this instance there are several reasons why that is probably not only impractical, but almost certainly pointless.
48. First LB Talbot is no longer a Lt Bailiff, his appointment having lapsed six months after the retirement, in May last year, of the former Bailiff, Sir Richard Collas. No doubt this could be remedied if it were crucial to do so, but there are further points. His involvement with the proceedings in Guernsey 2 ceased over three and a half years ago, with the conclusion of his costs-of-the-costs judgment. His pertinent recollection of events is therefore not very recent, and it might be doubtful whether it would have sufficient practical value to justify putting this point before him as opposed to any other judge of the same Court who could deal with it.
49. But the third, and to my mind decisive, point is that it is quite apparent from LB Talbot's cost judgments that even if the particular challenged charges were found, on a close examination, to be properly regarded as the costs of Guernsey 2 matters, LB Talbot would, and it seems to me beyond any reasonable doubt, come to the same conclusion in respect of them as he did in 2015/2017 across the board in relation to I&B's costs demonstrably incurred in relation to Guernsey 2 matters, namely that I&B would be entitled to a full indemnity for such expenditure. I say this because of his findings as to principle, and his findings in relation to I&B that there was no suggestion of improper conduct on their part in dealing with Guernsey 2 matters, and that he found the (now all too familiar) allegations of “over-resourcing” of legal advice and assistance to be unsupportable on the appropriate summary review which he undertook.

50. It follows that even if I were to allow these objections to go forward for detailed determination, and they were found to be properly categorised as costs of Guernsey 2, and they were then examined separately as such whether by LB Talbot or anyone else, the overwhelming likelihood is that they would be awarded to I&B on the basis of a full indemnity - which is exactly the same result as will happen if I dismiss the challenges on this ground here and now, and allow there to be summary judgment for these charges at least as regards any objection based on Guernsey 2.
51. I am therefore perfectly satisfied that to do so, ie to dismiss these challenges, will work no injustice against the TDT at all, but that to allow them to go forward is an arid exercise, completely disproportionate both to the amounts involved and to any possible merit of upholding purity of principle.
52. I carefully said “viewed as a separate group” at [46] above. This is because I am aware that there are other charges which may have been “Excepted” because I&B were prepared to accept that it was arguable that they did relate to Guernsey 2 matters, and I understand there are yet more objections within the Reinstatement Application which raise an argument that they may possibly be properly allocated to Guernsey 2 matters rather than Guernsey 1 or 3 matters, but made under the broader complaint of insufficient information/particularity.
53. Where such costs are described as “Non-application specific”, I suspect that these may well be the costs which LB Talbot rejected (see [40] above) for not being identifiable with any specific application in Guernsey 2, he apparently not accepting that he should award any trustee indemnity costs in relation to Guernsey 2 matters on a general basis but only if they could be shown to have been incurred in relation to a specific application. However, I have no information about this, and I will not speculate about any possible procedural complications if they indeed are such costs, and LB Talbot has already rejected them, but another tribunal finds that they do indeed relate to Guernsey 2.
54. On any basis, though, I am aware that the logic of my comments here and my finding as to the aridity of consigning such costs to a separate “Guernsey 2” heading for later determination would seem to apply equally to such other possible Guernsey 2 costs as to the present small group of £7,659.40. I have not, though, considered that point in relation to those other costs here, and will leave that to an appropriate later time.

### **Schedule 3.6 – Objections founded on carve-out of costs of “TDT Documents Application”**

55. The TDT Documents Application is specifically defined in Paragraph 15 of my Order of 19<sup>th</sup> December 2019 as being Civil File No 1971/2016.
56. This cohort of Red Objections relates to five charges dated in the period 2015 – 2018. The first two rest on a narrative reference to “TDT Docs” in charges of Ms Hargreaves of Mourant on 5<sup>th</sup> October 2017 (£256) and on 9<sup>th</sup> August 2018 (£736). The last three rest on references, to “*Delivery Up*” or “*Delivery up*” in charges of Mr Ballingal and Mr Hunter of Macfarlanes - £2,341.75 and £306 respectively - on 23<sup>rd</sup> February 2015 and to a reference to “*delivery up*” in a charge of Mr Ballingal for £867 on 27<sup>th</sup> September 2016. The latter three objections were made on the grounds that these were references to the Delivery Up Proceedings, but subsequently this was reported as an error, and the reference should have been to the TDT Documents Application.
57. I&B point out that Ms Hargreaves’ charges were noted in the narrative as being an apportionment; I take the charges therefore to be the estimated attribution to the on-going Guernsey 1 matter, which was under appeal at the time. I&B also dispute the assertion of F&B that they (I&B) have treated a similarly framed charge of 31<sup>st</sup> May 2017 by conceding that it was “mixed” and do not explain the rationale for the difference, because they say that is no such charge in the relevant Tab of documents. I have looked for charges at the date given by F&B, and I can, indeed, see nothing

similar. I&B also point out that the second charge was dated at a time when there was no activity in the TDT Documents Application.

58. The explanation with regard to the Macfarlanes charges is that “Delivery Up” cannot refer to the Delivery Up Proceedings which were long since finished, and that the attempt to justify them by reference to the TDT Documents Application is merely opportunistic. I do not accept this criticism, however, as the TDT Documents Application was an application for delivery up of documents, and the current labels have only been attached recently. The central point argued, though, is that they appear in an Invoice, the description of which is that of the Guernsey 3 action, and a reference to a skeleton argument was to the skeleton argument in I&B’s application to strike out Guernsey 3, which was imminent at the time of the first two charges, and that considered in their full context, it can be seen that these references are to the subject matter of work on Guernsey 3, and not on the TDT Documents Application.

### **Decision**

59. I shall dismiss the first four objections as I am, once again, satisfied that there is no real chance of F&B being able to uphold that they are charges which are properly referable to the TDT Documents Application, but I will uphold the last objection and permit that to go forward.
60. I do this, principally, having regard to the timing of those proceedings, but also having regard to the terms of the supporting narratives.
61. The TDT Documents Application commenced with GTC’s application which was made on 8<sup>th</sup> January 2016. The substantive hearing was on 5<sup>th</sup> October 2016. Judgment was handed down on 30<sup>th</sup> January 2017, although the terms of the consequent orders were finalised only on 18<sup>th</sup> May 2017. On 22<sup>nd</sup> June 2017 a further order was made that I&B provide further detail of their reasons for claiming to be justified in withholding documents, but as nothing further is noted, this presumably brought the matter to an end, therefore, within a reasonable time of a few weeks, to allow for compliance.
62. I&B can therefore have incurred costs in the TDT Documents Application only after 8<sup>th</sup> January 2016, when they would have had to become responsive to GTC’s application, up to, possibly, a reasonable time after the 22<sup>nd</sup> June 2017 Order, which could not have exceeded six weeks.
63. I am perfectly satisfied, therefore, that the Hargreaves’ charges are outside (after) this window and also that their terms are not consistent with the possibility that they related to work on the TDT Documents Application itself. I am equally perfectly satisfied that the two earlier Macfarlanes’ charges were outside (before) this window and therefore could not relate to the TDT Documents Application.
64. However, the final charge (Mr Balingall - £867 on 27<sup>th</sup> September 2016) is within the window and relates to a note for Mr Simon Day, concerning “*disclosure/deliv up and searches on Autonomy*”. Whilst this is close to the hearing of the Guernsey 3 strike out appeals in the Court of Appeal (26<sup>th</sup>-28<sup>th</sup> September 2016), it is also shortly before the hearing of the TDT Documents delivery up Application on 5<sup>th</sup> October 2016. In those circumstances it seems to me that there is a real, as opposed to a fanciful, chance of this being misallocated on I&B’s schedule, and in fact relating to the TDT Documents Application as defined, and I will therefore permit this charge to go forward.

### **Schedule 3.7 – Objections founded on carve out in respect of the costs of the NS 1 Proceedings (Guernsey and UK)**

65. This cohort of Red Objections relates to groups of charges where there is a reference to NS1 in the narrative. They previously totaled £35,873.60, but objections to two charges for Mourant (Ms Hargreaves’) work in January 2015 (total £1,120) and a charge for £30.60 (Mr Manchak) in

January 2020 have been abandoned. They are, annoyingly and confusingly, not in chronological order but I identify them and decide them as follows below.

66. The English NS1 proceedings were commenced by GTC on behalf of the TDT on 3<sup>rd</sup> April 2014, according to F&B's chronology. The Guernsey NS1 proceedings were commenced on 25<sup>th</sup> August 2015. I understand that neither set of proceedings has yet been determined.

## Decision

67. The first group, on page 1 of the Schedule, are charges totaling £1,414 contained in invoices rendered in January, February and March 2014. The English NS1 proceedings were on foot at this time, having been commenced on 3<sup>rd</sup> April 2013. The narratives for these charges do mention "NS1 proceedings" or "Claims". The explanation given by I&B is that they were incurred in Guernsey 1 for the purpose of considering whether the Joint Liquidators of the Defendants in Guernsey 1 (who were not parties to the NS1 Proceedings) should receive the NS1 pleadings, and they are not, therefore, the costs "of" the NS1 Proceedings themselves. This explanation seems likely to be correct on considering the terms of the relevant narratives for these charges and their context, and I do not think that F&B stands any real chance of contesting such explanation. I will therefore dismiss these three objections.
68. The next group of charges in time relate to work in January 2015 and comprise four further charges of Ms Hargreaves, totaling £10,402 (see page 2 of the Schedule). The narratives contain references to "NS1" but I&B contend that in context it is apparent that these relate to collating NS1 materials for the purpose of the proceedings in Guernsey 3 and the mere mention of "NS1" in any narrative is not sufficient to raise an arguable case that these are costs "of" the NS 1 proceedings without more. I agree. Looking at the narrative and the explanations given, F&B fail to satisfy me that there is a real chance of these charges being found to be costs "of" rather than "about" the NS1 proceedings and I will dismiss these objections also.
69. A single charge of £43 on 15<sup>th</sup> April 2016 is plainly, in my judgment, on its own narrative, not a cost of the NS1 proceedings, and I dismiss the objection to this, also.
70. The remaining charges all date from the period 31<sup>st</sup> March 2018 to 20<sup>th</sup> February 2020. A single charge of £187 dated 31 March 2018 appears, out of chronology, on the first page of the Schedule. I&B offers the explanation that it was, again, with regard to discussion about NS1 in the context of these proceedings and not costs of the NS1 proceedings themselves. Whilst the narratives may be more ambiguous as to this point on this occasion, there is evidence that some elements (at least) were an apportionment, and the total is so minuscule that I consider it disproportionate to argue about it. With the balance, I find, favouring I&B's explanation I dismiss this objection.
71. The remaining charges all arise during the period from August 2018 to 28<sup>th</sup> February 2020. The repeated objection is, in effect, that the narratives mention NS1 such that they are clearly, at least in part, costs "relating to" the NS1 proceedings, and that the only other candidate is these present proceedings themselves (referred to as the "Proofs" Application, or the "Priorities" Application), and that these should therefore proceed beyond this Paragraph 12 hearing, because "*no costs orders have yet been made in the Proofs Application*".
72. I am concerned, in this part of the exercise before me, (and in which the parties have elected to rely on their written comments) only with the question whether F&B's objections which I&B do *not* accept should prevent the relevant charges from being determined summarily at this juncture to be within I&B's right to indemnity, on the grounds that they raise a sufficiently cogent and

arguable case (a “real possibility”) that the particular charges are costs of the NS1 proceedings, which costs are, by agreement, excluded from this part of the exercise.

73. Answering this question, I dismiss F&B’s objections, on the grounds that they do not satisfy me that there is a sufficiently arguable objection that these costs *are* costs of the NS1 proceedings - which is the test here. Looking at the narratives, it again appears to me that the references to NS1 Proceedings are plainly as the subject matter of work done in other proceedings. The argument that they may be costs of the Proofs or Priorities Application themselves, is not an argument which is pertinent to the actual objection being considered under this heading, although it may give rise to the point which I have already foreshadowed at [12] – [16] above and explain further below. That, however, is another matter.

### **Schedule 3.9 – Objections that costs were not incurred in relation to [sic] the TDT**

74. This is a group of four items of somewhat more significance than many of those already considered. I was addressed on some of them in oral legal argument. I will deal with them individually.
75. The first is a total charge of £2,600 relating to work of Advocate Wessels in May 2013. It refers to “TFT” but on reading the text this is plainly as the subject of a “post judgment note” which was proposed in Guernsey 1, in anticipation of the judgment (although somewhat wishfully as regards the eventual receipt of such judgment). In addition it is pointed out that I&B had ceased to be trustees of the TFT some four years earlier. In those circumstances, I consider that there is nothing which stands any real chance of displacing I&B’s explanation, and this objection is dismissed.
76. The second and third items relate to Macfarlanes’ Invoices (this is important) dated 3<sup>rd</sup> and 20<sup>th</sup> September 2010, where the objection is that the Invoices are on their faces (respectively) stated to be in relation to matters other than the TDT and also to include narratives relating specifically to other matters such as “*transfer of assets... in the TFT TS and Lizella trust structures*”, and “*ITGL’s personal position*”, and whilst it is accepted that there are charges which relate to TDT matters and/or the Guernsey 1 litigation, this simply means that they should be treated as “mixed” and therefore subject to further directions.
77. I&B’s principal response is that these complaints are made under the mistaken impression that the whole of the value of the Invoice is being claimed, when the amount actually claimed is confined to the charges which were in relation to TDT or Guernsey 1 work or disbursements included in the Invoice, because it has been accepted there were charges related to other matters/trusts within the full invoice. They also point out that these objections have been raised by reference to an invoice, and not to specifically identifiable charges, as directed in my Order of 23<sup>rd</sup> April 2021.
78. Advocate Robison’s response in argument was that there had been no identification of the charges comprising the reduced sums claimed, so as to enable F&B to consider and formulate any objections to the relevant charges. Advocate Wessels pointed out in argument that this had been done in correspondence between the parties as to the first invoice and that in relation to the second, the error appeared to arise from reverting back to the original global sums mentioned in invoices, which were facts which had to be included in the present evidence, without having regard to explanations given by Mr Day in his evidence, that only charges related to Guernsey 1 or Guernsey 3 matter numbers were the subject of any claim in this exercise.
79. The above explanation was not refuted by Advocate Robison in reply, and therefore, I&B’s arguments being apparently correct as a matter of figures, and there being no further material in this Schedule objecting to the particular charges which they actually are seeking to claim as being the relevant costs within these invoices, I will dismiss the objections here, as well.

80. The fourth item is a set of six charges raised on 25<sup>th</sup> November 2011 in a Macfarlanes Invoice, where there are various references to “*TFT file review*” “*review of TFT files*” and just “*TFT files*”. F&B argue that these “plainly” relate to the TFT with no explanation as to how it could relate to anything else. I&B do explain, though, that these charges were within an invoice headed “TDT – First Application” (the then identification description of Guernsey 1) and related to the disclosure review which was required for that action, with the reference to TFT being to materials under consideration. They point out that they had ceased to be trustees of the TFT a year previously, and therefore would not be incurring costs on TFT matters. I find this explanation to be perfectly credible, and that there is no real chance of its being displaced, and accordingly, I will dismiss these objections too.

### **Overall conclusion**

81. In summary, from the decisions above, made on the agreed identified grounds, the overall result is that I dismiss all F&B’s objections made on these particular grounds, with the exception of the single charge raised under Schedule 3.5 for Mr Ballingal of Macfarlanes, of £867.

### **The further point**

82. I now turn to the further point which I identified at [12] – [16] above, which began to emerge at the hearing and gave rise to some post-hearing correspondence and agreement between the parties, but which has not had any effect on the decisions actually required of me above because of the precise formulation, for present purposes, of the issues in this matter.
83. The parties agree that, applying principles previously decided, there would properly be some further carve-out from the charges contained in I&B’s actual Proof as it has been – perfectly properly - compiled for the purpose of their ultimate claim, in respect of the costs of the present proceedings themselves. They have also now marked, in Schedules 3.1, 3.5 and 3.7 (where the point is especially material) those sums which they either agree are (or which F&B say are and I&B disagree) costs within these present proceedings. I think, however, that this point raises a wider point of principle which may well go further than the narrow exception which has been operated by the parties, and which has been related to this particular hearing. There will, I think, have to be directions as to how the general point, and the charges which have been flagged up, fall to be dealt with.
84. I see the point as follows. The overall exercise here is of quantifying the sum which I&B are entitled to claim to recover from the TDT assets. This sum is the ultimate total of what has been conveniently called their “Proof” of debt. Broadly, in managing the case up to now, those sums have been equated with I&B’s entitlement under their trustee indemnity, because that has been the largest and most contentious issue. That indemnity embraces I&B’s costs incurred “in connection with” the TDT, but those costs are not confined to expenditure or liabilities incurred whilst I&B were Trustees of the TDT (ie up to 2<sup>nd</sup> July 2010) but extends also to costs or expenditure incurred *after* that time, so long as those costs were still incurred in connection with their trusteeship of the TDT so as to be incurred “in connection with the trust”: (Art 26(2) of the Trusts (Jersey) Law 1984). The principal extension is, of course, to the subsequent costs of legal proceedings in which I&B became embroiled as a result of their former trusteeship of the TDT, but as to which their conduct has been vindicated by their success in those proceedings. The focus has therefore, inevitably, been on the costs of Guernsey 1 and Guernsey 3, as the costs which have been subsequently brought within I&B’s indemnity entitlement, with the costs of other proceedings (including “Guernsey 2” which was dealt with separately) being recognised as appropriately dealt with, at least initially, in the context of those other proceedings.

85. The “success” which had such a radical effect on the scope of I&B’s trustee indemnity entitlement occurred on 23<sup>rd</sup> April 2018. There were subsequent costs applications, and post judgment consequential applications. The matter then moved on, with an application for directions from the BVI Companies on 5<sup>th</sup> September 2018, which was the originator of the present phase of the proceedings, becoming the vehicle for the filing of the Proofs. The perception of legal costs being the costs “of” Guernsey 1 and 3, and therefore incurred “in connection with” the TDT, therefore becomes less close and obvious after that date, if not before. There have been many costs incurred by I&B subsequently to their actual success in Guernsey 1 and 3, and these are perfectly reasonably included by I&B in their “Proof”. My order of 19<sup>th</sup> December 2019 required claims made against the TDT to be made, and evidence to be filed in support of those claims up to (in effect) 28<sup>th</sup> February 2020, but there have also been several hearings since that time, and yet further costs incurred; I have been told at times that I&B’s claim will require “updating”.
86. With the bulk of I&B’s costs claimed in their Proof being those incurred in the Guernsey 1 and Guernsey 3 litigation, and thus the quantum of these being that of a “full” indemnification under their trustee indemnity, there has never yet been any consideration or argument on the question whether or when I&B’s entitlement to recover under such trustee indemnity ceases, ie when the costs which they have continued to incur *after* having ceased to be Trustees, or to be involved in successfully defending themselves from trustee related claims, cease to be costs incurred “in connection with” the TDT within the meaning of Art 26(2) of the Trusts (Jersey) Law, or Clause 12 of the Trust Deed, and become personal costs, recoverable only in right of their claim as an ordinary litigant seeking to enforce a debt.
87. To illustrate (but making no findings) the costs of formally quantifying a trustee’s claimed litigation costs so as to establish the quantum of his entitlement under his trustee indemnity might possibly, not unreasonably, be regarded as incurred “in connection with” the trust. If that quantification is accepted and paid, the trustee will then be fully indemnified for his proper out of pocket expenditure in connection with his trust, and the matter will end. If, however, the quantification is not accepted but is contested, requiring yet more expenditure on legal costs to establish the claim, and even possibly beyond this, to enforce the trustee’s entitlement, the question seems to be raised, whether this further expenditure is correctly characterised as being “in connection with” the trust (ie the trustee’s former office of trustee) or has become simply the costs of a legal dispute, or of having to enforce an unsatisfied obligation, such that it would then be correctly characterised simply as ordinary litigation costs between two hostile litigants. The significance of this, of course, is that such latter costs entitlement would then fall to be determined under court orders and party and party taxations, and whilst the circumstances could affect the principles applied on any such court ordered taxation - possibly even to the extent that the taxing officer might be directed to apply the *Alhamrani* approach – the material point is that this different characterisation *could* affect, and reduce, the amount properly recoverable.
88. If this point had been recognised at an earlier stage it would no doubt have been listed as a separate heading of exception (“carve-out”) in these proceedings. The parties have now identified at least some of I&B’s claimed expenses which would have been put under any such heading. The point of principle underlying such a potentially appropriate carve-out does not seem to me to have been fully identified, but will require to be. The parties should therefore consider how this issue should be dealt with.

## (2) The “Reinstatement Application”

89. In the part of my judgment of 23<sup>rd</sup> April which considered the actual objections raised by F&B to items (invoices) within I&B’s claim, I first dealt with and rejected objections which could be seen to be based on charges for particular identifiable subject matter (“themed” objections) and then considered the residual objections, either entirely separate or overlapping. Although sometimes categorised by F&B as “Insufficient Particularity” or “Unreasonable in Amount”, these objections all had in common that the essential complaint was that there was insufficient detail or information

as to the subject, nature or extent of the work being charged for to enable F&B (or, I think F&B would say: anyone) to satisfy themselves that the invoice in question had been reasonably paid. I therefore called all these “Insufficient Particularity **type**” challenges: see [324] (emphasis added). In the end, I dismissed all save one small item of those objections at that stage of the proceedings, for the reasons given in [355] – [377] of my judgment, and especially [370]. However, I gave F&B a second chance to raise such objections as they might, on reflection and in the light of my judgment, consider to be properly maintainable, by making a further application as they have now done.

90. I am using the heading “Reinstatement Application” as a convenient term for this application because it has been used by the parties, but I regard it as misleading. F&B were not given permission to “reinstate” previous objections but, rather to submit revised and differently formulated objections, based on the guidance which I gave in my 23<sup>rd</sup> April Judgment. This leads to an initial point as to approach.
91. Advocate Robison seemed to me to submit that I should approach the matter by evaluating the revised objections as if for the first time, effectively (I think) disregarding the previous false start. I had some inclination to accept this as a simple approach, but Advocate Wessels submitted that that was not correct. What had in effect happened was that F&B had been given the equivalent of a “leave to apply to amend” a pleading, after it had been struck out for disclosing no cause of action, such that the test was rather more stringent than the relevant claim merely being arguable on its face; it must show some prospects of success. He also submitted that as F&B had had since January 2020 to formulate their objections, and had amended these once in September 2020, before being struck out in April 2021, this was really the third time they had tried to formulate objections with sufficient *prima facie* validity. The court could and should, therefore (he submitted) start from a position of scepticism when assessing the latest attempt.
92. I do not accept this last narrow submission, because F&B had in fact been proceeding previously on a misapprehension as to the appropriate tests which they should apply. In fact, though, I do not think there is really any material difference in the two approaches, because the test for permitting a particular amendment of a pleading is really the same test as whether summary judgment can and should be given against it: *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5]. (Technically the burden of proof might be on different parties in each case, but that would be most unlikely ever to be decisive in practice.) However, whilst the fundamental principle is the same, I can, of course, take into account the history and circumstances if they seem to me to be material at any point. What Advocate Wessels’ contention does draw to my attention, however, is that it is more appropriate to describe my rejection of any objection now put forward by F&B as being to “disallow” it, rather than to “strike it out”.

### **The objections - general**

93. The objections now sought to be advanced by F&B on this latest attempt to resist summary judgment are set out on a spreadsheet, divided into two sections, the first being under the heading of “Unreasonable in Amount” and the second being under the heading “Insufficient Particularity”.
94. The former contains something over 900 objections to individual or groups or charges. The latter contains more than 5,800 objections to individual charges. Whilst this is in accordance with my direction of 23<sup>rd</sup> April as a matter of form and logically objections do require to be raised in respect of individually identified items of charge, since many of these are for sums less than £100, I would have hoped and expected that a method of enabling me to deal effectively with such a large number of objections in an efficient and proportionate manner, by grouping or some other mechanism, could have been agreed between the parties.
95. As it was, Advocate Robison submitted that, in the light of my direction that objections did have to be raised against identified charges, and my indication that the relevant current state of the

litigation would be a circumstance which could be material to considering their individual merits, there was no real alternative to my examining each one; he did not guide me to any common themes or suchlike which would enable me to make a decision governing any particular kind, or set, or group, of charges. The only exception which I perceived was that he submitted that where a particular charge had no narrative at all to support it in the bill rendered, that must surely pass the threshold test of giving rise to a reasonable case, even on *Alhamrani* terms, that it should not have been paid and therefore should not be struck out. This affected about 33 items.

96. Advocate Wessels' approach was, unsurprisingly, at the other end of the spectrum, since he was urging that I should refuse to allow any of the latest revised objections, but he did attempt to deal with them by category, by grouping them together, submitting that this provided a suitable and proportionate form of managing the issues. As regards the "Insufficient Particularity" section he submitted that it was possible to extract five broad groups of objections, all of which he submitted were simply invalid according to my guidance, and in the "Unreasonable in amount" Schedule, he identified three groups, with similar argument at this general level. I will consider this general approach later, where appropriate, but I observe here that Advocate Wessels' general arguments all had behind them the reminder of my guidance at [380] of my judgment, with regard to the permission to submit revised objections, I said:

*"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....."*

97. He points out that, despite this, F&B have sought to pursue objections to over 5,000 individual charges, and that they total something over £4Mn in value, (despite my stating, to give an idea of what I saw as the practical effect of my judgment, that my view of the extent of possible successful challenge with regard to an entitlement to full indemnity, applying the tests which I had indicated, was that it could be only a very small percentage of the total bill, up to, say, 1% - which represented around £275,000, see [362]). He submits that this is not an auspicious start.
98. He also submits that on examination the revised objections do amount to attempting to "*recast swathes of their previously attempted objections in different words*". They either repeat objections which have been previously rejected, or simply resort to the same old mantra of "insufficient information" without, therefore, having taken any notice of the direction that objections required to be made with specificity, based on the information which the court had already decided was sufficient, as a matter of proportionality, namely the information in the affidavits of Ms Hargreaves and Mr Day, the bills themselves and their narratives (as explained in those affidavits where necessary), the information supplied as to the identity of fee-earners and their charging rates, and knowledge of the state and progress of the litigation and surrounding circumstances obtainable from contemporaneous documents admitted in evidence, as well as the general knowledge of the parties.
99. He deprecated F&B's failure to attempt to provide any sort of systematic basis for enabling objections to be considered under headings (or "buckets", as he likes to call them) or in groups,

and came close to submitting that their very failure to do so, and in effect simply leaving it to the court to trawl through thousands of individual entries as it might see fit, or feel obliged to do, was sufficiently unco-operative in terms of the “overriding objective” and the assistance to furthering this which the parties are obliged to give to the court, that that alone could justify the court’s simply striking out the present attempt to cut down, substantially, I&B’s entitlement in principle to a full indemnity. I have not acceded to this argument, as I accept that it would be an extreme view, but I will say that this case has come very close, in my judgment, to justifying such an approach.

#### (A) Insufficient particularity

100. I move now to consider the two separate sections of F&B’s objections schedule, and I find it convenient to deal first with that of “Insufficient Particularity”. In view of the general argument there has previously been about the appropriate threshold test, I need first to recap on the general principles governing this distinction, because they have arisen rather conspicuously in regard to the form of these objections.

#### Allocation or reasonableness?

101. A trustee is entitled to a full indemnity for his “reasonable costs, reasonably incurred”. This means, that the costs must be for work or services which it was, in all the circumstances, reasonable to commission (“reasonably incurred”), and also at a reasonable charge (“reasonable costs”) for that work or service. F&B’s spreadsheet for “Unreasonable in Amount” is, therefore, self-explanatory in focusing on the second limb. On examination, however “Insufficient Particularity” does not reflect the first “reasonable costs” limb of objection, even though its full heading is “SCHEDULE OF OBJECTIONS: COSTS (INDIVIDUAL INVOICE CHARGES) NOT REASONABLY INCURRED ON THE BASIS OF INSUFFICIENT PARTICULARITY”. The spreadsheet therefore requires further comment.

102. In my previous judgment I dealt with “allocation objections” (Question 2 above) at [234] – [242]. I pointed out that in this particular case, a charge could be challenged either on the general ground that it was not “in connection with” the relevant trust (the TDT) or, because of the procedural parameters of this exercise, on the specific grounds that it properly fell within the agreed exclusions (“carve-outs”) for other identified actions or separate applications - although if that meant that I&B could not bring all the costs for which they claimed reimbursement precisely under the headings of “costs of Guernsey 1” or “costs of Guernsey 3”, since their entitlement to indemnity was for “costs in connection with” the TDT, (ie incurred in or because of their trusteeship), such other costs should not be excluded simply on technical “pleading” type grounds (see [239]).

103. I also stated that any objection that a cost was wrongly included because it was, in fact, a cost of another trust (I&B being a trustee of several Tchenguiz trusts), or another matter not within the ambit of this application was a potential dispute to which the *Alhamrani* “benefit of the doubt” principle did not apply. Evaluating the merits of a strike out application against such an objection would therefore apply the threshold of “real possibility” in the light of the fact that the burden of proof would rest on I&B without the benefit of any doubt.

104. What I actually said, at [235], referring to the general case, was:

*“.....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.” (emphasis added)*

105. I can see that, read literally, this might be viewed as stating that the mere appearance in the bill narrative of words referring to some such other trust or matter would automatically provide a sufficiently arguable case that the objection could not be struck out. However, my comment must be read in context. I was there illustrating how one might show a properly arguable allocation objection, and I had in mind a reference suggesting that the work was being done on, or for, some such other matter, or trust, which would not be “in connection with” the TDT, a reference to “Liza Tchenguiz’ divorce” being a clear example. I did not examine the whole range of bill narratives when making this point within the iterative process of examining the kind of objections which should properly go forward for a fuller hearing. It has subsequently been drawn to my attention that there are, in the thousands of bill narratives in the case, certainly references to other matters and possibly other trusts, but which can be seen, in context to be references to these as the subject matter of work which was being done for Guernsey 1 and Guernsey 3 purposes.
106. I find this a cogent point. My comment at [235] was intended to be illustrative of principle, and not to provide an automatic unthinking “tick box” rule that so long as the narrative for a particular charge contained a verbal reference to another matter such as “G2”, “TFT”, “TS” or suchlike, then an objection to that charge would be treated as good enough to be allowed to proceed *ipso facto*, and without any consideration of indications that such reference was to the subject of work done in Guernsey 1 or Guernsey 3.
107. I make this observation because, on examination, the material in the “Insufficient Particularity” schedule contains a very, very great many objections, the justification for which is that there is a verbal reference to “Guernsey 2”, or “Delivery Up”, or some matter such as “RCO” (the Royal College of Organists building) which was the subject matter of applications in Guernsey 2 (in particular), and that this is cogent grounds for an objection that the charge may therefore be misallocated, could be properly be attributed to (in this example) Guernsey 2, and therefore should not be struck out at this stage. Indeed, this argument then becomes even more extended, in places, on the basis that other charges which do not include any such reference, may, by their proximity to some which do, and the alleged timespan of the Guernsey 2 matters, also give rise by association to an arguable case that they have been misallocated.
108. I will deal with this point in more detail later where it arises, but it appears to me that this plethora of such objections has probably been inspired by the opportunity apparently afforded by my comments mentioned above, and it is therefore right that I record, as I have done above, the appropriate limits on the circumstances giving rise to any such argument. It has had the consequence, though, that the materials in the “Insufficient Particularity” section of I&B’s objections now contain a good many allocation objections, rather than being directed at substantiating an argument that certain costs were unreasonably incurred as opposed to being unreasonably in amount, as one might otherwise have expected.
109. Its practical importance, of course lies in the fact that the *Alhamrani* “benefit of the doubt” advantage for I&B does not apply to the assessment of “allocation” objections, whilst it does apply to “reasonableness” objections. I record this point here, to make it clear that I have borne this distinction in mind, even if my use of language at any particular point in the following text may not, in the interests of not being repetitive and laborious, make that perfectly clear.

### **The parties’ arguments on the “Insufficient Particularity” objections**

110. As previously mentioned, this Schedule contains about 5,825 individual objections made under this heading. I reach this figure from the fact that there are 5,835 lines on the spreadsheet of the Schedule, but lines 1- 4, 131, 198, 353, 390, 1817 (a heading), 3566 and 3589 are blank; there may be others. (When I refer to line numbers, in this judgment, I am referring to those contained in my version of the electronic bundle which included this spreadsheet, but see [139] and [140] below.)

111. Advocate Robison relied initially simply on the terms of his objections schedule itself as sufficient support for his arguments for resisting I&B's application that they should all be disallowed - effectively requiring an assessment of each individual objection, although perusal of the objections schedule itself suggests that the same terms of objection occur in places in relation to individual charges incurred around the same date or on the same invoice, such that the basis of such objection could be considered in relation to several charges if the relevant connected grouping had been identified. It has not been, despite my adverting to this possibility in [379] of my 23<sup>rd</sup> April Judgment.

## **I&B's case**

112. Again as previously noted, Advocate Wessels sought to contain the arguments within manageable bounds by submitting that the Insufficient Particularity Schedule revealed five identifiable groups or types of objection, all of which could be dealt with together, on a common principle. The groupings were those objections commencing "*Non-detailed description of work*", or "*Non-Application Specific*" and also objections to "*disbursements*", "*no narrative in bill*" and "*no recorded objection*".

### **(i) Non-detailed description of work**

113. Here Advocate Wessels' submission was, essentially, that this first group (which he calculated as some 4,633 individual charges) was actually just a re-run of the previous objections made under the "insufficient particularity" objections which had been ruled inadequate previously, (and this approach had been endorsed on appeal) and which offended the injunction not simply to try to repeat swathes of the previous objections in different words. He further submitted that where the wording went slightly beyond mere generalisation by adding complaints that without further particulars the charge "*may not be*" captured by I&B's indemnity, or that there must be "*doubt as to whether I&B reasonably paid*" such charge, that demonstrated in itself that the objection was not purporting to do more than raise the possibility of a doubt, and that was insufficient – certainly in the case of "reasonableness" objections properly so called - because I&B could claim the benefit of any such doubt. He further submitted that even where the narrative might condescend to some particularity by referring to a particular matter, such as a specified meeting, or a particular proof, but then merely complained that the narrative did not disclose the nature of the work being done, this was likewise clearly insufficient in terms of the guidance previously given.

114. Having submitted that the above was really a complete and immediate answer to all such objections, he went on to submit, by reference to examples, that the text of many such objections, when examined sensibly and in context, showed them to be either "nitpicking" or being deliberately obtuse with regard to the obviously likely work being undertaken at the time, as shown by other reference or charges on the invoice, and the then current stages of the litigation. For example, to suggest that a simple reference in a narrative to the "proof" of a known witness prior to the trial in Guernsey 1 was insufficient to support the overwhelmingly likely conclusion that work was being done on such proof, so as to justify an investigation on the basis that this could reveal that the work was not a task "reasonably incurred" (we are here considering reasonableness in nature, not reasonableness of amount) was simply speculative and was fanciful.

115. He submitted that the evidence (of Mr Day of Macfarlanes and Ms Hargreaves of Mourant) showed that whilst it had been necessary, in places, to extract information from earlier composite bills relating to both Guernsey 1 or 3 and other matters, because no-one had then expected that it would ever be vital to distinguish and separate them out, the Invoice charges now being claimed by I&B had been considered, at the time, as being appropriately allocated to the matters which had become known as Guernsey 1 and 3. That fact, alone (he submitted) raised sufficient of a *prima facie* case, in all the circumstances, that the charge was appropriately made and appropriately allocated,

to refute an assertion that there was a “real possibility” that the charge was unreasonably incurred, or not incurred in connection with the TDT at all, or not incurred in relation, in practice, to Guernsey 1 or Guernsey 3, and it would require a more concrete objection than the mere general assertion that it “might” not have been so incurred, to justify letting such objections proceed any further.

**(ii) Non-application specific**

116. As to the second group – “Non-application specific” (as to which he calculated there were 1,288 individual challenges) this could be analysed into three groups.

117. The first were challenges resting on the fact that the bill heading was merely “*advice in relation to Investect [sic] Trust Guernsey Limited’s own position in connection with the trusteeships of the Tchenguiz Family Trusts*” and this could “*feasibly*” relate to Guernsey 2 matters or to trusts other than the TDT.

118. The second were objections based on some particular reference in the narrative, eg the words “*second application*” (which was the initial label for Guernsey 2), or “*re trust priv docs*” which from its timing was “*likely*” to relate to the “*delivery up application*”, or “*the RCO*” which was “*likely*” to mean this related either to Guernsey 2 or to the NS1 proceedings, both of which were carve-outs, or “*Liaising with Quinn Legal*” which was “*likely to relate to the Delivery Up proceedings*” because that firm (assumed to be Quinn Emanuel) had been involved.

119. The third were a few references to another trust, such as the Maud Brown Trust, giving rise to an assertion that, as this was a non-TDT trust, the charge was “*thus*” out of scope.

120. Advocate Wessels’ first response was, once more, that these were a just re-run of previous objections, ruled insufficient. I recognise the point, although I think that in its broad assertion it may not have taken full account of the fact that, since these are now allocation objections, the test is only whether there is a real (not fanciful) possibility of I&B’s failing to show that these charges do not, on balance of probability, relate to some other trust or matter.

121. His second response is that the objections are generally based simply on the proposition that the charge in question “*could*” (because of the date of the charge and the subject term being of possible relevance to an “*out of scope*” matter as well as possibly Guernsey 1 or 3) be incorrectly allocated to Guernsey 1 or 3 and be correctly allocated to that other matter - despite its having been charged in a Guernsey 1 (or 3) Invoice and allocated to it by those then concerned with considering the point. He submitted that this proposition was mere speculation.

122. His third response is that, when one looks at the detail of the objections, instead of being founded on a principle, they are often based on obviously unrealistic hypotheses, such as that the reference to “*trust priv docs*” (see [117] above) could relate to the delivery up application, even though that had been disposed of five months previously, or that the reference to “*Quinn Legal*” for a charge of a mere £22.95 was likely to relate to an entirely different matter rather than that to which it had been deliberately billed, or that reference to the Maud Brown Trust could be more likely to refer to advice to I&B in relation to an entirely different trust, rather than to advice as to the TDT’s dealings with such trust - it being hinted that F&B also know full well that this latter was the case.

**(iii) Disbursements**

123. As to the third group - “Disbursements” - Advocate Wessels cites 357 challenged charges, in relation to various matters of expenses, such as “*Print Room Services*”, “*Hotel/Accom*” and “*Telecom charges*” but as to which the same complaint is made, namely that there are no documents or supporting vouchers and “*thus*” it is “*unreasonable for the Former Trustees to be reimbursed for costs of this nature without [supporting] documentary evidence*”.

124. Advocate Wessels' initial submission here is that there has never been any order for production of such supporting vouchers, but that in any event the idea that no reasonable litigant (as is generally the paradigm) would pay such obviously reasonably incurred types of expenses, in context, without supporting vouchers is so extreme as to be absurd. This was changed at the hearing, however, as I mention later.

**(iv) No Narrative**

125. Advocate Wessels noted 33 charges, totaling around £13,000, challenged on the basis that the bills contained no narrative in respect of these charges. His submission here was that this amounted to a submission that the work was not in fact carried out, and this was fanciful when F&B had been supplied with the name of the fee earner and in the context that the charge was billed in relation to the proceedings.

**(v) No objection**

126. This related to 2 charges, and Advocate Wessels' point here was the opposite to the last, namely that F&B clearly could not proceed to challenge a charge without saying why it was objectionable.

**F&B's response**

127. In his response on the Insufficient Particularity Schedule, Advocate Robison first refuted any suggestion that the revised objections had not been made in the form directed by my 23<sup>rd</sup> April Order. I accept that point.

128. Moving on from procedural arguments to those of substance he submitted that the "*Non-Detailed Description of Work*" objections were maintainable on the basis that it was for I&B to establish, initially and across the board, that the relevant costs "*prima facie qualifie[d] for being made in connection with [the TDT]*" at all, and the lack of particularity could be characterised as going to that primary question. However, I find that submission to be unreal. His argument then began to move off that point, into suggesting that the lack of particularity made it "*unreasonable*" for I&B to pay out such charges without investigating to ensure that they were appropriately allocated. This proposition, though, seems to me to overlook the point that the test to be applied is objective, rather than subjective, and would have regard to surrounding circumstances as well as the extent of the narrative on the bill. He submitted further that the fact that I&B had accepted that there were some allocation objections which did raise a sufficient *prima facie* case for further examination was in itself, support for the proposition that the same argument could, and therefore in all likelihood would, apply to the further objections now raised. This, however, is only a factual circumstance and whilst I bear it in mind, it cannot be determinative in itself.

129. His further arguments then seemed merely to re-iterate his primary submission that the terms of his objections in the Schedule were sufficient to resist I&B's application that they not be allowed. I do not need to record each of them, as they go to examples only. It is only, I think, appropriate to note in particular that he refuted the argument that because the objections deployed the exact same terminology, over and over again, this was any support for their inadequacy. I do accept that if the complaint is essentially the same complaint, it is neither surprising, nor wrong, that the language used to express it should be the same - although it has to be said that the incidence and extent of such repetition in the Schedule does rather suggest a somewhat mechanical use of the "Copy" function.

130. As regards the "*Non-Application Specific*" group, Advocate Robison relied, principally, on orally reinforcing his submission that, where there were references to subject matter which could be equally applicable to other proceedings (principally Guernsey 2, but also, possibly, the Delivery Up Application and the NS1 Proceedings) as well as Guernsey 1 or 3, then this possibility, shown by both subject matter and time, must (he submitted) be sufficient to support an argument that the

objection passed the threshold test for a maintainable allocation objection. He also placed reliance on the cumulative effect of there being (he submitted) so many such potential objections. He further pointed out that this form of objection is advanced in reliance upon paragraph [372] of my 23<sup>rd</sup> April Judgment, which stated that viable objections could be based on inferences that could be drawn from the combination of narratives in a bill and the current state of play in the litigation, as shown by the chronologies which had been filed by each party. I have, though, commented on the limitation of that point above at [104]-[107].

131. With regard to the “*Disbursements*” objections, he submitted that the response showed that I&B had blindly accepted those charges without investigation, thus supporting the view that they could well be unreasonable. It is fair to point out that, here, the objections are supposedly in relation to “unreasonably incurred” at all, rather than “unreasonable in amount”. However, I do not know if they are duplicated elsewhere, and I accept that in trying to make this complex dispute case-manageable, I have not looked at any question of overlap between charges objected to in both sections of the Reinstatement Application, (or, indeed, overlap with charges included in the “*Excepted Objections*”). Advocate Robison drew attention, in particular, to the remarkable size of many such charges especially for printing, with examples, in respect of a month, ranging from just over £5,000 apparently in January 2012 (line 790) to a remarkable £19,928 in February 2012 (line 824) at the highest. He relied on the fact that such challenged disbursements are not related to specific substantive time charges, but appear in invoices in which F&B have objected to time charges on the grounds that they “*may not have been incurred in connection with the TDT*”, and he submitted that therefore “*inevitably*” some portion of the disbursements must relate to such other entries, which means that there must therefore be a “*real possibility*” that some portion of the disbursements were also not incurred in relation to the TDT.
132. He reiterated his main argument as regards the “no narrative” class of objections but finally he invited me to draw adverse inferences against I&B with regard to any likelihood that the challenged charges were reasonably incurred (or, I think, paid) in connection with the TDT, certainly in relation to “*earlier dated*” (but unspecified) invoices, on the basis of I&B’s admission, in February 2021, that the employees responsible for any oversight of fee-billing at those times had ceased to be employed by ITG many years ago. He submitted that I should therefore infer, from lack of written or potential witness evidence, that there was no proper fee approval system in place, and that this must tend to support the real possibility that legal costs were unreasonably incurred.
133. I reject this last argument. It is largely a re-run of previous arguments which I dealt with and rejected in [354] in my 23<sup>rd</sup> April Judgment (and see also [335], [342]), [344]-[353]). I do not find the impact of these points to be any different at this second stage, and the recent explanation for any further evidence on this topic regarding a time some 8 – 12 years ago, being unavailable through the moving on to other employment of personnel involved in such matters at that time, is entirely unsurprising. Adverse inferences can only be drawn where a party fails to call evidence it might otherwise be expected to call because of its ready availability to that party. An alternative reasonable explanation negatives any case for the drawing of any such inference.

## Discussion

### Approach

134. I do not consider that it is appropriate or proportionate for me to be expected to make over 5,000 individual decisions as to whether separate entries on a spreadsheet, representing desired points of challenge to expenditure which has been deposed to as having been made and made on matters which are the subject of this exercise, disclose a sufficient (for present purposes) possibility of that assertion being incorrect in respect of any such individual charge, whether beyond reasonable doubt or on balance of probability. That, however, is effectively what Advocate Robison has requested.

135. Even if such objections are capable of being grouped together on the basis that the same objection is made in a single applicable factual context with regard to a number of such entries, I have not been asked to deal with these spreadsheet entries in that manner, and for me to attempt to reduce the scope of decisions required of me by doing such an exercise on the papers would be disproportionate. It would also depart from the role of the court as being the arbiter of disputes between two (or more) contestants, as defined and advanced by them, into requiring the court to take on an inquisitorial role, which is again, not appropriate. My function is to make decisions on the basis of the competing arguments put before me.
136. However, I equally do not feel comfortable with the approach advanced by Advocate Wessels (understandable though it is) that I can divide the charges up into the five broad separate categories which he has identified and make a decision with regard to each such group. I consider that some degree of greater examination is necessary to do justice, even in a suitably summary and proportionate manner, in this situation.
137. The approach which I adopted has therefore been the following. Having considered the general arguments advanced by each party, so as to get an overall feel for the scope and nature of their competing positions, I looked through the entire spreadsheet schedule of “Insufficient Particularity” objections, to examine the text of such objections so as to note patterns or identify particular features of sufficiently recurrent assertion that I feel able to consider their implications and weight as a matter of principle (albeit, now, principle at a level of factual detail, rather than at the higher level of legal principle which I was previously concerned to apply in my 23<sup>rd</sup> April Judgment). I also, though, looked for and followed up any examples which seemed sufficiently individual to require consideration as such.
138. As to apparent sets or classes, of charges/objections: in order either to form, confirm or modify any preliminary view I might take, I followed up individual examples from the Schedule in the underlying Invoices themselves, against the background, as appropriate, of the facts shown in both or either party’s chronologies. I followed up the individual examples raised in argument by either party, but I also followed up, randomly or with a focused objective where I thought necessary, other individual objections. I did so to the point where I felt confident of the basis on which to make an overall decision. I then made the decisions, set out later, as to permitting (or not) the further pursuit of any of the revised “Insufficiency Particularity” objections based on my above assessments.
139. I have given my decisions in general terms, intended to enable the parties to identify which individual objections are, or are not, to be permitted to be pursued any further. I do not regard it as the function of the court to carry out the further exercise of applying the general statement of my decisions to over 5,000 individual charges. If there is any dispute about the application of my decision to any particular identified charge, then the parties will either have to compromise the point or return to me for a further, yet more detailed decision.
140. Unfortunately, trying to follow up sample charges, in order to assess the weight and validity of any objection made to them, has not been totally easy, because the technological assistance provided to me, in the form of both paper and electronic bundles, has not proved to be as accurate, and easy and efficient to navigate, as would have been ideal. Carrying out the exercise of tracing the materials relative to any individual objection, for consideration for the purpose of judgment writing should, I would have thought, take 30 secs to 1 minute for one item, but has in fact often taken much longer.
141. I will give just one example. In his skeleton argument at Paragraph 32.3, Advocate Wessels refers to an objection at “Cell F1405” in the electronic bundle, relating to a 1.5 hour “Meeting with JB, JW, DZL, TF, SG” on 23 January 2014, the complaint being lack of any detail as to what this identified meeting was about. I was told at the hearing that this was a reference to Mr Day’s affidavit at p 774, to be found at Tab 7 in the paper bundle, but there numbered 329, at line X.

When I look at the paper version of Tab 7, this is correct. This page also reveals this to be a charge on Macfarlanes invoice (“Issue”) No 142. However, the electronic bundle, which is the source of the text of the objection being made, does not give the terms of the narrative of any particular charge, but only of the objection itself. My means of cross-referencing the two has therefore been to marry up the electronic bundle reference with the highlighted charge on the relevant Invoice in Tab 7, which I have had to do by using the reference to the Issue No (which is common to both) and the page and line number given on the electronic bundle, for confirmation. However, when I then refer to “Cell 1405” in the electronic version of Tab 7, this is to an entry on Macfarlanes Issue No 147, at Day page 791 (paper bundle page 343) line C - and is a charge for a “discussion with JW” on 4<sup>th</sup> June 2014, as to which the complaint is a generalised formula of “non-detailed description of work”. The electronic cell reference to the charge for the “Meeting” mentioned above is Cell No 1359.

142. I have found this lack of correlation to occur in very, very many cases. For a further example, in his skeleton argument in reply, Advocate Robison cited (at Para 32) ten examples of disbursements, mainly printing charges, of significant amounts, giving line numbers in the Schedule. On following up these references, I discovered that only one (letter b.) was an accurate line no. in my own electronic bundle. I was in fact able to trace the relevant entries by searching for them, in all other cases except one (letter c. – which I could not find at all) with the line no. disparity for each one being of different, gradually increasing amounts. The point is, however, that once again any process of checking references to evaluate arguments has been lengthened.
143. I concluded however, that it was not appropriate to call the parties back and ask for the references to be sorted out, because that would simply have prolonged and expanded the current exercise to an unjustifiable extent. I therefore decided to make the decisions I considered were required at this stage on the basis of the materials which have been provided to me (and whilst making the above criticism, I do not criticise, and I do appreciate, the good intentions of the parties, and the amount of effort which I am sure has gone in to trying to make these materials manageable), but to adopt the well-known “doing the best I can” approach. Since the Advocates did, at the hearing, say that they were content to leave decisions to me on the basis of the written materials supplied and such oral arguments as were made at the hearing, I am satisfied that this is the most appropriate course in all the circumstances.
144. Another factor which has proved cumbersome is that, despite the date of the work on any particular charge being of some importance in assessing the weight of certain objections (especially allocation objections) the date of the work, or even of the bill, did not appear on the electronic bundle, but only by searching back into the paper bundle for the corresponding Issue No. Furthermore, whilst Issue Nos. have (thankfully) been printed conspicuously on the paper copies of the relevant Invoices containing challenged charges for the purpose of this hearing (and these charges have been highlighted and given alphabetical line references to help identify them, for which I am certainly grateful) where I have felt it desirable to check material in other Invoices which have not figured in the current Schedule, for context at the relevant time, the only way of tracing these has been by laborious inspection of the dates of the Invoices in the previous bundles 2.1-2.7 provided for the PTR Hearing of 27 April 2020. Again, the point is that this lengthens the time needed to consider individual objections in context and illustrates further the impossible practical disproportion of conducting a determination process at a level of individual detail across the board.

### **General points**

145. First, I remind myself that I am not conducting a taxation of I&B’s legal costs, nor am I conducting an assessment of I&B’s costs as against their own legal advisers, nor am I conducting an account as between I&B and F&B. The basic exercise is determining the extent of I&B’s entitlement to a “full indemnity” for costs they have properly spent on or because of being Trustee of the TDT.

146. Second, I have had regard to, and remind myself of, all the matters which I have previously referred to in my 23<sup>rd</sup> April Judgment, - but in particular the singular length and complexity of the litigation context (being not just Guernsey 1 and Guernsey 3 but other related proceedings) and the amounts at stake: see, in that Judgment, paragraphs [6]-[12] and [39]-[47], and the processes of incurring legal costs: see [329] and [331] to [354]) – as being pertinent context when considering the reasonableness of incurring or accepting to pay the Invoices which were rendered, and which are now being considered as regards particular charges contained in them and which have been singled out.
147. Third, I remind myself of the arguments and matters which I have previously considered generally in [355] to [376] of my 23 April Judgment - and in particular [359] - insofar as they again apply in the present context, but I make two overarching points here, for present purposes.
148. First, I reject Advocate Robison’s effective submission that I should take no account of the fact that the charges with which I am concerned have all been previously allocated internally to matter references ascribed to Guernsey 1 or Guernsey 3 by those personnel within Mourant or Macfarlanes who were charged with making such an allocation decision at the time of the work. In my judgment this fact must carry some evidential weight, though of course it is not conclusive. Indeed, I think some weight can also be given to the fact that such judgements were also made internally at the time of the preparation of I&B’s proof.
149. I accept that there are some instances where it has been accepted by I&B that such allocations might need to be justified further (see the Excepted Objections). I do not think, however, that this can be elevated into being an acceptance that there is a general possibility of there having been misallocations, such as to cast any real doubt on the likely correctness of the allocation of other charges. I also accept that there is evidence that I&B have made some mistakes in their own favour, eg, the early invoices originally claimed for but subsequently found to have been already reimbursed to I&B. That, however, is a different kind of mistake, and I do not consider that it undermines the reliance one might otherwise reasonably expect to place on the likely appropriateness of allocation decisions. I accept, of course, that this is not an *Alhamrani* threshold point.
150. Second, - and this is an *Alhamrani* threshold point - with regard, at any rate, to work done and therefore charges incurred after 2<sup>nd</sup> July 2012, whilst the test for whether these were “reasonable costs reasonably incurred” is an objective one (effectively, that no reasonable litigant could have accepted that cost or charge in all the circumstances), it does seem to me to have some materiality that the charges now challenged were accepted by a litigant in all the circumstances. It has not been suggested that I&B were atypical as litigants, or were particularly special in some way, so as to fall outside the hypothetical general class of persons whom one might expect to find as “ordinary” or “normal” “reasonable litigants” in this type of case. Whilst it is of course possible that they may nonetheless have behaved unreasonably in some particular respect, this does rather emphasise the burden which must fall on F&B to demonstrate a case to displace the initial impression that I&B’s accepting these legal costs was not particularly remarkable or exceptional. It is also relevant that the legal costs which are now challenged were incurred at a time, (before the decision of the Judicial Committee of the Privy Council) when there was no certainty that I&B would be able to recover them from the TDT by way of indemnity. This underlines the fact that the bills were accepted by a litigant (whether I&B or, in effect, its insurer) who would have been having an eye to its own resources, in the usual way.
151. Returning to other general points, fourth, I have mentioned above (see [12 ]-[16] and [81]-[85]) that the parties have recognised a potential further “carve-out” of charges from current consideration under the convenient heading of “Proofs Application” costs. The line being drawn in respect of this appears to be, at least principally, a temporal one. The final judgment in Guernsey 1/Guernsey 3 was given on 28<sup>th</sup> April 2018. There were subsequent post-judgment applications, and so forth which could reasonably be viewed as part of Guernsey 1/Guernsey 3. The initiation

of the proceedings which gave rise to the direction for Proofs to be filed, which is what is now being worked out, was an Application by the BVI Companies made on 5th September 2018.

152. The possibility that charges included in the present materials ought to be dealt with separately as costs of these proceedings, and not of Guernsey 1 or Guernsey 3, was first focused on and recognised only when argument was made in relation to the Excepted Objections: see above. However, it appears to be capable of arising in relation to charges dating from some time after, perhaps, 5<sup>th</sup> September 2018, for example. I have not reviewed the dates of all the later legal charges claimed in I&B's Proof, but circumstances suggest that some of these may have been the subject of challenge on their merits by F&B, and some may, up to now, not have been. As I have heard no argument on the question of when where and how the dividing line between the costs of the "Proofs Application" and of other matters is to be drawn, I simply record, therefore, that I have made my decisions below without regard to that possible issue.
153. Fifth, and finally under these general observations, I must record one argument which was not made to me, in oral submissions or written arguments, at any rate. In my 23<sup>rd</sup> April Judgment at [253] I drew a distinction between a trustee indemnity expense claimed in respect of costs incurred whilst a trustee was in office, and one claimed in respect of costs or liabilities incurred after leaving office, but qualifying for indemnity on the grounds of nonetheless being incurred "in connection with the trust". In the former case, the duty of reasonableness must be affected by the trustee's duty to husband the trust assets responsibly and have regard to the balance of the interests of those (beneficiaries and others, including its own right to indemnity) with interests in the trust funds when incurring expenditure. In the latter case, there would be no such duty to "the trust" any longer and in the paradigm case of the trustee who becomes entitled to an indemnity in respect of the costs of successfully defending itself against a claim for breach of trust, the duty of reasonableness would be assessed only by the standards of the hypothetical ordinary honest litigant acting reasonably in its own interests.
154. It is therefore logically apparent that before 2<sup>nd</sup> July 2010, when I&B were removed as Trustees of the TDT, the scope of subject matter on which they might incur expenditure "in connection with" the TDT would be wider (although even then including the Guernsey 1 litigation which had already commenced, and potentially, even then, any personal legal advice which, as Trustees of the TDT, I&B might nonetheless reasonably take) than afterwards, but more constrained as to the freedom of action which they would enjoy in terms of reasonableness than afterwards.
155. I record here that I have received no actual argument directed to this topic, and I have perceived nothing in F&B's arguments reflecting any suggestion that I should apply any different standard or approach to their objections raised in respect of expenditure incurred by I&B pre- and post-2<sup>nd</sup> July 2010. Except for one point (but this arises under "Unreasonable in Amount") I have therefore proceeded on the basis that it is not suggested that any such possible difference, alluded to above, affects the current arguments.

## **Decisions**

156. Whilst I do not make my decisions with regard solely to the composition of the classes of objection identified by Advocate Wessels, I have found it convenient to use them as a basic framework for the decisions which I now set out, although not in the same order. Where I use line references, they are those in the electronic bundle which was provided to me, which I therefore trust the parties will be able to identify conveniently.
157. As already stated (see [110] above) there are about 5,825 individual charges to which individual objections are made in the Schedule. Those up to line 1816 relate to Macfarlanes Invoices. Those from line 1818 onwards relate to Mourant invoices.

### **(i) No objection**

158. The charges identified at lines 376, 409 and 2627 do not appear to be the subject of any objection, and I therefore disallow any objection to these charges.

**(ii) No narrative**

159. I am told that this refers to some 33 charges totaling around £13,000. From inspection, they all appear to relate to Macfarlanes Invoices and are all (as they obviously must be) relatively small (eg line 598 - £102), though a few (eg line 1003 - £1,274.95) exceed £1,000.

160. Advocate Wessels' argument has to be that a reasonable litigant could still have elected to pay the relevant invoices even with these charges for unspecified work within them, but this could only be on the basis that it would have been reasonable to view these as individually too small to be worth querying. Whilst I have some sympathy with that point as a matter of pragmatism, this is a "threshold" decision, and I do not find that argument sufficient to overcome the stark point that where there is no indication whatsoever of what a charge is for, there must be more than a fanciful possibility that it will turn out to have been for something impermissible or even a mistake.

161. I will therefore allow objections to go forward to charges made on the expressed basis of "no narrative", so long as that is a demonstrable fact.

**(iii) Narrative redacted**

162. This is not an objection type which was adverted to specifically by either Advocate, although it seems to me to be in an obvious individual category. It appears to arise in relation to certain charges within a cohort of Macfarlanes Invoices Nos 320 to 339. I have not attempted to total the charges in question accurately but they would seem to be in excess of £40,000. They are in respect of items of work, the earliest of which was 1<sup>st</sup> November 2018 (line 1708) and the latest of which was 30<sup>th</sup> January 2020 (line 1771). I observe, therefore, that they are all, in fact, post the conclusion of Guernsey 1 and Guernsey 3 and that this may, on any basis require, their removal for consideration elsewhere. I proceed, however, to evaluate the objection on its merits.

163. There were objections based on the redaction of narratives at the previous hearing, where objections were leveled at Invoices. The explanation then given was that there was a misunderstanding, and that the redactions were of costs which were not being claimed. I accepted that explanation. However, it cannot apply where the objection is now leveled at an individual charge where the narrative has been redacted. The redactions are not always of the entire narrative, but where they are of part only of a narrative (the apparent majority), there is no indication that there has been any apportionment of the item of work in question.

164. In my judgment, and similarly to the situation where there is no narrative, the obvious absence or withholding of information as to some aspect of the cost in question cannot be ignored and simply assumed to have been a charge which a reasonable litigant could have paid, regardless. This is not least because the actual litigant in this case will not have paid the Invoice with this information redacted.

165. I will, therefore, allow objections to charges made on the expressed basis of "narrative redacted" to be advanced, once that fact is shown. I do not, thereby, intend to imply that it is inevitably necessary for I&B to remove the redaction; it is up to them whether they feel they can justify the cost in question without actually removing the redaction. I will give liberty to apply for directions if the removal of the redaction is indicated but this is said to give rise to any embarrassment or harm for I&B which requires some means of protection.

**(iv) Disbursements unparticularised**

166. Taken at face value, the 367 (I am told) objections under this head are made to entries appearing on the front sheet of (mainly) Macfarlanes' Invoices, although some are also made in respect of Mourant disbursements. The parties' skeleton arguments dealt with them at face value, as mentioned above. However, at the hearing Advocate Wessels stated that, in fact, these objections fell "*into the same trap*" as those Excepted Objections at 3.9 above where objection was raised to the entire amount of an Invoice (this having to be produced as evidence of sums paid) whilst the amount actually being claimed was only in respect of part.
167. This argument was further elaborated on by Advocate Wessels at the hearing. Broadly, he explained that the problem was that the compiler of F&B's Schedule on this topic had assumed that the claim for disbursement items actually being made was the whole of the items stated under the categories in the front sheet, but this was only a cover sheet, showing that, and where, the sums actually claimed in this part of I&P's proof claim had been charged and paid. The detail of what was actually being claimed was found in the following pages which listed the charges and disbursements which had been allocated to the heading which was appropriate to this claim. Other matters paid for under the same invoice, were not included in the claim. The sums claimed were, therefore, invariably smaller than the totals shown on the Invoice front sheet, but could be properly identified by looking at the narratives which followed. This simply had not been done when the objections had been drafted.
168. This topic was dealt with briefly, but convincingly at the time, as Advocate Wessels took me on an audit trail through various pages in the bundles documentation which showed the way this worked, and he dealt with this specifically in relation to the 10 items which were cited as example entries by Advocate Robison in his skeleton argument. Eight of these were for printing charges, and he showed that, at the end of each narrative, the total for disbursements actually claimed for such items, including printing, were set out with some detailed narrative, and the sum claimed was lower than the invoice sheet total. The two which were different were said to be first, certain unspecified "lawyer's charges" (line 129) which he pointed out were not in fact claimed at all, but which he said had, in fact, been explained (they were Appleby's fees where the fee note had been lost) in earlier correspondence. The second was a charge for "Co-Legal LLP" (line 745 for £16,195.54) as to which suspicion was raised because this was a recruitment agency. He pointed out, once more, that that was not being claimed here, but pointed out that that would probably have been for external paralegal assistance at a time of heavy workload.
169. I accept Advocate Wessels' explanations. Insofar as I have felt it my function to look at the final pages in respect of each relevant invoice to check whether the objections which are listed in the schedule do in fact object to the sums which are being claimed if those pages are the correct quantum of the actual claim, this explanation appears to be borne out. On that basis, the objections are just misconceived and I would not allow any of them to go ahead. However, and from an abundance of caution, I have also considered the arguments put forward with regard to these objections at their face value.
170. The 376 charges total a significant amount, because many of the individual items are in four figure sums. The objections do not refer to Counsel's fees, but to other expenses. They are mainly advanced in relation to Macfarlanes Invoices, which include, on the front sheet, disbursements listed under headings such as:

- Print Room Services
- Telecom Charges
- Late night meals
- Taxis
- Company search fees
- Post/data post
- Train/air fares
- Lawyer's charges – Foreign/UK

Expenses incurred abroad  
Land Registry Charges  
Courier, and even  
Court fees.

Objections to Mourant's Invoices are fewer, their practice being to provide a little more breakdown of disbursements, or to specify payees (such as "Opus" line 2698) but items such as

Photocopying charges  
Flights  
Hotel  
Travel expenses  
Hospitality (etc)

are within those criticised and objected to as potentially unreasonably incurred. In respect of Mourant's Issue 42, (line 2627) there is an unspecified objection to all the "Disbursements" for that month, in the sum of £2,318.83, even though they are broken down into catering, photocopying, couriers, and notary fee.

171. The text of the objection is then, universally (except for the last mentioned above, and line 535 where there is an objection for "General (standard VAT)"):

*"unparticularised charges with no supporting and verifying documentation provided. Thus, it is unreasonable for the Former Trustees to be reimbursed for the costs of this nature without documentary evidence confirming the incurrence of such disbursements."*

172. It is clear from examination that this objection has been applied to each disbursement entry on the face of a Macfarlanes Invoice (and many Mourant Invoices) for a charge in excess of £100, although one Mourant entry specifically identified as for "Gatwick Express" (line 2211) appears to have crept under the radar at £96. Thus, "late night meals" at £26.97 are not objected to in June 2010 in Macfarlanes' Issue No 5, but "late night meals" at £105.47 are objected to in July 2010 in Macfarlanes' Issue No 6 (line 126). Whilst this might benevolently be seen as a surprising but commendable willingness by F&B to disregard the trivial, it does run contrary to the fact that these objections are supposedly that such charges are unreasonable costs *in their nature*, and could not or should not have been accepted to be paid *at all*; this objection is not part of the "Unreasonable in amount" Schedule.

173. The uniform text of the objection also points up the fact that the objection has been made on the basis of a mantra and a rule of thumb as to charges of £100 or more, without any actual consideration of whether the particular charge could, itself, be suggested - still less be clearly seen - to be an unreasonably incurred cost in the actual circumstances.

174. The universal objection is lack of supporting documentation. As Advocate Wessels pointed out (and I accept) this is scarcely a sensible complaint with regard to the subject matter of photocopying, printing and telecom charges. It also ignores the circumstance that there is none in the evidence in this application, because none has been ordered to be produced, in the interests of proportionality. Viewed on that basis this objection is, yet again, a disguised demand for further information which has already been refused.

175. Viewed in another way, though, it suggests that whoever formulated these objections for the purpose of this Reinstatement Application did not apply the correct test, even if they were applying it to the figure which was being claimed. The test is not whether a reasonable litigant would expect to be supplied with supporting vouchers for disbursements and would refuse to pay if not (with a view to justifying the proposition, itself lacking actual legal foundation, that it would therefore be

“unreasonable” to require an indemnifier to indemnify that litigant for expenses so incurred); the material question is whether a litigant could reasonably have accepted to pay the particular charge in question, for the services in the relevant period, in all the circumstances of the relevant litigation, or whether there is a real prospect of showing that no reasonable litigant could, without doubt, have done so.

176. The complaint with regard to lack of supporting vouchers is therefore wide of the mark, on several bases. In fact, it may be that there were supporting vouchers supplied at the time, but we do not know and that fact is just not relevant.

177. The stated basis of this objection therefore does not really, on its face, disclose any properly considered submission that the disbursement item in question was unreasonably incurred. In fact it is quite clear that the majority of the items listed would in principle be quite reasonably incurred items of disbursement in the case of a very major case being conducted in Guernsey with support in London, and in its last phase conducted in London.

178. In certain instances there is further detail, such as “Opus”, “Wordwave” “Gatwick Express” which do provide more indication of what the charges were about and which reinforce the view that they were on perfectly reasonable subject matters for the litigation.

179. I would therefore, in all probability, dismiss the objections to disbursements even if the actual claim related to the disbursement figure claimed in general, although I might have had to give close consideration to, and possibly allow to be advanced, any particularly egregiously large charge, such as line 755 (Co-legal LLP: considered above) and line 834 (£19,928.24 - a remarkably large charge for printing). However, since I accept Mr Wessels’ explanation that these charges are not, in fact, being claimed, supported by the evidence of the extent of the actual claim mentioned above, I do not have to do so on this occasion.

180. For all the above reasons, therefore I disallow all objections to disbursement items made in the form set out above. The single unexpanded objection of “Disbursements” at line 2627 is incompetent in form and therefore is in any event disallowed. The single objection at line 535 to “General (standard VAT)” is out of line, and could be a legitimate objection on the basis that it appeared to be a mistake, but as it does not appear to figure in the list of claimed disbursements following the relevant charges (see under Macfarlanes Issue No 36) that is also disallowed.

**(v) Insufficient detail - wholly generalised objection**

181. Under this heading I deal with the 4,633 objections noted by Advocate Wessels as recorded at [112]-[114] above. This is the form of objection which figures most often in this Section (ie raising objections that costs should be treated as unreasonably incurred because of insufficient particularity) although it comes in differing formulations. Their common characteristic is that the complaint is of insufficient detail in the narrative attached to the particular charge, either asserted without any further elaboration whatsoever, or with the only additional specific complaint being that reference to the subject of the work or charge (eg “RC Proof” or “Meeting”) is not sufficient to refute the objection. Most, and probably all, such objections, commence with the phrase “*Non-detailed description of work*”.

182. The most common form is:

*“Non-detailed description of work: A lack of sufficiently full or clear information with regard to the description of the work which has been charged; Narrative is a vague and unparticularised description. It is therefore not possible to determine the exact nature of the work undertake [sic]. Thus, it is unreasonable for the Former Trustees to be reimbursed for the costs of this nature.”*

This particular wording appears about 3000 times, being the objection in all but a handful of instances between lines 3051 and 3835 and the predominant objection made between lines 1345 and 1636. There are other slight variations, which, again, sometimes occur several hundred times each, such as (between lines 2961 and 3049) the same as the above but with the final sentence instead reading

*“Thus, doubt is raised as to whether the charge is a reasonable cost for I&B to claim”*

a phraseology which is better targeted at the material question, but does not improve the content of the objection. In places (an example is lines 1808-1810) this type of objection appears simply as

*“Non-detailed description of work: Narrative is a vague and unparticularised description. Thus, it is unreasonable for the Former Trustees to be reimbursed for the costs of this nature.*

Further similar phraseologies are

*“Non-detailed description of work: Narrative is a vague and unparticularised description. Thus, it is not possible to determine the exact nature of the work undertaken / reasonableness of the charge in the light of the time charged.”*

(which is the almost universal objection between lines 1818 and 2339), and

*“Non-detailed description of work (no time allocation for separate tasks) Narrative identifies multiple tasks but does not specify the amount of time spent on each task. Accordingly it is not possible to determine the exact nature of the work undertaken and the reasonableness of the time spend on the task. For all these reasons the reasonable implication is that this charge may not be captured by I&B’s indemnity claim. I&B have not sufficiently shown evidence how or why this specific charge was charged to them by their lawyers. Thus it is unreasonable for the former Trustees to be reimbursed for the costs of this nature.”*

183. As to all these objections but with one exception noted below, having considered the general arguments and looked at some random examples to test the view I had formed, I accept Advocate Wessels’ argument that these objections should not be allowed to proceed, as they are in fact simply a re-run of the kind of objection which is really no more than a demand for further information which I have previously disallowed. Taking account of all the circumstances, an objection in these terms just does not raise a sufficiently real prospect that any particular charge is for work likely, beyond the benefit of doubt, to have been unreasonably incurred or accepted by I&B. I add, for the avoidance of doubt that this includes not only objections made with no specificity whatsoever, but also those raised in similar terms to the above but including a reference to a particular stated subject in the narrative supporting the charge (eg “Court Preparation” “Meeting” “RC Proof”).

184. I make one single exception to this, which I noted in such perusal of the vast swathes of such objections as I have been able/felt it appropriate to make. That is the objections at lines 816 – 819 inclusive. There the objection is raised on the ground that a reference to “yachts” does not make it sufficiently clear how this can relate to Guernsey 1 or 3. This is so singular, that I do find that objection to be sufficiently well taken to be allowed to be advanced, at this initial stage. This is the only such objection which I noticed which seems to me to have the necessary quality of *prima facie* inexplicability. “Sk” and “sks”, for example, appear to be obviously shorthand for “skeletons”.

185. This is enough to dispose of and disallow all this cohort of objections, (apart from the exception noted) but I must add that, having considered various examples, it also seems to me that in very many cases, Advocate Wessels' comment that the objection has been formulated on the basis, more that it is simply capable of articulation than that there is actually any commonsense substance in it, has justification. That impression is pervasive.

(vi) **“Could be Guernsey 2”**

186. The “Non-Application Specific” class of objections - those which generally commence with this phrase - has now become objections that the charge in question does not, or (more usually) *may* not, relate, either to the TDT or to the matters which are within the scope of these proceedings, because they may relate to matters which have been carved out by agreement. “*Out of scope*” has therefore at times also been used as a shorthand for this.

187. It is convenient to deal with the “Could be Guernsey 2” carve-out for this separately. This is a very common objection. In relation to Macfarlanes invoices it frequently takes the form:

*“Non-Application Specific: narrative does not identify the specific matter / proceedings / application to which the charge relates. The date of the invoice is at a time when the Guernsey 2 proceedings were on foot. The summary at SJD1/[xxx] refers to “TDT - First Application”. However, there are other invoices issued by Macfarlanes that contain this same summary and charges related to the Guernsey 2 proceedings (e.g. Macfarlanes Issue [xx]). There are other charges within the invoice that appear to refer to the Guernsey 2 proceedings. For all of these reasons the reasonable implication is that this invoice may contain charges allocated to Guernsey 2 particularly as there is insufficient particularity to identify this charges as not being related or being related to Guernsey 2. I&B have not sufficiently shown in evidence how or why these charges were charged to them by their lawyers. Thus, it is unreasonable for the Former Trustees to be reimbursed for the costs of this nature.”*

In relation to Mourant Invoices the central wording is along the lines of:

*“.....The date of the invoice is at a time when Guernsey 2 proceedings were on foot. The general description on the invoices charges at LAH7 [xxx] refers to “the Tchenguiz Discretionary trust/Eliza Limited” but makes no reference to Guernsey 1 or Guernsey 2 proceedings. Various applications were made in Guernsey 2 in [month]. This invoice contains charges for work undertaken in [month]. There is insufficient particularity to identify these charges as not being related or being related to Guernsey 2.....”*

188. The same objection arises in a briefer form, in many other places, where it is framed along the lines of

*“Narrative references the “RCO” which mean that the charge is likely to relate to applications made in Guernsey 2 in relation to the RCO.”*

or similarly in relation to a reference to “*IRL*” (ie, Iver Resources Ltd) or to “*Farnborough*” or to “*Welcome Break*” or to “*Piccadilly*”, etc.

189. It will be observed that this is now an “allocation” objection rather than a “reasonableness” objection, and I recognise that I&B therefore does not have the *Alhamrani* benefit of the doubt as regards the ultimate decision on this objection. However, I will disallow all the objections where the basis is that a particular charge “*may*” relate to Guernsey 2 (whoever expressed), even applying the normal threshold test, for the following reasons.

190. My first and main reason is because I do not consider that F&B has a real chance of demonstrating that any of these charges were and therefore are, properly attributable to Guernsey 2, even facing a mere balance of probability test.
191. “Guernsey 2” is not a separate action in itself, but a set of applications conveniently brought before the court under the particular Civil File Ref. No 1505/2010. That set of applications was considered to be concluded by 2015, when the costs of the various parties to them were awarded by LB Talbot, in proceedings conducted between 2015 and 2017, and with “costs of the costs” being awarded by him in April 2018. The importance of this is that the question what costs were properly allocatable by I&B and their lawyers as being incurred in Guernsey 2 (whether as the costs “of” those proceedings as narrowly identified, or even on the possibly slightly wider description of “costs in respect of ...the Guernsey 2 proceedings”, which was the wording agreed by the parties in my Order of 10<sup>th</sup> December 2019) has previously been considered by I&B and their lawyers, and, indeed, adjudicated on by LB Talbot. This was at a time and in a situation where I&B’s interests would seem to have been to maximise the costs which were allocated to Guernsey 2, as they would be about to secure payment of these costs. The correctness of any such allocation was also subject to some scrutiny on GTC’s part on behalf of the TDT at that time. As already noted, LB Talbot made his decision on the basis that he would award costs out of the TDT in respect of costs which were shown to be those of any identified Guernsey 2 application, but not where this could not be done. He did not disallow any costs for unreasonableness in themselves, but only for not being sufficiently identifiable as he had required, and the failure of this precise qualification did not and does not preclude any such costs still being “in connection with” the TDT and recoverable under I&B’s right to indemnity.
192. That all occurred over three years ago. On that basis, I find it to be entirely fanciful to suggest that any remaining legal charges incurred by I&B at that time “could” be properly attributable to Guernsey 2 matters, simply on the grounds of the position being ambiguous, and this being a possibility on the basis of time. The charges may be amongst those which were not accepted by LB Talbot for not being sufficiently identified with any particular Guernsey 2 application, but that does not put them outside the proper scope of I&B’s indemnity, and if they have been refused (by LB Talbot) to be awarded in Guernsey 2, they can and must be awarded, in my judgment, as part of the general Guernsey 1 or 3 cohort of expenses, since the existence of those pieces of litigation was the situation which required considering external (Guernsey 2) legal advice and activity, even if individual items might not have been directly identified with a particular application. It is, generally, perfectly possible for advice and work in the general context of the primary Guernsey 1/Guernsey 3 actions to refer to matters which might at some stage become, or have been, the subject of specific applications made in Guernsey 2, without actually being (and therefore not viewed, quite reasonably, by those advising I&B as being) costs which could (let alone should) be allocated to a Guernsey 2 application as the costs “of” it. They clearly have to be allocated to some matter, and Guernsey 1 or 3 could well be the only sensible matter description available. In my judgment – and this has become more refined and informed since the time when I unquestioningly accepted the parties’ agreement that the “costs of Guernsey 2” should be carved out of the present exercise of quantifying I&B’s proper indemnity entitlement from the TDT – Guernsey 2 has had its day, and unless it appears sufficiently likely that there has actually been a positive mistake, with costs “of” Guernsey 2 proceedings now being identified when they had not been at the time of the proceedings before LB Talbot, those costs must be taken, without more, to be general costs of the Guernsey 1/3 litigation matters. F&B’s objections based on a “could be Guernsey 2” argument are therefore disallowed, on their absence of intrinsic merit.
193. However, there is a second reason why I would also disallow any objection based on the “could be Guernsey 2” argument, and this is the consideration that there is, in my judgment, no realistically possible advantage to F&B in being permitted to carve out those charges at this stage. This is the reason which I gave above at [46]-[54] in relation to the disputed Excepted Objections in relation to Guernsey 2. This is that the only logic for allowing such objections to proceed was that if they were taken before the tribunal which was seised of Guernsey 2 matters, it was possible

that the award made to I&B in respect of them could be less than the full indemnity they would otherwise be entitled to. Since, however, LB Talbot had previously awarded Guernsey 2 costs to I&B on the basis of a full indemnity, without qualification and without demur, the prospect of his then not doing the same in respect of any further costs now, apparently, called up to be arguably allocated to Guernsey 2, must be so remote that it can be safely and fairly disregarded.

194. I had previously viewed this argument in the light of the small number of objections raised under the Excepted Objections, but on considering it in this wider context I find it to be equally applicable, and indeed probably to have even more force. It would be quite remarkable if so many “Guernsey 2 costs” had really been mistakenly assumed not to be.

195. I am, I think, entitled to make this determination under the court’s inherent jurisdiction with regard to case management, but I consider that it is also within the exercise of my express powers conferred by RCCR 2007 r 50(2)(f) or (p).

196. For the above reasons, therefore, any and every objection now sought to be “reinstated” by F&B on the grounds of a possible allocation to Guernsey 2 is disallowed.

**(vii) “Could be NS1”**

197. This objection is of a similar type to the objections citing Guernsey 2, but in relation to the two independent actions, being High Court Proceedings File No HC-2013-000411 in England and Civil File No 1955/2015 in Guernsey, which have been referred to as the “NS1” or “NS One” Proceedings.

198. This objection began appearing in relation to Macfarlanes Invoices only at Issue No 197, for work in September 2015, shortly after the issue of the Guernsey NS1 action, but the great majority - and there are a large number - are raised in relation to a great many of the charges on Mourant Issues Nos 76 and 77, for work done between February and April 2014.

199. The objection generally relies on some reference to the “RCO” within the narrative of the charge and the fact that the NS1 proceedings were “*on foot*” at that time, as the English proceedings plainly were. There is a variation, though, which relies on the fact that the relevant Invoice contains *other* charges which “*appear*” to relate to the NS1 proceedings, to justify an objection that therefore there “*is a likelihood*” that the particular charge under consideration relates also to the NS1 proceedings, because (it is said) no weight can be attached to the fact that it has been raised under a bill ascribed to “*G1 Appeal Against Personal Liability*”.

200. I have looked at the narratives of these charges. Many have the appearance of being charges relating to the administration of the RCO, such as regarding payment of annual rent for RCO car parking spaces, payment of interest on sums held in respect of the RCO/IRL, payment of costs incurred in relation to the June 2013 “RCO appeal”, payment of ATED (Annual Tax on Enveloped Dwellings), to pick out just a few.

201. Unlike the position in comparing Guernsey 2, I have very little idea what the actual issues in either set of NS1 proceedings were, or (I think) still are: I do not think they have been finally disposed of. I understand that they may relate either to assertions as to where the true beneficial ownership of assets which indirectly confer rights in respect of occupation of the RCO properly lies, and/or to complaints that I&B did not devise or follow through a procedure for extracting the RCO out of the TDT (and therefore the ambit of assets potentially vulnerable to recovery of the BVI loans) when they should have done, or, in relation to the Guernsey Proceedings, to claims to enforce an alleged agreement for the transfer of shares in IRL, either directly or through a claim – probably not a clear basis of claim in principle in Guernsey law – to proprietary estoppel. I have not had to look at the detail of those proceedings and their issues at all, before now, for the purpose of these proceedings, in the way that I have had to acquaint myself with more detail of other actions, and

neither have I been given any further education or guidance on that subject in argument for this hearing. Advocate Wessels has not advanced any arguments aimed specifically at this objection, arguing, in effect that I should be able to treat it as standing or falling in line with the general arguments which he has made as to the insufficiency of the objections under the “insufficient particularity” rubric at a high general level. This really amounts to asking me to disallow these objections on the grounds that they are only speculation, or that the clear lack of substance in the vast majority of other objections under this heading should cause me to have sufficient doubt about whether this set of objections can have intrinsic merit that I can properly disallow them at this preliminary stage.

202. However, this is again, an allocation objection, and therefore not to be judged at on the standards of an *Alhamrani* threshold test. Without some knowledge of the NS1 Proceedings and their issues, and without the inferences which I draw from the previous conduct of proceedings as I can with regard to Guernsey 2, I feel quite unable to make the kind of summary deductive decisions with regard to the “Could be NS1” allegations, as I do feel able to make with regard to allegations that the charges “may” relate to Guernsey 2. What I have read in the narratives does suggest to me that the charges are not particularly likely to be the costs of NS1 proceedings, but equally they do not appear likely to be to be costs of Guernsey 1 or Guernsey 3 proceedings either (although, in such a case and as I have previously said, they would not therefore fall outside I&B’s right to indemnity, but to keep the record in proper order I&B might need to amend the descriptions in their Proof to cover such costs even if not clearly within the particular descriptive headings which they originally used to explain their Proof claim, an amendment which I would readily permit.) The fact is, that I just do not know what would or would not relate to issues in the NS1 proceedings, at this time in early 2014, and in those circumstances it seems to me that I cannot say that it is entirely *fanciful* that some, at least, of the challenged charges, the narrative for which is not self-evidently likely to refer to Guernsey 1 or 3 matters, might be found to properly relate to NS1 matters, even though - and influenced by the fact that F&B have appeared willing to raise very flimsy arguments in other contexts - I may reckon that the likelihood of this is below 50:50.
203. With some reluctance, therefore, I will not disallow any objection which asserts the possibility that the charge has been wrongly included in the present quantification exercise because it may well, on further examination, be properly held to be a cost in respect of either of the NS1 sets of proceedings, where that objection is based on there being a reference to the RCO, or to IRL, or to ABN-Amro within the narrative of the charge objected to. However when the ground of the objection is not that of actual reference, but is based on mere association, (ie that whilst the charge itself does not contain any such focused reference, there are claimed to be grounds for thinking it might relate to the NS1 proceedings because *other* charges raised in the same Invoice appear, possibly, to relate to the NS1 proceedings), I consider that this objection goes too far into the field of mere speculation. I will not allow the objections in that form to be advanced, not least because the claimed “appearance” seems to me to be based only on a general inference, and thus an entirely self-serving argument, and not on any specific reference to which it can be linked in such other charges, as far as I can see.
204. As I have said, I have not heard any argument from I&B directed at this particular point (“Could be NS1 Proceedings”), and that is perhaps unfortunate. I have come close to ordering that, because of this, I would, if I&B wished me to do so, adjourn this particular set of objections which I otherwise feel cannot be disallowed, for further argument at this stage as to why any concerns which I may have, and which possibly arise only from my ignorance of the facts of the litigation context in this area, can be allayed, so that this set of objections should also be disallowed. However, on balance, I have concluded that it would not be appropriate to do so, as it would simply fragment the conduct of these hearings even more, and they are undesirably fragmented already. I should, in the interests of efficiency, aim at arriving at a cohort of objections however detailed and disparate that cohort may turn out to be, which will go forward (if they continue to be pursued/resisted) to a final stage of hearing on their merits.

**(vii) “Could be Delivery Up”**

205. This objection of “insufficient particularity” but with the alternative candidate being the Delivery Up proceedings appears against several charges in Macfarlanes Issue 35 (between lines 470 and 491) and also Issue No 110 (lines 1048 and 1050), and Issue 121 (line 1224), Issue 126 (line 1301). Here the assertion is that there is a direct narrative reference to “Delivery Up” although the narrative itself may not use upper case.
206. It may possibly also be being raised in regard to Mourant Issue 42 (lines 2496 to 2627) in conjunction with both Guernsey 2 and Mourant’s Issue 53, (lines 2628 to 2693), although I am not certain if it is. The principal assertion there is that the charges arose at a time when Guernsey 2 proceedings were on foot, but each objection relies to some extent on the fact that there are apparently charges in the same Invoice attributed to the Delivery Up Proceedings. This is admitted, and even given attribution by I&B up to the sum of £84,653, in the case of Issue No 42, which is almost half the total invoice amount. This is, once again, said to show that the matter description in the heading of the Invoice cannot be fully relied on, with the facts above mentioned therefore suggested to give rise to an inference, that other charges within these Invoices, those being objected to, could also relate to other matters not within the scope of the present exercise. It is not clear if “Delivery Up” is therefore being referred to as evidence to support the allegation of sufficient uncertainty, only, or whether it is also being relied on as the actual candidate for being the correct attribution of the charge.
207. I have already held that the correct scope for a correct carve-out of costs relative to the Delivery Up proceedings is confined in time to the period from of 8<sup>th</sup> October 2011 to 19<sup>th</sup> March 2012. Of the Macfarlanes charges, only the last (line 1301, at £4,080.00) is within that time frame, and the narrative refers to a hearing in the Delivery Up proceedings, as well as to a hearing “before Talbot” which must be Guernsey 2. I will therefore allow that objection to go forward, although some apportionment may be required.
208. With regard to the objections to Mourant’s Issues Nos 42 and 53, the former is within the relevant time frame, and I cannot locate the latter. However, I disallow these slightly expanded objections, whichever is their basis. I have already disallowed them if the assertion is really that they “Could be Guernsey 2”, and if it is that they “Could be Delivery Up” they are otherwise affected by the argument considered under “Could be NS1”, namely that, in my judgment, likelihood by association, rather than likelihood by actual narrative reference, is just not sufficient to raise any objection out of the realm of fanciful speculation, and into the realm of real possibility.

**(viii) “Could be TDT Documents application”**

209. The TDT Documents Application was a short-lived Application operating from 8<sup>th</sup> January 2016 to its conclusion around mid-August 2017 (see [61]-[62] above). I am in fact unable to find any reference in this Section to objections made that the charges could be in relation to these proceedings; they all seem to be made within the Excepted Objections, section, and I do not consider them further.

**(ix) Miscellaneous**

210. The matters below are items of objection on this Schedule which do not fall under the above broader headings but which, either because they are examples referred to by the parties in arguments, or because they came to my attention when I was generally reviewing the objections in this Schedule, I feel they require specific comment.
211. At line 2720 (Mourant Issue No 71), there is an objection that a claim for “Third party Professional fees” of £682.50, apparently for the transcript of the hearing on 6.12.13, is not only unexplained (which it is not) but that it appears to be the same charge as appears in Issue No 70. I cannot easily

trace issue No 70 and am therefore unable to check if this is the case – plainly the date for the transcript is likely to reveal this. If it is, then, as this has come to my attention, I regard this as an objection which should be allowed to go forward, and be either explained or allowed, small though the sum is.

212. Allocation objections are made in respect of references to the “Maud Brown Trust”. I know nothing of this trust or its relationship (if any) with the TDT. There are three such entries at lines 387, 616, and 1168. I have looked at the narratives and they are not informative. I&B say that this was in relation to dealing with the Maud Brown Trust on behalf of the TDT and suggest that F&B are being deliberately obtuse in not recognising this. However, as the narratives shed no light on the likely correctness of this assertion I feel I can draw no reasonable inferences from my own knowledge, and this is an allocation objection I will allow it to go forward.

### **Summary**

213. My decisions and comments set out above in respect of this “Costs unreasonably incurred on the basis of Insufficient Particularity” Schedule ought, I think, to enable the parties to identify whether any particular objection is being allowed to go forward or is disallowed, although I accept that if there is disagreement as to the application of my decisions, further argument will be required. I turn now, therefore, to the second part of the Reinstatement Application.

### **(B) Unreasonable in amount**

214. There are just over 900 separate objections in this part of the Reinstatement Application: there are 985 lines on the Schedule, but a significant number are headings and intermediate totals. They call into account about 1500 individual charges. Up to line 615 they are made in relation to individual charges, with the objection comprising a paragraph of text. From line 616 onwards, they are made in relation to groups of charges on a particular subject ( eg: “Judgment”, “Review skeleton”, “Insurers”), or a particular topic (eg “Guernsey” “Conference calls”, “Various meetings”), each group being extracted from a particular monthly Invoice, and being the subject of a paragraph of text. Whilst this change occurs at a point (Issue No 51) in the numerical stream of Macfarlanes Invoices, the latter Invoices themselves are not in totally chronological order. The reason or rationale for the change of approach is therefore not clear. In principle, of course, F&B is entitled, as a matter of procedure, to seek to make out its objections as to unreasonableness of amount on the basis of challenging individual charges, or on the basis of challenging groups of linked charges, as they think appropriate.

215. Once again, F&B’s approach in advancing their application to be permitted to amend their suite of proposed worthy objections to I&B’s indemnity claim has been that Advocate Robison simply relied on the text of the objections in his spreadsheet schedule as incorporated into his skeleton argument in support of such application. It was left to Advocate Wessels to try to analyse these 900 odd objections into conveniently applicable sections or headings so as to make making decisions about whether they disclosed a proper case to go forward a more manageable exercise, with Advocate Robison then seeking to refute his submissions in a reply skeleton argument put in on the working day before the actual hearing, and in oral argument.

216. Advocate Wessels’ suggested analysis was that these objections disclose three general types of complaint, though often combined, namely

- (i) over-resourcing of time spent or personnel involved;
- (ii) the old and familiar complaint of “insufficient particularity”, ie failure to provide sufficient detail, to F&B’s satisfaction, of the task or work being done;
- (iii) that the work done was, or could have been for the personal benefit of I&B.

He had annotated the spreadsheet with three columns marking where the particular objection contained such element. His suggestion was that I should consider the general merits of the complaints under each of these three heads and then see which objections were left standing at each successive stage.

217. Having looked randomly at various of the individual objections, I accept that they do contain the broad categories of sub-objection stated by Advocate Wessels, and that this is a convenient course to adopt, although not in the particular order which Advocate Wessels listed.

**(i) “Personal Benefit”**

218. Skimming the numerous pages of the spreadsheet, whilst this last complaint is a frequently appearing one (although only in relation to some individual objections and not grouped ones) I do not think that any objection rests solely on this ground. It is therefore convenient to deal with it first and I can do so quickly.

219. I have already held (and I gave particular and detailed consideration to this possible argument in my judgment of 23<sup>rd</sup> April 2021, at [59] – [64]) that the existence of personal benefit to a trustee is not, in itself, a ground for depriving a trustee of his indemnity, where the cost can be seen to have been incurred “in connection” with the trust or his position as trustee, and the trustee is claiming in circumstances where he is reasonably (whether viewed objectively at the time, or retrospectively after being vindicated by success) investigating, protecting or defending his own interests. It is also in the nature of this objection that it is even less potentially arguable on the basis of a mere “unreasonable amount” complaint than of an “unreasonable in nature” complaint.

220. Advocate Robison made a rather weak attempt, in relation to some very early costs and objections (eg lines 3-5) to argue that where I&B received the benefit of a “case note on liability of trustees”, or on “removal of trustees”, in December 2009, - ie before Guernsey 1 commenced, but at a time when the history shows that issues which might call in question I&B’s conduct as Trustees were very obviously brewing - this could, and would, have been of general use in and about the conduct of their trust management business. He argued that they at least to be reduced on the basis of some apportionment to the specific, as against such general, utility.

221. Quite apart from the question whether this is an “unreasonable in amount” objection at all, I regard it as unreal. Any person who takes advice on a topic for a particular reason can store up that advice for later use if a similar situation occurs, but that does not stop it all being properly taken in respect of the matter which has actually arisen, and therefore properly charged as a legitimate expense in respect of such matter. The fact that it will then necessarily become potentially part of the advisee’s general knowledge and useful expertise is entirely irrelevant.

222. I am quite satisfied that any supposed question of “personal benefit” does not give grounds for any objection in this part of the Schedule to be allowed to be advanced. The effect is that I strike out the potential objection to any charge coloured into the third column of Advocate Wessels’ response to F&B’s spreadsheet objections, although this does not seem to mark out any such objection as consequently having insufficient grounds to be permitted to proceed at all, at this first juncture.

223. Consideration of this issue has, though, led me to one further material point. It is the case that the basis of complaint in this regard has been included in many of these *revised* objections raised by F&B on behalf of the TDT, even after the rulings which I made on 23<sup>rd</sup> April 2021, and this has been done in terms which clearly suggest that no account has been taken of these rulings. There are very many examples, for example at and around line 500 and similar, where the grounds for seeking a reduction for “unreasonable in amount” are expressly stated to be *because* I&B were then no longer trustees but were engaged in hostile litigation against the TDT, so that it should be regarded as expenditure for their personal benefit – implying that this fact somehow affects whether the charge should be regarded as unreasonable in amount.

224. There is also, either combined with, or as an alternative, a complaint that reasonableness of amount should be judged in the context of the importance of “mounting costs against the TDT”. I expressly held in my 23<sup>rd</sup> April judgment that this could only, if at all (and it would be fact specific) be a consideration at the time when I&B were still in office as Trustees of the TDT, because after their removal, they owed no duty to the TDT to confine their expenditure in connection with the trust to amounts which it might be reasonable for the TDT to afford (see [253]). Yet this point appears in very many objections raised with regard to expenditure incurred after 2<sup>nd</sup> July 2010.
225. These are both points which I have expressly considered and ruled against as being possible grounds for “reasonableness” objections at this relevant time, and that is a decision which has also been upheld on appeal. The fact, therefore, that it is demonstrable that certain of F&B’s objections are misfounded and/or have not been formulated, or revisited, in the light of my previous rulings, means that I feel that I can make no assumption that any objection has been responsibly vetted for validity in accordance with the guiding principles which I said should be applied on any Reinstatement Application which F&B might think fit to make.

**(ii) Insufficient Particularity**

226. The objection of “insufficient particularity” appears in many different phrasings within this suite of objections. Although there is a spectrum, it is convenient to identify two general forms at the extremes.
227. The first is a bare assertion that a particular charge is unreasonable (usually “*patently*” unreasonable) because of the amount of time charged without (allegedly) sufficient information connecting it with either the litigation matter or indeed with the TDT, and it is “*therefore*” unreasonable in amount and should be reduced by a stated percentage or fraction. (I observe that reference to “connection with the TDT” is inappropriate in an objection supposedly dealing with unreasonableness of amount, as it is a matter going to allocation. Once again, this demonstrates a lack of either discipline or understanding in the formulation of its objections by F&B.) An example is line 87.
228. The second (a general random example is line 369) contains very much more detailed and discursive criticisms, usually first alleging that the time charge is again, “*patently*” or “*clearly*” unreasonable, with a more elaborate list of factors. The first is, naturally, a critical reference to the stated time spent, either by an individual or, in the group of charge cases, by the several fee-earners alleged to be engaged on the same relevant task such that their charges must be viewed as linked. Occasionally the work is said to be of “*wasteful and unnecessary nature*” (eg line 511, regarding Macfarlanes attending the Guernsey 1 trial). Sometimes the objection is raised that the work is that of a partner, or that the level of seniority of the fee-earner is not shown to be justified because others of lesser charge out rates either were doing, or could have done, the work (eg line 207, 368). The objection is then most commonly phrased also along the lines that the time and charge are unreasonable in amount given the “*lack of clear contextual information*” which clarifies the nature and content of the matter and how the charge is reasonably incurred, or connected with the TDT, and/or its “*duplicative nature (on top of other similar charges by this [lawyer][paralegal] and other lawyers in respect of the same [matter])*”. The stated suite of criticisms is then submitted to justify the proposition that a “*reasonable*” charge would be only a particular percentage or fraction.
229. The cited fractions vary, as far as I can see, from a minimum of 12.5% of the claimed charge to a maximum of one half, with the most usual range being between 20% and 40%.
230. Advocate Wessels’ argument was, essentially, that where the objection rests, in total or in part, on an assertion that the charge is unreasonable in amount simply *because* (however expressed) there is insufficient detail of the nature of the work being charged for in the narrative relating to it on the relevant invoice, it is just incompetent, because it is merely a re-run of the form of objection which I have previously disallowed. As such he submits that it should not be allowed to be reinstated,

either for being, quite simply, abusive, or, and in any event, on merits grounds, because it is insufficient to overcome the threshold test for such an objection which, in this case, *is* subject to the *Alhamrani* threshold test.

231. Advocate Robison’s response to this was to invoke his principal theme with regard to supporting F&B’s objections under this “unreasonable in amount” heading. He came to refer to this as the “tipping point” argument. It was, in effect, that it was not reasonable to review his arguments on the basis of individual charges, because one must have regard to relevant context, which included other related or linked charges. Whilst an individual charge might appear possibly not unreasonable in isolation, when one considered the aggregate of work and charges rendered by an individual fee earner for a particular task on the Invoice in question, and then also on (possibly) other invoices for adjacent time periods, and then also in conjunction with charges made by other fee earners on the subject invoice, and then also, possibly, under invoices for adjacent time periods, one arrived at a “tipping point” at which the totality of the work, the time and the charge became plainly excessive and unreasonable, viewed by the proper standards of a reasonable litigant. One must therefore have regard to such charges in this context, and consider the reasonableness of their amount in the round.
232. It does not seem to me, though, that Advocate Robison’s argument really meets the point. To sustain an objection on the grounds that some work which, *ex hypothesi*, it was reasonable to have done has, without any doubt, been the subject of excessive charges and should have been obtained for a lesser sum, in circumstances where the charge has been paid by a litigant whose conduct of the action has (I am satisfied) fallen within the normal range of what would be expected in applying a reasonable and responsible attitude to one’s own costs of conducting important, heavy, complex and high value litigation, F&B will (I paraphrase) have to stand a fair chance of showing that the expenditure in question was egregiously excessive. In the 23rd April Judgment I used the phrase “undeniably profligate”, and this still seems to me to be apt. The absence of detail in the narrative attached to the charge is of no actual relevance to this point, as the best it can do is to raise a possible doubt, and this is insufficient. In my judgment, if F&B have any real prospect of proving their necessary case, then the foundation of this will be sufficiently apparent at the level of the evidence currently before the court, interpreted in the known context of the litigation background.
233. Indeed, where F&B’s objections do set out the kind of detail which they suggest is absent and justifies a consequent reduction in the amount to be awarded, it is apparent that this goes far beyond what it would be realistic to expect to find on bills rendered in the situation in which they were rendered here. Detail about the “complexity” of the issues behind any particular task – one of the matters of frequent complaint here - would not be set out on a bill to a client; the client would either know, or leave it to the lawyer. This kind of objection of lack of detail might be material, and indeed would probably be effective, in the context of a taxation of costs under court order, (that is why costs draftsmen get employed) but that is not the exercise here. Obviously, it could also be material if I&B were an accounting party in respect of this expenditure, but they are not. F&B are simply, in effect, arguing that I&B must justify the level of their expenditure in the degree of detail which satisfies F&B that they cannot possibly object to it, when the burden of such proof is not on I&B, and when the degree of detail sought is not, on any basis, what they are obliged to produce.
234. I therefore accept Advocate Wessels’ arguments as to the lack of merit of any objection in terms of mere “insufficient particularity”, that this objection is simply a repetition of the general “insufficient particularity” arguments which I have previously disallowed, and that advancing it, certainly as the sole objection to a charge, is virtually abusive. Therefore, in respect of all the objections where this is the only stated basis for the objection itself, that objection will not be permitted to be advanced.
235. As a matter of logic, I do not consider that the assertion of lack of detail adds anything to any of the matters of more specific substance which might be found in any more lengthily formulated

objection. I would therefore disallow its separate effect in regard to any such individual objection as identified on the schedule, although I accept that it remains as context for the other, more specific, objections.

236. The effect of the foregoing is that in respect of all the grounds of objection coloured into Advocate Wessels' second column of response to F&B's "Unreasonable in amount" schedule, that objection must be removed, and one is left to consider only the objections as to which the first column, headed "Resource/time spent" is found to apply.
237. Before moving on to this, though, I should add for completeness, that I have been somewhat troubled by the logic of an argument that *because* a charge is allegedly insufficiently particularised, it follows that one can properly fix the lower amount which would be a *reasonable* charge in respect of the work in question, which has been *ex hypothesi* reasonably done in principle. It seems to me that at that juncture, any such assertion must necessarily be totally arbitrary, because one is claiming that one does not know what the work done actually was, and my impression, looking at Advocate Robison's Schedule, is that they are indeed so. I did ask him, at the hearing to explain to me how he had arrived at the percentage which he was content to argue was a reasonable charge, but I did not get a clear or satisfactory reply. He resorted once again to his "tipping point" argument, and then moved on. I have formed the distinct impression that the fractions or percentages suggested are, indeed, largely arbitrary.
238. However, I do not think that that is a sufficient reason on its own to disallow such objections, and I do not do so on that basis. Given that the threshold which F&B must surmount in this instance is that of showing that they have a real (not just fanciful) prospect of showing, beyond doubt at a final hearing, that the charge in question was unreasonable in amount, and that if they surmount that hurdle at this stage, appropriate directions for this issue to be determined would have to be given, which might possibly, therefore, involve the introduction of more evidence, it does not seem to me that the ultimate question would, in fact, then be tied to any assertion which F&B may have been required to make as to what a reasonable amount might be, at this mere initial stage. Since, however, I take the view that assertions of mere lack of particularity in the narrative supporting the costs claimed are just not competent to be admitted in, or to surmount the relevant threshold on, this application, that point does not require further consideration.

### (iii) Excessive Resource or Time Spent

239. I&B calculate that there remain 625 objections under this category. Advocate Wessels identifies some, but a minority, as being specifically aimed at a particular charge, such as line 6, where objection is taken to Ms Gray's attendance (8 hours) at an all-day meeting in Guernsey with Advocate Wessels in December 2009, to review documents was unreasonable in amount because she need not have attended because of the attendance of Mr Lavender, a Macfarlanes partner, who "*could have undertaken*" her tasks. It is argued that therefore the charge for her services should be reduced to 1/3. His second such example is at Line 98, where a 6 hr charge for "drafting a schedule of documents" in April 2010 is said to be *ipso facto* unreasonable in amount because of the time stated and the nature of the task, and that it should be reduced, again to 1/3.
240. However, he observes that most such objections are in fact very much more discursive and he suggests that three examples are each typical of three more general patterns of such objections. The first (Line 73) is an objection to the length of time spent, without "*clarifying details*" (apparently) to justify this, coupled with criticism of the involvement of a Macfarlanes partner/personnel at all, so as to show that such resource/personnel was at all merited. The objection in this case is said to justify reducing the charges claimed, for reasonableness, to 3/8. The second (Line 197) is an objection of a type noted above, citing the mantra of "*patently unreasonable*" time spent but in the context of considering "*mounting costs against the TDT assets*", with charges "*seemingly*" incurred without any reasonable restraints on work allocated to various lawyers, across the two firms, disclosing "*burgeoning fee charges*" and

*“non-existent evidence as to the checks taken to determine whether [there was] work allocation and work duplication and the steps taken and costs incurred were necessary, prudent proportionate, moderate and reasonable”*

so as, in this case, to demand a reduction in the charges claimed, for reasonableness, to 1/3. The third pattern (Line 622), here one of the “group objection” charges, again cites the “*patently unreasonable*” time (here, on three fee earners spending a total of 37 hours between them, reading and analysing the first instance judgment in Guernsey 1), and then criticises lack of contextual information regarding the length of the judgment and the complexity of issues it gave rise to, and how it “*relates to the G1 proceedings and [is] reasonably connected with the TDT*”, all allegedly justifying a reduction in the charges to 37.5%.

241. Advocate Wessels first notes the fact that all the “unreasonable in amount” objections are aimed at Macfarlanes’ charges and (eg at lines 119 – 128, 865/6 and line 946/7) at those of English Counsel. However, a generic objection to charges in respect of English solicitors and counsel has already been rejected previously, by me. In my 23<sup>rd</sup> April Judgment I specifically held that the employment of English solicitors and Counsel generally, ie even at the early stages of this litigation when it was in Guernsey, was eminently reasonable and justifiable both on account of the size and importance of the claim, and the complexity of the issues in the litigation, and in the context of the previous litigation history. Advocate Wessels implicitly invites me, therefore, to treat these objections as a means of circumventing that decision by resort to arguing that English lawyers’ particular charges – and in fact very many of them – can be argued to have been unreasonably incurred in amount so as to be heavily reduced, even if they cannot now be objected to *en bloc* in their entirety. In substance, therefore, this is an argument that this raft of “reasonableness” objections should be disallowed for being, in effect, an abuse.
242. However, he also submits that, even on the merits of these objections themselves, and when asking the pertinent question (which I have to keep repeating, laboriously is: do F&B, on the basis of the *prima facie* case they now make in these objections, stand any real (not merely fanciful) prospect of demonstrating that, without any doubt, the amount of these costs was unreasonably accepted by I&B as a hypothetical reasonable litigant in their position), the answer simply has to be that they do not stand any such prospect.
243. He reminds me of my previous impressionistic view that, given that I&B are entitled to a “full” indemnity for everything they have actually paid out, and since this could only be reduced on the basis of a finding that some charge was beyond doubt outside the range of what might be accepted as reasonable, any cutting down of their actual expenditure was only likely to be minimal, and possibly even effectively (though I did not lay this down as a limitation) where there could be seen to have been some mistake (see [380]).
244. Advocate Robison’s response to this argument was to repeat, once again, his tipping point argument and to invite my attention, albeit by now in his reply skeleton, to about ten sets of examples of charges for (he suggested) the same task (eg, five charges totaling 31.1 hour, for “Reviewing documents in Autonomy System” in May 2010; 4 charges for Document Reading by N Bell in February 2010), to support his argument that there was, patently, good *prima facie* evidence to show beyond doubt (therefore), that work had been unnecessarily and unreasonably duplicated, or “excessively lawyered”.

## **Decision**

245. The objections now left are those that the charges in question are unreasonable for involving excessive use of resource or of time. I am not going to allow them to go forward.
246. First, I have frequently found that I just do not accept the basic premise, often advanced, that the time claimed to have been spent is excessive for the particular task listed. An objection made at

line 375 to a charge by Mr Buswell (who was preparing Lydia Bleasedale's witness statement) for a 1-hour telephone call with Counsel, does not seem "*patently unreasonable*", even without any detail of the discussion, the purpose of which being pretty obvious. F&B merely assert that it is. The suggestion that it is patently unreasonable to spend "8.9 hours working on witness statement" on one day in January 2012 (line 335), with witness statements due for exchange at the end of March 2012 in Guernsey 1, also strikes me as without the necessary foundation. There are many other such examples.

247. I accept that where the individual charge is criticised, this may be subject to Advocate Robison's "tipping point" argument that in reviewing a reasonable amount of work and therefore a reasonable charge, one must have regard to a pool of charges on the same matter, in order to form a fair view of whether such total amount was "excessive". First, however, the particular pool of such charges for global consideration must then be identified. Whilst this appears to have been done in relation to the later "group" objections in the Schedule (see [213]), it has not been done in relation to earlier ones; there is simply a wholly vague and general reference to the involvement of "other lawyers" on the same matter. If a point about excessive work on a particular matter is to be assessed by reference to several charges, then it is for F&B to identify the relevant group, to enable them to make their argument. It is not for the court to do so, and it is insufficient, in any event, just to make an assertion that there were other such charges or lawyers also involved in the task as a foundation for successfully challenging the one particular charge.
248. Despite this, I did consider the context of an example of individual objections of this type, where association with other lawyers was mentioned as part of the objection, to evaluate this kind of submission. I chose the objections to charges for proofing Mrs Bleasedale, which are numerous made between lines 361 and 448 in the Schedule). These are charges for the work of Mr Buswell, Mr Munk, and Ms Horne, and latterly Mr Day, for time taken on various aspects of this task, in March 2012. The bulk of such charges are early on; at later times they overlap with work on proofing also Mr Robert Clifford. The involvement of Mr Day, the most senior lawyer concerned, was relatively small and mainly on reviewing matters, towards the end, as one would expect. I note that there is no objection to the charging rates being applied, only to the amount of work done and charged for.
249. In relation to individual charges for such proofing work, there is a general objection to any time charge by anyone in excess of about 4 hours, that it is unreasonable in amount "*owing to its extraordinary length*". However, proofing is a laborious process, and I do not think it would be extraordinary or unusual to find those involved spending very long sessions even of 8 or 9 hours, as sometimes charged here, in doing it, especially under trial timetable pressures. The remainder of the general form of objection, stripped of the irrelevant allusions, such as to lack of detail, lack of identifying the connection with Guernsey 1 or the TDT, demonstrating the importance of the matter and costs apparently being incurred without restraint, then generally comes down to the fact that there were other lawyers also involved. As this is hardly surprising, it lacks substance on its face. However, on reviewing the various associated charges and time apparently spent on this exercise for myself, I did not gain the impression of any remarkably great amount of time being spent on this important task, as a matter of what one might normally expect.
250. As another, random, example from the pre-grouped section I considered lines 796 – 837. These relate to charges helpfully grouped as being in relation to the Guernsey 1 appeal. That took place on 16<sup>th</sup> – 19<sup>th</sup> February 2015. There are 42 individual charges objected to, totaling £24,783.74. Whilst the subject of some are not particularly clear to me, (some relate to an involvement with "Louw Rabie", a point which clearly raised itself as relevant shortly before the appeal hearing), they include costs relating to making notes at the hearing itself. Although the majority of charges on this invoice (of 30<sup>th</sup> April 2015) are objected to, the rationale for objecting to particular charges as being unreasonable in amount, but not to others is not immediately apparent. Notably, the attendance of Mr Pintus of Macfarlanes on the whole of the first day of the appeal hearing is

apparently not objected to as being amongst costs collectively unreasonable in amount, but his subsequent attendance does seem to be.

251. To give the flavour of many objections in the schedule, the objection made that this selected group of charges is unreasonable in amount, and should only be allowed at 37.5% of the total, is in the following terms:

*“These multiple charges are clearly unreasonable and, therefore, unreasonable in amount, having regard to: their repetitive, sometimes duplicative, and multiple nature (cumulative with other charges which other fee-earners in Mourant/Macfarlanes and counsel spent on the same workstream/category); time expended on cost items, and the involvement of many fee earners across the firm on the G1 appeal matters. F&B's complaints are also in relation to the lack of clarifying details as to - the nature, purpose and scope of the items outlined; their complexity; the nature of work allocation, especially how fee earners are allocated to work on complex litigation (what is their experience and level of knowledge/expertise? etc.); the length of time spent on each item if each is part of a whole list of other charged items for the day (it is not for F&B to guess how much time was spent on the relevant cost item where none have been provided amongst a whole list of items which make up the charge); how they are linked specifically to the G1 proceeding and reasonably connected with the TDT. It is noted that I&B, by this time, were not acting qua trustee. It is submitted that the time spent and, consequently, the fees charged, by a partner are not prudent given that a lower fee rate fee-earner could have undertaken the same work at a fractionally lower cost. It is submitted that the multiplicity of fee earners across this category, across both firms, duplication of work and expenditure of excessive hours on the same items is imprudent, disproportional, immoderate and unreasonable. Given those complaints, it is submitted the charged amounts are unreasonable and a reasonable amount in the circumstances, it is suggested, should be 37.5%.*

252. Having looked at the charges in question, as set out on the Invoice, and having regard to the terms of this objection which owe more to rhetoric than reason, I simply do not find these to justify any assertion that they could come to be viewed as undeniably profligate or unreasonably excessive in amount, which is the test with which I am concerned.

253. In summary, I do not regard the assertion of duplication or of other lawyers' also being involved, made without any more specific basis of fact, as being any evidence sufficient to suggest that there was excessive time spent or personnel involved, (even bearing in mind that this was the English lawyer end of the operation) and certainly not undoubtedly so. The mere employment of several persons on the same task is obviously not in itself evidence of “excessive lawyering”. There can be many reasons for doing this, such as the breadth of the task, the current availability of particular persons at different times, the necessary involvement of personnel at different levels of seniority, the need for more than one person to be acquainted with the matter to provide cover for absences and the obvious point that in an extremely heavy matter two heads may very reasonably be seen as being better than one. Employing more than one person on a matter is obviously going to cause a “duplication” of their time spent reading in, but that is an inevitable consequence of the (still reasonable) fact of deploying more personnel. Depending on the degree of acquaintance with the detail of the matter which is required to enable the persons in question to do their job properly, that apparent “duplication” can perfectly reasonably be quite extensive, in time terms.

254. The same point applies to the employment of counsel. I do not regard the fact, for example, of both Stephen Smith QC and James Brightwell having been engaged to give advice (see lines 119 – 128) as being remotely suggestive of profligate over-lawyering – and still less as any logical justification for a universal arbitrary reduction in all their billed fees to 1/3, as is claimed.

255. In his oral reply, Advocate Robison homed in particularly on charges in December 2013 for Mr Lavender and others (especially Ms Ganesarajah) for reading and analysing the first instance judgment in Guernsey 1 (clearly from a pre-release as well as thereafter, though it may and probably did extend also to a judgment of the Court of Appeal ) for a total of 37 hours (lines 622-629), and Mr Lavender making two trips to Guernsey for the judgment hand down and subsequently for day long meetings for a total of 50.5 hours, (lines 616 – 620). Interspersed with this he also attended “various” other meetings and calls (30 hours) (lines 637 – 642), as well as Mr Day spending a total of 21.3 hours on reviewing skeletons (lines 631 to 63) obviously, from their timing with regard to submissions on consequential orders and applications in Guernsey 1. Advocate Robison invited me to consider these in the context of the work being done and charged for at the same time by other lawyers at Mourant (which I have looked through), pointing out the number of personnel involved in the local firm, as well as two counsel, and then the number of personnel also involved at Macfarlanes. He submitted that the Macfarlanes involvement was clearly unnecessary and over-resourcing as to both the number of persons and what they were doing, being particularly exercised at an entry for Mr Lavender apparently spending 8 hours reading the judgment. He submitted that all this Macfarlanes involvement was patently unreasonable in amount, to the extent of between 87.5% (Guernsey trips) and 62.5% (reading judgment) of the work charged.
256. I accept that there was a lot of work being done at the time, by both firms of lawyers, but in the context of the importance of the matter, the complexity of the issues (this was three way, not just two way, litigation), the consternation which the initial, significantly adverse, judgment must have caused, and the need to act quickly to take protective steps against its immediate effects, this is not surprising. It has to be accepted (because I have so found) that it was reasonable to employ the services of an English team of lawyers on a case such as this. Once that is accepted, then it seems to me that the range of assistance which it would be reasonable to accept and pay for must be very wide, as it will generally be governed by what the lawyers advise the client is desirable. The client is entitled, and is quite reasonable, in taking such express or implied advice at face value, unless it is really outstandingly excessive. This case was certainly extensively resourced, but it needed to be. It might have been possible to manage it on less work and resources, but that does not mean it was outside the range of what is reasonable, to deploy extensive resources, not least because one may not know, except with the benefit of hindsight, where particular work or resources might not have been vital. Looking at the work complained about and with a general knowledge of the requirements of heavy commercial litigation and the usual deployment of legal resources to run it, I am quite unable to say that this cohort of charges has any immediate appearance of potentially falling outside the range of what I would expect to encounter on a case like this, so as to enable a complaint about the amount of the charged costs to surmount the *Alhamrani* threshold test.
257. As mentioned, Advocate Robison did, in his skeleton argument (Paragraphs 37 – 39) list about ten groups of charges, which he cited as examples of charges which would be sufficiently excessive when viewed together, on the basis of his “tipping point” argument, to support a claim that there had been excessive resources deployed, or time spent. I was left to look at most of these on my own, and I have done so, to see if, with the point now being focused on, they might possibly support F&B’s right to object to reimbursing I&B these charges, on the grounds that they were unreasonable in amount. I would have assumed that these would have been amongst the examples he regarded as strongest. However, it seemed to me that they were of no more weight than the matters I had otherwise looked at.
258. The first group (Paragraph 37) related five charges said to be for “Reviewing Documents in Autonomy system), comprising 31.1 hours spend in May 2010 (with Guernsey 1 having commenced two months previously). However, this description is slightly misleading as they included a session of training, and looking at hard-copy company documents and were also incurred by two people. The total does not seem to me to stand out as potentially unreasonable.

259. The second relates to four charges by Mr N Pell for “document review” in January 2010. There is no explanation as to why the hours involved might be thought to be unreasonably excessive; the submission seems simply to relate to the fact that there were four charges for such work on separate days. I do not find that to be remarkable.
260. The third group relates to eight charges in February 2010 mainly for “document reviews”, but by three persons (Ms Fuller, Mr Jacobs and again Mr Pell) but with a completely unrelated charge at line 53, relating to Mr Lavender, with an enigmatic narrative, but plainly related to “insts” which must mean (“Instructions”) and looks perfectly plausible. Why this is grouped with the other seven charges is not clear and, once again, the reasoning is not explained.
261. The fourth group looked slightly more interesting because it comprises three charges, on 1<sup>st</sup> and 4<sup>th</sup> October 2010, as to which it is said that “*Daniel Lavender and E Dixon were able to record a collective 32.5 billable hours in two days, 23.2 of which were on one day*”. This is indeed the case, but it is difficult to see what the connection is as to why this makes all these three charges, collectively, unreasonable in amount. Ms Dixon billed 9.5 billable hours on Friday 1<sup>st</sup> October, but compositely for a “*meeting with James Brightwell [counsel] Amendments to docs retained list, and calls with [Daniel Lavender] and [Jeremy Wessels].*” She also billed 13.5 hours on the following Monday, 4<sup>th</sup> October, for “*Preparation and review and amendments to docs retained, redacted and handed over*”). Mr Lavender billed 9.7 hours on 4<sup>th</sup> October 2010 for “*update call docs*” which may, and probably was, on the same topic. (I suspect this will have been to do with handing over trust documents from I&B to GTC. A lot was plainly happening on 4<sup>th</sup> October 2010, because both Mr Day and Mr Rose each billed around 14 hours of time with regard to this topic, although these are not, apparently, objected to – at least not under this heading.) I cannot, however, see what the particular link is that makes these three charges together supposed to be, arguably, clearly unreasonable in amount, even, and perhaps even especially, in context.
262. The fifth, sixth and seventh examples cited by Advocate Robison were pairs of objections, but on examining these, I actually had difficulty seeing how they could be reasonably linked as being work on the “same task” which is the argument supposedly under illustration.
263. His final example, at Paragraph 39, sought to refute an argument from Advocate Wessels on the grounds that Advocate Wessels’ refutation – of an objection to a 1-hour charge of Mr Lavender, in relation to a “strategy paper” on 12<sup>th</sup> January 2010 – had been taken in isolation. He submitted that it ought to be considered in connection with five other charges, making a total of £6,736.10 for the “same task”. The first of these was, indeed a previous 3.8-hour charge of Mr Lavender the previous day regarding preparing a strategy paper. However the remaining four were, for Mr Lavender, of 3.4 hours, on 1st February 2011 for “*ins[urance] call strategy paper corres[pondence]*”, and then in June 2011, for Mr Donnelly (2<sup>nd</sup> June, 1.1 hours: “*Reading draft strategy paper, marking up same*”, Mr Day (3<sup>rd</sup> June: 5.2 hours *Reviewing an amending strategy paper*” and Mr Lavender again, but on 8<sup>th</sup> June: 8.4 hours, “*Prep for and attendance at strategy meeting*”). I do not see how any of the last four, but in particular the last three, can be classed as being “on the same task” as the charge under examination so as even to begin to provide a foundation for Advocate Robison’s submission that they can and should all be considered as a group for the purpose of assessing an “undoubtedly unreasonable in amount” submission. Moreover, the quantum of suggested reduction is different in respect of some of these items, which suggests that the prospect of evaluating them as a group had not been considered before.
264. I have gone into what might appear to be a surprising level of detail in reviewing some of F&B’s postulated objections for a particular reason, and this is to illustrate what I consider to be the lack of quality in the objections which have been raised by F&B. I have directly seen, in very many places, that proper regard has not been paid to the criteria which I set down as being those which should be applied in advancing any objections on grounds of unreasonableness of legal costs, which F&B might think it right to make under the permission given to them. I have found so many instances of this in the objections which I have considered, that I feel entirely justified in

concluding that they are representative of the general quality, even of the objections which I have not considered. I would certainly have expected Advocate Robison to advance his best examples, and it is, of course, for him to convince me that there is merit in any proposed objection(s).

265. Had I been presented with a relatively short and specific list of specifically targeted objections, which showed, by their nature and by the matters they referred to, that regard had been had to the necessary egregious appearance of unreasonableness, and the objections were reasonably formulated with that requirement in mind, then I would have been able to consider them, individually on their merits. Indeed, charges such as that for a 13 hour telephone conversation (which was previously pointed out to me, and which I felt could plainly not be treated as *prima facie* reasonably incurred given the obvious likelihood of its impossibility) might have been found, and could have come within this category. However, this simply has not happened. It is not for me to trawl among the hundreds or thousands of objections to try to identify any which might have met the standard for inclusion in such a list. Equally, the fact that so many of the objections actually made are, in my view, clearly without foundation (having either still relied on wrong tests, or taken an unrealistic approach to what the charges referred to must, as a matter of common sense, have been broadly about), means that I could not even take the view that a sample which had merit would justify allowing others to proceed also, even if I had found any such sample – which I have not.
266. The more I have looked at this Schedule, the more firm I have become in my view that it is generally without merit, and that Advocate Wessels is correct when he submits that this has turned into an attempt to undermine my previous decision that it was not unreasonable for I&B to employ English counsel and solicitors on this litigation. On any basis, they really amount to no more than an assertion that these charges were “too high”, which is just not sufficient to surmount the relevant threshold. As I am therefore unconvinced that any of these objections, even those which I may not have considered individually, could have sufficient merit to be allowed to be reinstated, I refuse to allow any to proceed.
267. My conclusion, therefore, is that I should simply refuse to allow any of these “unreasonable in amount” objections to proceed, as they simply do not come close to passing the appropriate threshold test. Against the background that the employment of English solicitors and English counsel, in particular leading counsel, to advise and assist in a matter as heavy and complex as this litigation undoubtedly was, was reasonable, the charges which are revealed and claimed in the invoices here are, in my judgment, *prima facie* sufficiently within the range of what a litigant in I&B’s situation might then reasonably accept to pay, even having regard to the involvement of Mourant itself in Guernsey.
268. For completeness, I should just mention that I have previously noted the distinction between the matters affecting the issue of reasonableness which would affect I&B’s duty before 2<sup>nd</sup> July 2010, as contrasted with those after 2<sup>nd</sup> July 2010, when they were removed as Trustees. Before that date they would indeed have had a duty to have appropriate regard to the interests and financial position of the Trust when considering the proper expenditure of its funds, whether on the legal proceedings in which it was involved, or on reasonably taking advice as to their (I&B’s) own position.
269. This was not a point which figured at all in argument before me, although it was a point referred to in the text of various objections. These were mostly with regard to costs incurred after 2<sup>nd</sup> July 2010, though, and so the point was irrelevant and should not have been made at all. However, the same mantra objection was also made in respect of one set of charges incurred before that time, namely the disbursements for Counsels’ fees between November 2009 and July 2010, at lines 119 - 128 of the Schedule). However, there are no specific objections made to the merits of individual fees, the thrust of the objection simply being that the charges are “too high”. They do not strike me, from the information, as being likely to be found to be so, in all the circumstances, and even in the context of considering them on the basis that they would clearly and knowingly be

chargeable to the TDT as “trustee costs”. As no actual argument as to this point was made to me, I do not consider it further.

### **(3) Remuneration claim**

270. I in fact intimated my decision on this point at the end of the hearing.

271. I&B has claimed for a total of £518,837 odd in respect of unpaid remuneration. This was in respect of 21 invoices dated between 1<sup>st</sup> October 2009 and 18<sup>th</sup> October 2010, although, obviously, in respect of remuneration earned before 2<sup>nd</sup> July 2010 (subject to any claim arising in the circumstances of their removal). Having accepted that a claim for trustee remuneration would *prima facie* be a good further claim in principle, I heard no argument about any objections to I&B’s claimed entitlement at the previous hearing and stood this claim over for further argument (see [395] – [399]).

272. Advocate Wessels sought to persuade me that I had in effect already decided that there should be judgment for this sum included within I&B’s claim, when I decided, in December 2020 (and the Court of Appeal subsequently agreed) that a trustee’s claim for remuneration was accorded the same priority as regards the assets of the trust as the trustee’s claim for indemnity as to his costs and expenses.

273. I do not accept that argument. That decision was solely as to priorities and it was given on the assumption that a valid claim for remuneration was in existence.

274. Advocate Robison, however, has, at this hearing, taken the point that I&B’s claim for remuneration relates to invoices rendered as long ago as 2010, and that on that basis the claim is now prescribed.

275. Advocate Wessels, apart from objecting that this objection or defence had never been raised before skeleton arguments in this hearing, urged that this was not the case. He suggested that a trustee’s claim for remuneration could not be said to be contractual; it would be based on the terms of the trust deed, and there was therefore no obvious contractual defendant to any claim. He submitted that phrases in the authorities and textbooks acknowledged the status of a trustee remuneration claim as something akin to, but less than, a beneficial interest in the trust fund.

276. I concluded that this was not a point that I could, let alone should decide in Advocate Wessels’ favour as a matter of summary judgment. It strikes me as being far too potentially refined to be appropriately decided on this basis.

277. The text books (see eg. Lewin on *Trusts*, 20<sup>th</sup> Ed at 20-21) say that the nature of a trustee’s claim for remuneration is “not clear”, which certainly does not suggest that it is a summary judgment point. An untutored, but instinctive, feeling that the right to remuneration must be in the nature of a contractual right, being the engagement of a professional person for professional services, may turn out to be incorrect on further examination, but that requires a proper hearing and argument. Even if the claim is correctly analysed as contractual or quasi-contractual, there would very likely then be issues of *empêchement* which would require to be decided.

278. All this points to this particular issue not being a matter which is appropriate for summary judgment, and this claim will have to proceed to a hearing.

### **(4) Interim Payment**

279. Lastly, I come to I&B’s application for an interim payment to be made to them on account of their claim against the assets of the TDT. More accurately, this is a claim against what has been called the Preserved Sum. It is in the hands of the Joint Receivers. It was the product of an application made in 2019 to enable the TDT to continue to function, insofar as it could (and particularly with

regard to administering the RCO, which was the London home of Mr Robert Tchenguiz, the principal beneficiary of the TDT and his family) whilst at the same time preserving a cash fund which would be sufficient to meet any claims which would potentially rank in priority to the claims of F&B as the present Trustees of the TDT. These were the costs of the Joint Receivers, the claims of higher-ranking creditors (whether the two former Trustees or those claiming potentially through subrogation to their respective liens over the TDT assets), and a further allowance for the predicted future costs of those involved in the proceedings to determine the correct distribution of the assets of the TDT. The Preserved Sum was achieved by F&B raising a sufficient capital sum to be held separately on account of such liabilities, so that the RCO could be returned to the TDT trustees. The Preserved Sum itself was originally around £41,500,000, distributed between five accounts, to allow for idiosyncratic points in respect of some smaller claims, but this sum in the Joint Receivers' hands has subsequently become adjusted downwards, in practice, to about £36.7Mn. The precise sum does not matter, but this gives an indication of the magnitude of sums involved.

280. The basis of I&B's claim to an interim payment was to compare the effects of the competing possible principles of distribution. It had been held by me, in December 2019 that the correct principle for the distribution of the assets, if there were insufficient to meet all claims upon them, was that the groups of claims made by or through the rights of successive trustees ranked, as such groups, in order of the time of appointment of such successive trustees. The competing argument was that all claims made by or through all trustees should be satisfied *pari passu*. My decision that the former principle was correct (*ITG Ltd and another v Glenalla Properties Ltd & Ors*: (2019) Royal Court [2019] GRC 064) was affirmed in the Court of Appeal, in August 2020 (*ITG Limited and Ors v Glenalla Properties Ltd & Ors* Court of Appeal [2020] GCA 042). However, F&B had appealed this decision to the Judicial Committee of the Privy Council, in January 2021, and whilst the case had been heard in June 2021, their advice to Her Majesty had not yet been given.

281. I&B's argument was that if the correct principle was that of priority in order of time, then, as the first Trustees but subject to the Joint Receivers' higher-ranking claim to costs, I&B would be entitled to recover all of their claim up to exhaustion of the available assets (which would not happen). If the correct principle were that of *pari passu* distribution in regard to all claims made, then I&B would recover an appropriate dividend on their claim. The former award would always exceed the latter. I&B submitted that the court could confidently, therefore, award an interim payment of something approaching the latter sum as that could not be an overpayment.

282. Leaving aside the intricacies of precise figures and arithmetic for the moment, the formula of I&B's calculation was therefore, broadly, to extract from the Preserved Sum the sum set aside for the Joint Receivers' costs (£2Mn), and then to take their own total claim as a percentage of all the claims made against the TDT in the Proofs which had been submitted, to apply this percentage to the remaining Preserved Sum, and to request an interim payment of this amount, less an amount of £1,615,650.89 already paid out to them previously in respect of the "Talbot" costs of Guernsey 2. In Advocate Wessels' Skeleton Argument, this produced a claimed figure for an Interim Payment of £12,755,430.96, but this was on the assumption that all claimants' proofs were admitted in their full values. (This sum needs to be considered against a figure claimed, in I&B's proof, as at 23 April 2020, of £27,522,332.67)

283. In his Reply Skeleton, Advocate Robison disputed several of the assumptions which had been made in I&B's calculation. The details do not matter but this produced a comparable calculation on his competing assumptions of only about £2.68Mn. He argued, however, that because of the uncertainty as to the outstanding outcome of the Privy Council appeal, and in the light of one further matter, the Court should not make any direction for payment of any sum to I&B as an interim payment, but should await that outcome.

284. Before referring to the further matter, I record that Advocate Wessels, at the hearing, revised his previous calculations to take note of Advocate Robison's criticisms and to assume (as he explained) a "very worst case" scenario for I&B in the case of an order for *pari passu* distribution.

Taking figures all at 23 April 2020, he accepted the reduced value of the Preserved Sum (from the Schedule to an agreed Court Order in November 2019). He reduced I&B's presumed claim so as to remove the value of all charges subject to already accepted or still disputed objections from F&B, making £21,350,981.19. He then reduced this claim further to take out the costs of these proceedings themselves and of other claims/actions, which might possibly have to be determined through other routes and might be downgraded. This brought the figure down to £16,542,402,81. He then used this figure in his calculation of a dividend payment, but allowing all the Proof values of all other parties to be counted at their full value. This produced a claimed interim payment figure, after deducting the payment I&B had already received under LB Talbot's Order in respect of their Guernsey 2 costs, of £6,558,430.06.

285. I now turn to the particular matter in contention, which I will call the “**RT/TDAT claims**”. They are two claims of Mr Tchenguiz personally and of I&B as trustees of the TDAT each of £79,551,000 (approximately), which they each claim against the assets of the TDT through subrogation to the lien of F&B as the current trustees of the TDT.
286. They have emerged before. They first appeared as one part of the subject of an application of 4<sup>th</sup> February 2020 made by F&B as Trustees of the TDT, at a “pre-trial review” type hearing in April 2020 for permission to amend and serve their proof of debt to add these claims, treating them, therefore, as claims of outside creditors for which F&B were liable as trustees of the TDT. The claims themselves are each for one-third of the amount of the judgment debt which, in Guernsey 1, the BVI Companies had been awarded against the assets of the TDT (but with I& B incurring no personal liability), a total of some £238 Mn. That judgment debt rendered the TDT potentially “insolvent”, which is what was the trigger for these present proceedings.
287. In March 2019, F&B had obtained an assignment of this judgment debt from the liquidators of the BVI companies, to themselves as trustees of the TDT. Plainly, a debt of this magnitude would effectively swamp all other liabilities of the TDT in any distribution on *pari passu* principles. However, in a decision handed down on 9<sup>th</sup> December 2019, I ruled not only that the correct principle of distribution of trust assets as regards the satisfaction of claims made by or through successive trustees was not *pari passu* but “first in time” according to the dates of appointment of such successive trustees (the “Priorities Decision”), but also that the effect of the assignment had been to extinguish the judgment debt itself (the “Assignment Decision”). Both these decisions were appealed by F&B, but were upheld in the Court of Appeal in a judgment dated 21 August 2020, handed down on 16 September 2020. By a Notice of Appeal served on 18 December 2020 and filed on 6 January 2021, F&B have appealed the Priorities Decision, (but not, I understand, the Assignment Decision) to the Judicial Committee of the Privy Council, it having been determined that they could appeal as of right.
288. Since it seemed to me, in 2019, that F&B might have advanced their proof of debt on a false assumption as to the principles of distribution of the TDT assets, I indicated that I would entertain any application to amend their proof which they might wish, on reflection, to make. The 4<sup>th</sup> February 2020 application to amend was the result.
289. Having advanced their argument during the hearing of the Assignment Issue on the basis that the Assignment had been to F&B as Trustees of the TDT with no qualification, (which accorded with the documentary evidence produced) F&B now sought to advance the two claims of Mr Tchenguiz and the TDAT mentioned above, on the basis that they were each (together with the TDT itself, although nothing was claimed in this respect) entitled to the benefit of one-third of the BVI Companies' debt, or its value. The Assignment had been made and taken in the context of a global settlement of claims and cross claims between many parties, including the BVI Companies, Kaupthing Bank HF, F&B in both capacities, Mr Tchenguiz personally, and possibly others. Mr Tchenguiz and the TDAT had, it was asserted, given up their own claims (I had the impression these were for costs orders, rather than substantive law claims, but it does not matter) against other parties – even, I think, including against the BVI companies themselves – and it was argued that

as a result of this, either impliedly as a matter of operation of law, or as a matter of agreement between Mr Tchenguiz and F&B (as both the TDAT trustees and the TDT Trustees), the benefit of the BVI companies' debt was, or was to be treated as, held beneficially for Mr Tchenguiz, the TDT Trustees and the TDAT trustees, in equal shares. Hence the claim to one-third of the value of that debt was being made by those two outside creditor parties against F&B as the TDT Trustees and the TDT assets. There were additional smaller claims also advanced, the first being for the amount spent by Mr Tchenguiz and the TDAT in costs on proceedings which were withdrawn by them as part of the global settlement and were therefore said to be wasted; this was said to be an alternative claim to the first one. The other claim was a claim for the costs incurred by the TDT, the TDAT and Mr Tchenguiz in obtaining finance to enable them to acquire the benefit of (inter alia) the Assignment. These latter two purported claims have not assumed any subsequent role.

290. I refused to allow F&B to make these amendments for three reasons. The first was that the first (main) pair of claims, in particular, although being advanced by F&B as a claimed amendment to their proof, were wholly inconsistent with the case which had previously been advanced by F&B as to the actual and intended effect of the documents when arguing the issue on the Assignment Decision. The second was that, in any event, I could see no reasonably arguable basis for the alleged claims of Mr Tchenguiz and the TDAT against the TDT disclosed by the matters being advanced, and the third was that I was certainly not prepared to admit such claims to proof simply because F&B was (unsurprisingly) willing to accept them. I directed that in the circumstances the claimants themselves, ie the TDAT trustees and Mr Tchenguiz, would have to make their own application to justify the basis of any such claims against F&B and the TDT assets, and on an application where the merits could be properly argued and opposed, if appropriate, by those with an interest in doing so. However, I also indicated that, as the point would only have practical effect if the correct basis for distributing the assets was *pari passu*, and that could only occur if F&B's appeal (then only in the Court of Appeal) on that issue succeeded, such consideration could be left until after the result of the appeal was known.

291. However, my decision, handed down on 30<sup>th</sup> April 2020, was 20 months ago, and at that time, the process of finding any clear quantum of entitlement for I&B's claim had barely even begun. Whilst the issue could reasonably be viewed as academic then, with the situation moving on to the point where I&B can now make out a case for receiving some interim payment, it has ceased to be so.

292. What subsequently happened was that:

- on 20 June 2020, F&B applied to introduce fresh evidence into the appeal, regarding the RT/TDAT claims;
- on 23 July 2020, Mr Tchenguiz and F&B as trustees of the TDAT did make an application to this Court to be joined in these proceedings to rely themselves on the RT/TDAT claims;
- on 24 July 2020, F&B applied to introduce the same evidence as in the 23 July Application as fresh evidence in the appeal;
- on 29 July 2020, F&B and Mr Tchenguiz applied to be joined in the appeal proceedings in order to rely on the RT/TDAT claims.

293. On 16 September 2020, the Court of Appeal gave reasons for refusing all the above applications made to them, on the grounds that any application by Mr Tchenguiz and the TDAT trustees to rely on the RT/TDAT claims must be made to the Royal Court, and that the interests of Mr Tchenguiz and the TDAT trustees in the subject matter of the actual appeal were sufficiently represented by F&B on behalf of the TDT itself. Whilst criticising the fact of inconsistent sworn evidence now being advanced by F&B, the Court of Appeal did not have to make any actual decisions which were affected by this, and did not do so.

294. On 17 September 2020, Mr Tchenguiz and F&B as Trustees of the TDAT discontinued their application of 23 July 2020 to be joined in these proceedings in order to make out their supposedly arguable case for the validity of the RT/TDAT claims, and consented to pay indemnity costs in respect of it. This was in the face of applications by I&B to have the application listed for an immediate hearing.
295. On 22 January 2021, AFR on behalf of Mr Tchenguiz and F&B as the TDAT trustees stated that they still intended to file an application to be joined in these proceedings and to rely on the RT/TDAT claims, but, relying on my previous comment that this was not material unless and until the correct order of priorities was held to be *pari passu*, they would not intend to do so until after the determination of the appeal (now) to the Privy Council. Mourant, for I&B objected that this would now be an abuse of process. Neither party took any action before this court at that time.
296. In the meantime, the process of gradually identifying undisputed or indisputable costs and charges to which I&B, as a creditor, and potentially the priority creditor of the assets of the TDT, were entitled, continued, in particular with my judgment of 23<sup>rd</sup> April 2021.
297. The RD/TDAT claims were not raised in the arguments at this hearing until I&B sought to forestall a possible argument from F&B on their claim for interim payment, by asserting that the RT/TDAT claims, coupled with the continuing lack of resolution of F&B's final appeal on the Priorities Decision, could not be used as a factor to militate against any interim payment being made, in the light of the above history.
298. Unsurprisingly, however, F&B then did so. Advocate Robison argued, that I&B were well aware that the position of Mr Tchenguiz and themselves as trustees of the TDAT was that the RT/TDT claims would be brought if, but only if, their appeal to the Privy Council on the Priorities Issue were successful, relying on my previous comments as authority for this course. In consequence he argued that no interim payment to I&B could be appropriate.
299. Advocate Wessels submitted, as indicated, that I had previously held that the claims themselves were apparently unarguable on the basis on which they were advanced in April 2020 and no information supplied since then had effected any improvement. Mr Tchenguiz and F&B as trustees of the TDAT were given a second chance to make good their asserted claims on their own account, but they have not taken it, even though they once started to do so. Instead they withdrew, before they had to make out and support any legal argument. He submitted that I therefore can, and should, affirm my previous decision now and refuse to have any regard to those asserted claims as factors of any influence upon the consideration of whether I&B ought to have some interim payment.
300. I stated in the course of the hearing, that it seemed to me to be wrong that Mr Tchenguiz and F&B (with their TDAT trustee hat on) could simply block I&B's claim to an interim payment on the basis of a "worst case" minimum to which they really must be entitled even on a *pari passu* basis by asserting claims which I had already said appeared to be completely unarguable, without any attempt to show that their claims did, in fact, have some substance or merit. I had declined to direct them to do so in April 2020 because at that time I&B's claim was insufficiently defined so as to provide any basis for an interim payment, but matters had now changed, and the assertion of the existence of the RT/TDAT claims without any attempt to justify them *was* having a practical impact. Even with the decision of the Privy Council expected imminently (the appeal had been heard in June, and the decision must surely be given before long), I did not think it right to allow this situation to continue. I therefore ordered F&B – who were parties to the hearing before me, even if they might choose to instruct other Advocates in relation to advancing the RT/TDAT claims together with Mr Tchenguiz – themselves, and to convey the same to Mr Tchenguiz, that if they were indeed minded to pursue these claims at all, they must, within 7 days (of 18 November 2021, when I made that order) file such claim, together with a sufficient explanation of how the claim was composed, plainly with a view to my assessing whether it disclosed any reasonable claim or

cause of action. As stated above the issue had ceased to be a totally academic one, with the potential availability of a worthwhile interim payment to I&B having become appropriate.

301. What actually occurred was that, in fact on 25 November 2021 at 15.38, AFR filed an application on behalf of their clients to be joined in these proceedings for the purpose of deciding whether they should be permitted to rely on their respective proofs of debt, but this was together with an application to adjourn such application until after the conclusion of the appeal in the Privy Council, to be heard on the papers, supported by an affidavit which did not explain the basis or composition of the proof of debt at all, but simply recited the history of the matter from 9<sup>th</sup> December 2019 in great detail and concluded by questioning the utility of their having to do so before the decision of the Judicial Committee had been handed down, since that might make that claim academic.
302. On 9<sup>th</sup> December 2021, Mourant objected that the above was in blatant defiance of my order (as I think it was) and that accordingly, as I should now disregard and disallow the RT/TDAT claims as being unarguable, Mr Tchenguiz and the TDAT having had a long time, and a clear last chance, to try to justify the basis for their claim and not having done so, and I should in effect, treat such claims as struck out and disallowed.
303. On 16<sup>th</sup> December 2021, Advocate Richardson of AFR, on behalf of Mr Tchenguiz and F&B as trustees of the TDAT, submitted a skeleton argument, once again reiterating their grounds for seeking an adjournment of their application to be allowed to rely on their debts until after receipt of the decision of the Judicial Committee, but also, highly belatedly, condescending to set out a basis for their argument that these claims had sufficient potential validity that they could not simply be dismissed as unarguable.
304. By a letter dated 17<sup>th</sup> December 2021, Mourant noted the contents of this Skeleton Argument, and simply requested me to proceed to determine I&B's interim payment application without regard to these purported claims, or to list a hearing for the determination of that point as soon as possible. (It will be appreciated that since the end of the hearing on 18<sup>th</sup> November, I had been engaged in making my decisions and writing my judgment on the main matters above.)

## Decision

305. Whilst this is not quite the same situation as an interim payment being ordered in a hostile action, the principles must be analogous. I can, if I think fit, order an interim payment to be made out of the Preserved Sum in respect of a sum which it appears that the claiming party is sufficiently certainly going to recover out of that Preserved Sum, so as not to keep the party unreasonably out of his/its entitlement for any longer than necessary.
306. Leaving aside any possible impact from the RT/TDAT claims, I would broadly accept Advocate Wessels' "very worst case" scenario as indicating the order of a payment which I&B would undoubtedly recover out of the assets of the Preserved Sum, even on a *pari passu* principle of distribution. Advocate Robison raised one or two matters of adjustment for the impact of other or future costs, or the mechanism for "grossing up" payments already received in full but which would, on the *pari passu* hypothesis, have to be discounted which he said would still have to be taken into account. This may well be right and I would think it right to make an allowance for this. Since, however, Advocate Wessels' assessment has been made by taking just about every other competing item at the "worst case" for I&B, I think this kind of approach would do justice perfectly in the case; I would not think it necessary to withhold any interim payment at all. I would be minded, therefore, to make an award of £5 Million to I&B by way of interim payment, absent the consideration of the possible impact of the RT/TDAT claims.
307. This potential impact depends on two things. The first, of course, is the question whether the appeal to the Privy Council in respect of the correct distribution regime (first in time, as at present, or *pari passu* as the appeal contends for) will succeed. It seems to me that I must factor in the assumption

that it will succeed, although the prospect of its not succeeding provides a further safety valve against the possibility of my decision being over-generous to I&B.

308. The main factor for consideration, therefore, is whether in all the circumstances, I should treat the intimated RT/TDAT claims as having sufficient possible merit that they could turn out to be valid and sustainable, so that in the case of a *pari passu* distribution, they would adversely affect the amount which I&B could claim to recover. Advocate Wessels told me that if the RT/TDAT claims were factored into his “worst case” calculation at their respective £79.5Mn figures, they would reduce the potential recovery for I&B on this basis from his £6.5 Mn figure to £833,739.07, and he appeared to indicate that he would not have regarded the application as worth pursuing for only that amount.

309. I have come to the conclusion that I can and should disregard these claims on the grounds that they do not disclose the availability of any sufficiently reasonable claim or cause of action to justify according them any weight whatsoever at this stage.

310. In my judgment of 30<sup>th</sup> April 2020, I said, with regard to these claims:

*“39. As these claims are formulated in this case, I do not find they pass this “reasonably arguable” test, on their face.*

*40. First, as regards the claims to the two individual shares of the value of the BVI Companies’ debt allegedly held by RT and the TDAT, respectively, and asserted to be claimable by them against the TDT assets, I have already held that the BVI Companies debt in the hands of F&B as Trustees of the TDT was extinguished. Moreover, I did so on the basis of sworn evidence that F&B took the assignment and were in effect the beneficial owner of the assigned debt as Trustees of the TDT, and also of documentation showing the purported assignment to them of the debt without qualification which would naturally suggest (following authorities) that this would be intended to be an accretion to the assets of the TDT. It would seem that it is only as an afterthought that these claims on behalf of RT and the TDAT, which are said to be on the basis of a resulting or constructive trust, have now been advanced.*

*41. Second, even taking the assertion of such a structure at face value, it is difficult to see how this claim could be mounted on the facts disclosed. There is no indication or suggestion of the legal basis on which an argument in support of a resulting or constructive trust could be advanced in this situation. One has to remember that such trust claims are actually a form of proprietary interest claimed to exist in, or to be imposed upon, an asset. It is suggested that this claim can be made here because RT and TDAT somehow gave consideration for the acquisition of this asset (the debt), with the asserted consequence being that this therefore gave them a share in it. Quite apart from the fact that the asset itself, in my judgment, has disappeared, ie, even assuming that the beneficial interest in it had somehow survived separately, this is not a situation which discloses the advancing of a purchase price which might give rise to a resulting trust, nor does it seem to me to disclose any set of circumstances which could be argued to impose, willy nilly, some kind of “constructive trust” in favour of RT or the TDAT on the Trust assets of the TDT in the hands of the current Trustees of the TDT.*

*42. It is asserted that consideration for the purchase of the debt is to be found in RT’s and the TDAT’s involvement in the broad settlement with Kaupthing and the BVI Companies under which they (RT and the TDAT Trustees) gave up their claims and thus forwent the costs incurred in the relevant litigation, thereby enabling the BVI assignment to be procured. But this was a global settlement of a complex set of claims, debts, alleged debts, and so forth, and I cannot, at present, see how the situation could ever be analysed to give RT or*

*the TDAT trustees any enforceable claims against the TDT assets for a sum equal to one third of the face value of the BVI Companies' combined debts."*

311. The explanation of the basis of the claims now given in Advocate Richardson's skeleton argument does not, in my judgment, improve the position. It occurs at Paragraphs 6 and 7. At Paragraph 6 he reiterates the "*constructive or resulting trust*" argument that I considered and rejected above, but now advanced as a "*common intention constructive trust*". This generally is a doctrine applied in the English law relating to the ownership of property, usually between a married or unmarried cohabiting couple. I do not need to describe its ambit in detail here; suffice it to say that it rests on a set of principles specifically evolved to do substantial justice in a family law context when a relationship breaks down, to recognise the contributions of one partner to the property or the relationship when the other party is the legal owner of the property. The principles operate somewhat differently from mainstream constructive trusts.

312. I cannot see that this is a clear or likely doctrine which could be held to avail the TDAT or Mr Tchenguiz on the general facts disclosed. It is based on the alleged common intentions of F&B on behalf of both the TDT and the TDAT and of Mr Tchenguiz that the benefit of the BVI companies' judgment debt should be held for each of them in equal shares after the Assignment had taken place. It appears to be intended to argue that this alleged intention would, or could, somehow prevent the beneficial interest in the debt - or at least, it appears, the relevant two-thirds of it - from being extinguished, so as to preserve a potential *proprietary* interest of the TDAT and Mr Tchenguiz in these notional third shares, as a claim against the assets of the TDT. Quite apart from any evidential hurdle as to proof of the relevant intention at the required time (whatever may have been any subsequently formed intention) and any procedural hurdle in getting over the inconsistency of the sworn evidence and previous argument relied upon by F&B (whose intention necessarily has to be "common" to support this argument) at the hearing about the Assignment Issue, I can see no recognisable legal principle behind this argument. I do not see how any "trust" type basis for these claims as quasi-proprietary claims, could survive the extinguishment of the debt, the very *chose in action* itself, through the effect of the Assignment.

313. The second argument now advanced is that of reliance on the principle of "unjust enrichment", coupled with the proposition that this could give rise to a proprietary claim because the law, nowadays, will "fashion a remedy" for unjust enrichment. This, it is said, could amount to creating a proprietary interest (for the benefit of the TDAT and Mr Tchenguiz) because of their "*thwarted expectations*", but even if it did not go that far it would create a claim as to which different priorities, in favour of the TDAT and Mr Tchenguiz, might be applied. Advocate Richardson suggests that these issues raise complex questions and novel points of law, in relation to the Jersey or Guernsey law of unjust enrichment. However, the essential proposition here is that:

*"the TDT and its other creditors or beneficiaries remain in the position of having been unjustly enriched at the expense of the TDAT and RT because of the elimination of liability on the loans".*

314. However, it is misleading simply to look at the Assignment on its own on any basis, first, because, as I have mentioned above, it was part of a much wider global settlement among multiple parties, which makes the possibility of any recognisable "unjustness" in the ultimate effects of the agreed transactions very much more difficult to identify. Also, the Assignment was conceived and effected as part of the TDT and its affiliates' jockeying for advantage with regard to potential claims against the TDT assets, in the light of the first instance decisions in the *Re Z II Trusts* litigation in Jersey, that the distribution of trust assets for an "insolvent" trust would be on a *pari passu* basis, which, again, clouds the issue.

315. Most importantly, though, it seems to me, that it is also necessary to recall what the claims (of F&B as trustees of the TDAT and of Mr Tchenguiz) actually are, that have to be shown to be capable of being mounted in the exercise now being considered, because this tends to get lost in

the generalities of description in the skeleton argument. The arguable claims which I am concerned to identify are ones which are claimed to be advanced against the assets of the TDT, through its relevant Trustees (F&B). Any claim in unjust enrichment would have to show that the assets of the TDT themselves were “unjustly enriched” in a manner at which Mr Tchenguiz and/or the TDAT trustees (remembering that they are in fact the same entities as the TDT trustees) would be entitled to complain. It is not enough, nor does it found a claim against the TDT assets, for Mr Tchenguiz or the TDAT trustees to complain that I&B has been “enriched” because of the falling away of a competing claim, because any such allegation is, in effect, the mounting of a claim in “unjust enrichment” directly against I&B, and that is not what is happening. I do not see, and it has not been explained to my satisfaction, how either of these applicants could mount any claim in unjust enrichment against F&B as Trustees of the TDT, as to £79.5Mn odd each, which is what is required to be shown. I think it is fanciful to suggest that they could do so, certainly to the extent that the outside possibility of any such argument ever succeeding should be seen as a sufficiently potent factor as to be worthy of preventing a reasonable interim payment being made to I&B at this stage out of the Preserved Sum, if that is otherwise justified.

316. I will therefore, as I have indicated, award an interim Payment of £5Mn, to be made to I&B out of the Preserved Sum. I regard this figure as an appropriate figure to exercise due caution with regard to the payment, as against Advocate Wessels’ calculation of £6.5Mn odd, given the potential for adjustments that may still be required.

317. I make the following two further points. First, I have not gone so far as actually to strike out the claims intimated by Mr Tchenguiz and the trustees of the TDAT, because I do not need to do so; I have simply decided that in all the circumstances of the case, I consider that it is sufficiently safe, as to doing justice rather than causing any real risk of injustice, to allow an interim payment of the amount I have stated, notwithstanding the present intimation of those alleged claims.

318. Second, I have also borne in mind the fact that in what I regard as the highly unlikely event that this interim payment did turn out to have been excessive, there are likely to be other points in the distribution of assets, or giving effect to costs orders, where this can be adjusted, and it is also the case that I could, if necessary, order any excess from an interim payment order to be repaid. I do recognise that the facts of the matter suggest that I&B themselves are not likely to be of sufficiently sound finances to be able to make payments personally, but this litigation is clearly being supported by insurers, and any interim payment will therefore be being received by them in the full knowledge that it is, merely, interim, and there is the outside possibility that something might have to be repaid.

319. In conclusion, therefore, I will make an order directing the Joint Receivers to release the sum of £5Mn to I&B by way of interim payment. Of course, if F&B’s appeal to the Privy Council is unsuccessful, any problems with this interim payment will disappear. I would then be willing to entertain an application from I&B for an appropriate additional Interim payment, but I do not feel able, at this stage and after writing this judgment, to fix a figure now, which it would be appropriate to order to be paid conditionally on that event.

### **Final point**

320. Finally, as an independent matter, I must raise concern about the possible effects of the costs which are being racked up in this phase of the dispute between the parties, and which I draw to the attention of the two present parties at this stage.

321. The costs incurred in advancing arguments in these proceedings are apt to affect not only I&B and F&B as trustees of the TDT, but also GTC. If the correct principle for recovery of costs is that of priority in time, whilst GTC will rank ahead of F&B, they will rank behind I&B. If, therefore, I come to the conclusion that F&B’s arguments have caused I&B to incur increased costs beyond what they reasonably should have done as part of the disputatious but nonetheless quasi-

administrative process with regard to the proper distribution of TDT trust assets, and if this, in turn, impacts on the availability of TDT assets to meet *GTC*'s claim to its own proper costs, whether subordinated to I&B's claim or *pari passu*, then it seems to me that an issue could arise as to whether either party here may bear any responsibility to *GTC*, to hold them harmless from any such disadvantage.

322. I have not, at this stage, given any consideration to the legal grounds, cause of action, or principles of equity or fairness which might be argued to arise or apply to such an argument, and I am emphatically making no finding about any such contention or situation. However, this possibility has occurred to me, and I think it appropriate to mention the point sooner rather than later, so that the parties can bear it in mind when considering their further actions.

**Lieutenant Bailiff Hazel Marshall QC**

**4<sup>th</sup> January 2022**