Applicants' application seeking an order that the Respondents file copies of documents that have been withheld by them on the basis of privilege, so that the Court can determine whether each claim to privilege is justified and an order that any document where the claim to privilege is found to be unjustified be disclosed to the Applicant.

**[2022]GRC015**

**IN THE ROYAL COURT OF GUERNSEY**

**(ORDINARY DIVISION)**

**Between:**

**(1) FORT TRUSTEES LIMITED**

**(2) BALCHAN MANAGEMENT LIMITED**

**(in their capacity as the trustees of the Tchenguiz Discretionary Trust)** **Applicants**

**-v-**

**(1) ITG LIMITED**

**(2) BAYEUX LIMITED**

**Respondents**

**Hearing dates: 21st and 22nd June 2021**

**Judgment handed down: 26th April 2022**

**Before: Richard James McMahon, Esq., Bailiff**

**Counsel for the Applicants: Advocate P Richardson**

**Counsel for the Respondents: Advocate J M Wessels**

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

The Trusts (Guernsey) Law, 2007
*Lewin on Trusts* (20th ed.)
*Tiger v Barclays Bank Ltd* [1951] 1 All ER 85
*Phipson on Evidence* (19th ed.)
*UTB v Sheffield United* [2019] EWHC 914 (Ch)
The Royal Court Civil Rules, 2007
*Ogier Trustee (Jersey) Limited v CI Law Trustees Limited* [2006] JRC 158

## Introduction

1. The Applicants, Fort Trustees Limited and Balchan Management Limited, are the current trustees of the Tchenguiz Discretionary Trust ("the TDT"). The TDT is a Jersey trust established by an instrument dated 26 March 2007. The Respondents, ITG Limited and Bayeux Limited, were the original trustees of the TDT until they were removed in 2010. Since that time, there has been a considerable amount of litigation before this Court and also elsewhere arising from this and subsequent changes of office-holders and other issues arising from the administration of the TDT.

2. By an Amended Application dated 15 November 2019, the Applicants seek an order that the Respondents file copies of the documents set out in the schedule to it that have been withheld by the Respondents on the basis of privilege so that the Court can determine whether each claim to privilege is justified. Thereafter, following such a review, the Applicants seek an order that any document where the claim to privilege is found to be unjustified be disclosed to them. The Application further seeks an order that the Respondents provide copies of all WIP reports covering the time period set out in the previous Order on the basis that those documents should already have been disclosed. Finally, the Application seeks an order that the Respondents should personally pay the parties' costs of the proceedings, including this Application, and so should be deprived of their indemnities in respect of those costs from the TDT.

3. The Application does not state the basis on which it is made but Advocate Paul Richardson, on behalf of the Applicants, suggested that this was a continuation of the proceedings that resulted in an Order I made on 18 May 2017, as varied on 9 June 2017, which had been pursued under sections 68 and 69 of the Trusts (Guernsey) Law, 2007. Accordingly, I treat the Application as being pursued on that basis. I am satisfied that there is no need to consider any alternative basis, such as the Court's inherent jurisdiction.

4. The evidence in support of this Application is the Ninth Affidavit of Ian Davis, which was sworn on 21 January 2021. The evidence on which the Respondents rely is the Third Affidavit of Louise Hargreaves, sworn on 1 April 2021. In addition, the Court has received an Affidavit from Robert Tchenguiz, sworn on 28 April 2021, a Third Affidavit from Nicole Martin, sworn the same day, and a short Affidavit of Patricia Whitford, sworn on 21 May 2021.

5. In comparison to the amount of material exhibited to the first two of these Affidavits, the parties' Skeleton Arguments were briefer, although that on behalf of the Respondents is more extensive. There is general acceptance of the applicable principles, but the Respondents question the utility of any such order being made at this time. The Respondents also refer to the inordinate delay in pursuing this Application.

6. At the end of the hearing last June, I reserved judgment. At that time I did not know that it would take me as long as it has to produce my decision, for which I apologise to all concerned.

**The facts**

7. I do not propose to set out the background to the Order made in 2017 in any great detail and will instead concentrate on what has happened since. The previous judgment dated 30 January 2017 contains more detail for anyone needing to place subsequent events into context. The reasoning contained therein will also be relevant to this judgment, so both should be read together.

8. The Order made in 2017, as varied, required that:

> "*All documentary records, books and other papers belonging to the Trust which relate to the administration of the Trust between the 26th day of March, 2007 and the 1st day of August, 2010 other than those that have already been disclosed and to which no assertion of privilege is made shall be disclosed within 28 days with permission to inspect the same being given thereafter to the applicant with permission to take copies.*"

The second limb of the Order was that:

"*A detailed affidavit setting out any document, to which paragraph 1 would apply, being retained, explaining the right or duty being relied on to justify retention shall be provided to the Applicant within 28 days.*"

At that time, the trustee of the TDT was Rawlinson & Hunter Trustees SA, which later changed its name to Geneva Trust Company (GTC) SA (and so I will refer to it as "GTC").

9. Before the hearing of the 2016 application, the Respondents made available to GTC 14 boxes of physical files. 146 documents were withheld on the basis of privilege. Details of those documents were set out in a schedule exhibited to the First Affidavit of Mr Gonzalez, sworn on 4 February 2016 (to which I will refer as "the Gonzalez list").

10. Following the 2017 Order, the Respondents made available for inspection further sets of physical files. However, it removed 240 documents on the basis of privilege. On behalf of the Respondents, Luiz Gonzalez swore his Fourth Affidavit on 15 June 2017, in which he referred to legal advice privilege and litigation privilege. He exhibited a table containing 240 items. In respect of each item the table shows the date, a brief description of the document, the sender(s) and recipient(s) and identified those items to which there were attachments, setting out what those attachments were.

11. GTC was dissatisfied with the content of Mr Gonzalez' Fourth Affidavit and so returned the matter to the Court, resulting in a further opportunity being provided to the Respondents to provide an explanatory Affidavit being ordered by me on 22 June 2017. This resulted in the Fifth Affidavit of Mr Gonzalez, sworn on 29 June 2017. The previous list was exhibited but with an additional column indicating whether the assertion of privilege related to one of the categories that Mr Gonzalez had mentioned in the body of his Fourth Affidavit.

12. Still being dissatisfied, GTC applied for further relief by way of an application dated 14 July 2017. This was met by the Respondents seeking to strike out that application as an abuse of process. I dealt with these applications on 9 and 11 August 2017. During the course of the hearing, Advocate Richardson handed up a copy of a WIP report to 31 March 2010 as an example of what the Applicants could glean if these were to be provided.

13. Accordingly, on 25 August 2017, Sebastian Prichard Jones, a partner of Macfarlanes LLP, swore an Affidavit and exhibited to it a schedule of documents in respect of which the Respondents assert privilege. This document contains more detail than had been provided previously. Mr Gonzalez also swore his Sixth Affidavit the same day, in which additional explanation was given.

14. Mr Prichard Jones further explained how the original 240 documents listed had been reduced to the 234 documents now set out in the Respondents' schedule. He further explained that there were several documents over which the Respondents were no longer asserting privilege, This has reduced the number listed to 229. He also stated that the list should be understood as covering documents that did not belong to the TDT but they had been listed anyway so as to assist. His Affidavit also summarises the explanation from the Respondents for the reasons why what took place during a tumultuous time for the TDT may not have been as well-organised as it should have been, which is why the exercise of asserting privilege has evolved once the documents were again reviewed. The schedule exhibited to this Affidavit is a key document to which I will return.

15. The Applicants became the trustees of the TDT on 3 October 2017.

16. On 7 June 2018, the Applicants applied to remove GTC from the proceedings and to be joined to them in its place. The Respondents consented to the joinder of the Applicants but not to the

removal of GTC. Their response explained that there were costs issues in relation to earlier applications that were outstanding and that the Applicants, as the new trustees of the TDT, should be looking for information to assist with the administration of the trustee from the outgoing trustee.

17. On 1 November 2019, the Applicants sought directions in relation to the removal of GTC, along with the relief sought by the Application as amended which is now before me. By an Order of this Court on 23 January 2020, GTC was removed as a party.

18. The parties have also been involved in proceedings flowing from the making in 2013 of a receivership order. Those proceedings resulted in an order made on 3 October 2019 that the Joint Receivers who had been appointed in relation to many of the assets of the TDT were required to transfer those assets, subject to a ring-fenced sum of cash being retained, to the Applicants. As a result, the Applicants have received the physical books and records of companies in the TDT. They have noted the absence of any form of insurance documents for each of those companies, but the file structure contains a tab labelled "insurance". Because there are no documents there, the Applicants infer they have been removed.

19. The proceedings in which the parties have been engaged most recently relate to determining the priorities of claims to indemnity ("the Priorities Claims"). These proceedings are being heard by Lieutenant Bailiff Marshall QC, who had also made the transfer order in 2019. I will have to refer further to these proceedings but, because the parties are familiar with the decisions taken in those proceedings, I will not set out the detail of them, to which I have been referred, in this summary of the facts.

20. A request has been made by those acting on behalf of the Applicants in the Priorities Claims for confirmation as to whether the Respondents maintained insurance policies for these companies and, if so, for copies of those documents. They have not been provided by the Respondents. The Applicants argue that the present Application is a suitable vehicle for considering this issue as well. The Respondents rely on the explanation already given in a letter dated 5 February 2021.

21. Correspondence between the parties' Advocates rumbled on for many months after the Application was first served relating to how to progress the remainder of this Application. Reference is also made in that correspondence to the consequences of both England and Guernsey going into lockdown as a result of the coronavirus pandemic that played out from March 2020. However, it was not until the evidence in support of the Application was produced in January 2021 that matters really progressed. As regards the Applicants seeking insurance documents, their Advocates wrote asking if the Application could be treated as covering this aspect as well without formal amendment, not wishing to burden the Court with additional paperwork during the Island's second lockdown. There has been no direct response to this request.

**Other evidence**

22. The Affidavit of Mr Tchenguiz states that it is provided because he is the protector of the TDT and also a beneficiary. Aside from noting his support for this Application, his rehearsal of historic events adds nothing to what needs to be considered to decide this Application and so I have taken no account of it or the documents that he has exhibited.

23. Ms Martin's Affidavit replies to the evidence on behalf of the Respondents. I have noted her correction relating to the WIP example being in relation to a different trust (the Tchenguiz Family Trust) rather than the TDT. I have also noted the way in which some of the issues relating to this Application have been covered in correspondence. There is a tendency, it seems to me, to think that reading volumes of correspondence will assist, but what matters are the

submissions made to the Court arising from relevant facts, not how the parties' Advocates have sought to argue the potential case through their correspondence.

24. Ms Whitford is a director of the parent company of the Applicants. She explains that she has read Mr Tchenguiz' Affidavit and supports it to the extent that its contents are within her knowledge. She rejects the suggestion made that the Applicants are stooges for Mr Tchenguiz. For similar reasons to my comments about the evidence of Mr Tchenguiz, the content of this Affidavit adds nothing to the issues I have to address. Even to the extent that the relief being sought is discretionary, if this and the other Affidavits had not been filed on behalf of the Applicants, it would not have affected the outcome of the Application.

**Parties' contentions**

25. Advocate Richardson pursues a simple case. The Applicants, as successor trustees to GTC of the TDT, seek to enforce the terms of the Order made in 2017. Primarily, the relief sought is to look broadly at the position as a whole, and to examine more closely the Respondents' claim to privilege. The burden is on the person asserting privilege to establish it. This has not really been attempted in relation to the Gonzalez list and the schedule exhibited by Mr Prichard Jones is inadequate. The duty of an outgoing trustee to hand over all documents and information which relate to the administration of the trust is the background against which decisions have to be taken. This was clear and accepted in 2017. There has not been compliance with the 2017 Order. This is particularly the case in relation to the WIP reports, which clearly should have been disclosed to comply with the first paragraph of the 2017 Order.

26. In relation to the costs orders sought, Advocate Richardson submits that the Court should find the position adopted by the Respondents has been hostile and so costs should follow the event. Further, given the conduct of the Respondents in relation to these matters, the Court can go further and deprive them of their ability to rely on their indemnity. This is supported by reference to the manner in which successor trustees of the TDT have needed to make multiple applications to extract incrementally the documents that should have been provided anyway.

27. On behalf of the Respondents, Advocate Wessels submits that this late Application is an abuse of the Court's processes. The delay in itself is a good enough reason to dismiss the whole of the Application. In any event, it fails to recognise that the landscape for the current trustees has changed. Whereas when I made the Order in 2017, there was the possibility, arising from the appeal to the Judicial Committee of the Privy Council, that litigation would need to start all over, the Judicial Committee's decision means that is no longer possible. The landscape has, therefore, changed significantly. What is now being litigated, effectively the Priorities Claims, is the better vehicle in which to seek any further disclosure that is needed for the purposes of those proceedings. This is a collateral attempt to sidestep that proper approach to seeking anything further.

28. Given the history of the orders for delivery-up already made, the Respondents submit that the Court should question what purpose is now served when it is more than a decade since they were removed from office by the Protector, in looking again at any of these issues. The documents being sought should always be intended to assist in the ongoing administration of the TDT. As such, the Applicants' challenge to the manner in which privilege has been claimed is a stale issue and of no practical benefit to anyone. Apart from mere assertion, there is no proper analysis of why the Applicants contend that the schedule exhibited by Mr Prichard Jones is deficient. There was no challenge to the manner in which privilege was claimed as set out in the Gonzalez list in 2016 or 2017 and so it is too late now to raise that.

29. In relation to the WIP reports, the Respondents argue that these do not belong to the TDT and so were not covered by the 2017 Order. As regards the insurance documents, it is accepted that there could be no claim to privilege, but this is not covered by the Application.

30. As regards the costs claimed, it is wrong as a matter of principle for the Applicants to seek to recover costs that could only have been claimed by GTC. When GTC was removed as a party, it meant its claims for any costs against the Respondents disappeared. In relation to the possibility that the Respondents could be deprived of their indemnity, whilst the Respondents accept that the costs position in respect of these delivery-up proceedings have been "carved out" of the Priorities Claims proceedings, a similar process should be adopted here to enable both sides to respond to the claims, including by way of evidence.

31. In reply, the Applicants suggest that the Respondents appear to be making the task for the Court more complicated than it really is, emphasising that this Application is about ensuring compliance with the previous Order. Advocate Richardson notes that the Respondents have consistently sought to argue that applications by the TDT's trustee(s) should be struck out without success. The WIP reports contain valuable information about the steps taken by the Respondents when they were administering the TDT. This would be the best contemporaneous documents about their trusteeship. Any delay in progressing the Application should be ignored as irrelevant. They argue that the Respondents' attempt to argue that a similar process to the Priorities Claims should be followed is flawed because this is a discrete set of applications where this Court can deal with where those costs should properly fall in the usual way.

32. During the oral submissions, all of these points were developed to a greater or lesser degree.

**General comments**

33. As a general preliminary comment, I do not regard this Application as an opportunity for any of the parties, or the others involved with the TDT from time to time, to seek to re-litigate matters. Some of what has been put before the Court strikes me as attempting to do just that. What matters is that this Court has made an order expecting the Respondents to comply with it. Some historical perspective may just about be relevant to place that Order into context, but it is the question of whether or not there has been compliance and, to the extent that there has not been, whether anything further now needs to be done in relation to the Respondents' assertion that they are entitled to withhold certain documents that needs to be resolved on this Application. The approach of seeking to descend into detail on who said or did what many years ago is not, in my view, helpful and so I will not address the various arguments that have been raised on those issues contained in the evidence before me. As I have already stated, the content of the Affidavit of Mr Tchenguiz largely falls into this category.

34. I accept the Respondents' position that the Applicants, and before them GTC, have been provided with lots of material pursuant to orders of this Court as well as in the context of litigation in which there has been the usual obligations relating to disclosure. That is the background in which the current Application falls to be viewed. I have to ask myself whether there is any material that has been ordered to be disclosed but where there has been incomplete compliance and, in particular, I have to consider whether the claim to privilege is one that I should now look behind.

**Scope of the Application**

35. The Applicants have argued that their Application, properly read, extends to all the Respondents' assertions of privilege, which can be found in a list exhibited by Mr Gonzalez to his First Affidavit, sworn on 4 February 2016, prior to the hearing of GTC's application that resulted in the Order I made in 2017, as well as those 229 documents set out in Mr Prichard Jones' Affidavit. In particular, they note that the list Mr Gonzalez provided covers a longer

period and there is only a small amount of overlap with the schedule exhibited by Mr Prichard Jones. Despite recognising that the privileged documents listed in Mr Gonzalez' First Affidavit are referenced in the schedule to the Application, the Respondents argue that the Application can only be read to cover the list exhibited by Mr Prichard Jones.

36. As is apparent from the manner in which I dealt with the assertions of privilege in August 2017, this was confined to considering the documents that had been covered by Mr Gonzalez in his Fourth and Fifth Affidavits. There had been the possibility of amending the application at that time, but Advocate Richardson, then on behalf of GTC, chose not to pursue that. Accordingly, the order made, that resulted in what has been exhibited by Mr Prichard Jones, was confined to the 234 documents at that time still in issue, which then became 229. This supports the limitation that the Respondents seek to put on what can properly be considered now.

37. However, it is clear from the two entries in the schedule to the Application as amended that both lists are being pursued by the Applicants. Accordingly, whilst the Respondents can submit that the focus should be on the list exhibited by Mr Prichard Jones on the basis that GTC, and now the Applicants, did nothing about the Gonzalez list before now, I am satisfied that both lists form part of the Application that falls to be determined and so both will have to be considered, even if the consideration of the Gonzalez list will be quite brief.

38. The fact that the Application makes no reference to the insurance documents issue is, in my view, a good reason for treating this aspect as not being covered by it. If the Applicants assumed that the absence of objection amounts to consent, I think they should have checked again that there was agreement to proceeding without a formal application to amend. I will, however, comment on what has been said about the existence or non-existence of these documents in passing in the hope that it will avoid there needing to be any further application.

**Delay**

39. There are two aspects of delay in relation to this Application that give rise to concern. The second in time relates to the speed at which it has been progressed once the Application itself was served. The first in time relates to the time between service of the Affidavit of Mr Prichard Jones and actually making this Application purporting to seek to enforce the terms of the Order from 2017. I will take them in that order because it is the former that has been raised by the Respondents more openly, with the latter point leading naturally into their submissions about the utility, or purpose, of granting any relief now.

40. It is fair to criticise the Applicants for making what was effectively a fresh Application without being ready to progress it within a reasonable timeframe. Ideally, the Application should have been accompanied by the evidence in support. Any litigant who makes an Application where there will inevitably have to be evidence in support and does not provide it at the same time or shortly thereafter will run the risk that the Court will take a dim view if the supportive evidence is delayed.

41. The impact of the pandemic does not, in my view, afford the Applicants a complete answer as to why it took so long for the Ninth Affidavit of Mr Davis to be prepared. I accept the submissions made that there were other things going on during 2020 that demonstrate to me that those working for the Applicants chose not to progress this Application. I am satisfied that the Application could have been got ready for a hearing quicker than it was. Another way of viewing this is to treat the Application, as amended, as actually having been made considerably later than it was. The effect would be that the gap between the Order made in 2017 and the subsequent applications dealt with by August 2017 and the making of this Application was longer than it actually was. I think this is relevant when considering how the passage of time and the changed circumstances affects the utility in granting further relief now.

42. In terms of the delay in progressing the Application, I am not persuaded that this alone would warrant striking out the Application. Instead, it is a factor to take into account in the event that the Court has any discretion to exercise.

43. The delay between the 2017 Order and the steps taken thereafter, by which I refer to the hearing in August 2017 resulting in the Respondents' final answer, being the Affidavit of Mr Prichard Jones and even making this Application in November 2019 raises serious questions as to the reasons for that delay. They are not really explained in the evidence on behalf of the Applicants. Whilst the Applicants took over the TDT trusteeship from GTC shortly after the hearing in August 2017, the speed with which each of the Respondents' attempts to comply with para. 2 of the Order points towards no one considering in, say, September 2017, that a further application was required. To that extent, I think it reasonable to infer that the decision to pursue the present Application has come rather late in the day.

44. Despite these misgivings about how this Application came to be made at the time, and the Respondents may be correct in suggesting that there is a degree of tactical advantage being sought by focusing attention away from where the Respondents' attention might otherwise have been directed at that time, I am not persuaded that the timing of the Application is a sound reason for refusing to determine it on its merits. It may validly be suggested by the Respondents that the lack of urgency surrounding the alleged non-compliance with the Order from 2017 demonstrates that there has been adequate compliance or that their alternative arguments about the utility in re-opening the question of compliance now serves no purpose, but I am persuaded that it is appropriate for the Court to consider whether the Respondents have properly complied with the Order made and, if not, what the proper further order to make now ought to be. The Court makes orders for a reason, expecting the party against whom it is made to do what it has been ordered to do. Similarly, it expects the party in whose favour an order has been made to bring the matter back to the Court if it considers that a further order is warranted and to do so in a timely fashion. GTC understood that in 2017, returning to the Court several times in quick succession. The Applicants have adopted a more laissez-faire approach, but that in itself is not, in my view, a good reason to dismiss the Application on such a timing technicality without more ado. Again, this is a factor to bear in mind when considering how to exercise any discretion the Court has and it may also impact on the view to be taken as to any appropriate costs order.

**Utility and abuse of process**

45. The stronger argument advanced on behalf of the Respondents questions what purpose is served by making any further order now. It is fair to acknowledge that I was in two minds in 2017 as to whether a deliver-up order was justified. The judgment from January 2017 explains the reason why I eventually overcame that hesitation and decided that the Order should be made. The context was very much that disclosure, when viewed in the round, appeared to have been rather a painful exercise and GTC, the applicant at the time, was the successor trustee of the TDT to the Respondents. I was also conscious that I doubted that the Judicial Committee would have wished to have to determine an application for further disclosure within the context of the appeal proceedings with which it was then seized. As demonstrated by the fact that further physical materials were disclosed to GTC at that time, the Order did serve some purpose.

46. If the present Application were a further application for delivery-up of materials by the Respondents relating to the TDT, I would have the concerns that have been articulated on behalf of the Respondents. I would question what the purpose would be in considering any application seeking an order for anything new. Paragraph 1 of the 2017 Order was intended to supplement what had already been provided, which is why there was reference therein to "*other than those that have already been disclosed*". There was a final date inserted of 1 August 2010, to ensure that any searches would be proportionate and cover up until shortly after the Respondents were removed from office. The other qualification was that the Order related to all "*documentary*

*records, books and other papers belonging to the Trust*" (emphasis added). Disclosure did not extend to anything in respect of which an assertion of privilege was made. The manner of dealing with assertions of privilege was to require through para. 2 a detailed affidavit setting out "*any document, to which paragraph 1 would apply, being retained, explaining the right or duty relied on to justify retention*". In other words, the only requirement for the affidavit was to justify the retention of a document to which para. 1 of the Order would otherwise apply. It means that the Order required a search to be undertaken of documents relating to the administration of the TDT that had not already been disclosed, and then either to disclose any such document or explain in the affidavit required why it was not being disclosed. This Order can be regarded as building upon the previous delivery-up order made by Lieutenant Bailiff Sir John Chadwick. Having made the Order I did, there would arguably be no scope for any further application to fill any other gaps because this Order was designed to be the last.

47. For this reason, I do not treat the present Application as a fresh application for delivery-up, but regard it as being confined to inviting me to consider how far the Respondents complied with the terms of the Order made in 2017. I have just pointed out that the Court expects parties to comply with orders made. As such, the Respondents' arguments about utility fall to be viewed as much in the context of this compliance exercise as to the purpose of requiring the Respondents to do anything further so late in the day and against the backdrop of a changed litigation environment. However, I do accept what Advocate Wessels has said about the need to consider compliance against what use any document in question will have for the ongoing administration of the TDT, which is the basis on which the Order was made in 2017. I have, therefore, sought to balance the extent to which I should review the question of compliance with the option that was available to the Applicants to seek to obtain some material within the confines of the Priorities Claims. However, I think it is fair to say that these delivery-up proceedings are as good a place as any in which to assess compliance, which is why I have decided that I should consider each limb of the Application in turn. Similarly, having reserved decisions on costs back in 2017, those costs arguments now fall to be resolved in the context of this Application.

48. For these reasons, although I have some sympathy with the Respondents as to why they have to respond to this Application at this stage and whether it really does serve any purpose in helping the Applicants to perform their ongoing duties as trustees of the TDT, I have not been persuaded that I should simply dismiss the Application. I think it is fairer to all the parties to address what the Applicants seek on the merits of the Application made and the materials in support thereof. I will consider the utility arguments as they affect consideration of any further order to make.

**WIP reports**

49. I will first consider para. 6 of the Application. It seeks all WIP reports for the same time period as the Order from 2017 "*on the basis that such WIP reports are documents falling within this order*".

50. Advocate Richardson argues that such reports are clearly encompassed within the terms of the Order but have not been disclosed. In doing so, he refers to the reference in *Lewin on Trusts* (20th ed.) to the papers to which an incoming trustee is entitled including "*the internal memoranda of a corporate trustee*" (para. 21-119). The authority for that proposition is *Tiger v Barclays Bank Ltd* [1951] 1 All ER 85. In the headnote, it refers to an outgoing trustee producing to his successor in office "*entries relating to the administration of the trust recorded by him in a diary or other document*". The WIP reports contain a chronological list of entries recording the steps carried out in the administration of the trust. As such, they can be equated to diary entries.

51. Advocate Wessels, however, suggests that these WIP reports belong to the Respondents and not to the TDT, which is why they have not been included in the disclosure made following the 2017 Order. In the alternative, he argues that there is no purpose to be served now in providing the Applicants with reports relating to events more than a decade ago.

52. I have considered the example of a WIP that was provided to the Court in 2017. I am satisfied that it falls outside the terms of the 2017 Order. The explanation offered by the Respondents is that this is an internal document generated for its own purposes. I accept that explanation because, although the example refers to "*All Tchenguiz WIP*", the columns appear to me to be designed to enable invoices for work actually performed to be generated. Indeed, the column headed "Action" is uniformly filled with "Invoice". The final column headed "Comment" contains a description that I am satisfied would then be translated into the description of the work set out in the invoice then generated. I do not equate this to a diary because all of this information will be set out in the invoices subsequently produced. In these circumstances, I am satisfied that the WIP reports to which para. 6 of the Application refers can no longer be pursued by the Applicants because these are not papers "*belonging to the Trust*". I do not regard the omission by the Respondents as being non-compliance with the 2017 Order. For this reason, para. 6 of the Application is dismissed.

53. Even if I am wrong to reach that conclusion, and I should have found that each WIP report to which para. 6 relates is a document belonging to the TDT and so covered by the 2017 Order, I would not be minded to order that they be disclosed at this time. The principles to which I referred in the judgment in January 2017 operate. In making the order that I did, had the question of the WIP reports been addressed at that time and had I also been satisfied that they fell within the description of belonging to the TDT, I would have enquired further as to whether the WIP reports had been translated into some other document provided already, meaning that this would be a form of unnecessary duplication. On that basis, I would, albeit recognising that I am now applying hindsight, have not made such a broad order. Towards the end of the judgment from January 2017, I pointed out that "*The best that could be done is to order that any documents that have not been disclosed to date and which are no longer covered by an assertion of privilege be disclosed*". As of today, I see no utility in ordering disclosure of the WIP reports where, from the example already offered, the information contained therein will already exist in the invoices that have been issued relating to work carried out in respect of the TDT. On this basis, even had I thought that para. 1 of the 2017 Order covered the WIP reports, I would now exercise the Court's acknowledged discretion as to whether delivery-up orders should be made against requiring the Respondents to do anything further. In short, there is no utility in doing so after such a long period of time.

54. Although I have indicated that I do not consider that the insurance documents for the companies within the TDT fall within the terms of the Application, I am not persuaded that, even if they did, I would grant any order in respect of this aspect, ie, to construe para. 6 of the Application as if it also covered other documents said to fall within the Order made in 2017. I am satisfied that the answer provided in correspondence suffices. It depends on whether there is an inference that can be drawn that having folders that refer to insurance in a standard-format of folder necessarily means that there would be a document in there. The Respondents have explained that no such inference can be drawn. I am inclined to agree. In correspondence, it was stated on behalf of the Joint Receivers that they did not remove any documents from the materials they received from the Respondents. I accept that assertion and so the Respondents would have had to choose to remove documents before passing over their materials to the Joint Receivers. I am not satisfied that they will have done so. There seems to me to be no good reason to do that. As such, I take the view that the Applicants should be satisfied when the Respondents say that there was no such insurance taken out and the reasons why.

55. Even if I am wrong to form that view, the passage of time between the period covered, when the Respondents were the TDT trustees, and today is sufficiently long that this is an instance where I would again agree with Advocate Wessels that no purpose is to be served by ordering the Respondents to look for any such documents and state what the outcome of their searches is. For example, if this particular issue had been raised squarely in 2016/17, it is possible that there would have been a further exclusion from the terms of the 2017 Order dealing with this aspect. In 2022, I am not persuaded that this is something that needs to trouble the parties further.

**Assertion of privilege**

56. As I had said at the hearing in August 2017 leading to the Affidavit from Mr Prichard Jones, I was satisfied that the Respondents could group documents together in categories rather than having to provide a commentary on each one. I further indicated that, if GTC (and so now the Applicants) remained dissatisfied, I would take a view on whether or not they have justification for asking for a review of the documents affected by the claims to privilege, most likely by the Court. However, if there had been a proper, principled approach to the assertions made, that may well not follow. Indeed, I referred to what "*might be the ultimate solution in an issue of this nature*" being for the Court simply to inspect the documents. I explained that I did not particularly want to do that "*but if it solves the mistrust that is palpable between the two sides then that will probably be the ultimate solution*". It is on this basis that I have reviewed the merits of para. 4 of the Application.

57. Although I have to address both the Gonzalez list and the schedule exhibited to Mr Prichard Jones' Affidavit, because both are set out in the schedule to the Application to which para. 4 refers, I can deal quickly with the Gonzalez list.

58. As explained in the Ninth Affidavit of Mr Davis, this list was produced as part of the Respondents' materials leading up to the hearing in 2016 that resulted in the Order made in 2017. The list is headed "*Former Trustees' List of Privileged Documents*". It covers 19 pages and contains comparatively little by way of detail. It gives the date of each document, its time if known, the type of document, who sent it, who received it and to whom it was copied. In particular, I have noted that for the type of record, the entries relate in large part to e-mails and some attachments. After the first item, the date range given runs from 15 July 2008 through to 17 May 2010, although there are few entries in respect of the final year covered.

59. Because the documents described in the Gonzalez list appear to me to be electronic documents, they would have been covered by the first delivery-up order made by Lieutenant Bailiff Chadwick. Because para. 2 of the Order I made in 2017 relates to documents to which para. 1 would otherwise apply, I take the view that the detailed affidavit I ordered the Respondents to provide did not need to cover electronic documents that had previously been disclosed. This was, I think, acknowledged during the summer of 2017 when the focus was on the assertions to privilege made in respect of those documents then ordered to be disclosed "*other than those that have already been disclosed*". Accordingly, I accept the submission made on behalf of the Respondents that the documents contained in the Gonzalez list fall outside the terms of the Order made in 2017.

60. If I am wrong to reach that conclusion, and I have noted that some of the documents referred to in the schedule exhibited by Mr Prichard Jones also appear to have been electronic, at least originally, because a good number refer to e-mail, it is apparent that the Respondents did not apply the same approach to these claims to privilege as they did to the documents subsequently set out in the Fourth Affidavit of Mr Gonzalez onwards. The level of detail is insufficient to know whether the claim to privilege can properly be maintained. However, rather than make

any order in the form sought, I consider that this is an area best left for now. That is because I would not be minded to make any order in the form of para. 4 without first giving the Respondents the opportunity to explain those documents in a similar fashion to the explanation now given to the 229 documents referred to in the schedule to Mr Prichard Jones' Affidavit. Just as I declined to require production of the documents for review in 2017 without first providing the Respondents with the opportunity to explain their assertions to privilege more fully, I would be reaching the same conclusion now. I think the better course, though, as with what happened in August 2017, is to leave the Applicants to make a specific application for this relief, although I am certainly not encouraging them to do so because this is now so historic as to be of no real benefit to anyone. Indeed, I mention this purely because it is theoretically possible but, in general, I take the view that the opportunity to progress pre-2017 disclosure issues should not be regarded as having passed.

61. Because there had previously been disclosure of the electronic documents, in respect of which there were these assertions of privilege in respect of some of them, by the time of the Order in 2017, I am satisfied that these documents had already been disclosed by the Respondents, in the sense of having been listed by them in this manner by Mr Gonzalez. The terms of the present Application before the Court do not cover the Gonzalez list because of the Applicants' stated reliance on seeking to enforce the terms of the 2017 Order, which did not extend to what is in the Gonzalez list. Given that the documents disclosed fall outside the terms of the 2017 Order, although included within para. 4 of the Application on a strict reading of it, I am satisfied that I can simply ignore the Gonzalez list now for these reasons and proceed to consider the colour-coded schedule exhibited by Mr Prichard Jones.

62. There are nine colours used as a means of grouping together collections of the documents contained in this schedule. The key explains the sub-division of these categories as follows:

    (i) green is used for legal advice privilege for communications with Macfarlanes in relation to advice on the Respondents' own position, obligations and potential liabilities and the steps that they might take in light of the position of the TDT;

    (ii) blue is used for legal advice privilege for communications with Macfarlanes in relation to the Respondents' own position in light of insolvency issues, proposed transactions and other legal issues affecting trust assets;

    (iii) purple is used for legal advice privilege for communications with Mourant Ozannes in relation to advice on the Respondents' own position, obligations and potential liabilities and the steps that they might take in light of the position of the TDT;

    (iv) tan is used for legal advice privilege for communications with or between lawyers in relation to personal advice relating to the Somerfield Proceedings and their settlement;

    (v) turquoise is used for legal advice privilege for communications with lawyers in relation to giving/receiving personal advice relating to requests for information from the Joint Liquidators;

    (vi) orange is used for litigation privilege for documents created for the dominant purpose of the litigation which became known as Guernsey 1;

(vii) red is used for litigation privilege for documents created for the dominant purpose of the litigation relating to hostile proceedings brought by the protector/R&H [ie, GTC] in (i) Guernsey – the Hillier Injunction Proceedings (ii) Jersey – seeking, *inter alia*, to prevent Guernsey 2;

(viii) yellow is used for litigation privilege for documents created for the dominant purpose of the litigation which became known as Guernsey 3, relating in part to the Somerfield Proceedings; and

(ix) pink is used for invoices and associated correspondence relating to personally privileged matters.

I regard the ninth of those categories as parasitic on the previous eight. The section of the schedule dealing with the invoices concerned, and any supporting documents accompanying the invoice in question, total 62 documents. If a claim for privilege can properly be maintained, I take the view that it would then extend to the corresponding invoices as well. Accordingly, the contest between the parties relates to the remaining 167 documents in those eight categories.

63. I have also reminded myself that the documents in the schedule Mr Prichard Jones exhibited is a fuller version of the way in which the material had been set out in the Fourth and Fifth Affidavits of Mr Gonzalez. I think it is important to remember that this was an iterative purpose where the earlier efforts were marked by me as "*could do better*". The document numbering relates to the documents as listed by Mr Gonzalez in his Fourth Affidavit. The number of documents in respect of which privilege is asserted has reduced a little. In the schedule found in Mr Prichard Jones' evidence, the 229 documents have helpfully been listed chronologically, with undated items interposed where it is most likely they should feature. One of the columns relates to the manner in which Mr Gonzalez had set out in his Fourth Affidavit the basis of the Respondents' claims to privilege. Although four categories had been set out in para. 11 of that Affidavit, there are only two bases relied upon (paragraphs 11.1 and 11.3).

64. Although Advocate Richardson's submissions have operated on a high level of questioning whether the Respondents have really understood what they were required to do, leaving the Applicants with concerns that the assertions to privilege cannot be supported, specific examples are given in the Appendices to the Ninth Affidavit of Mr Davis, so I will consider those claims first. I accept the suggestion from Advocate Wessels that I can infer that these are the strongest points the Applicants can make. I do not need to consider Appendix 1 or Appendix 4 further because they deal with the Gonzalez list.

65. The seven documents set out in Appendix 2 are said to be examples where the schedule in the exhibit to Mr Prichard Jones' Affidavit is said to contain insufficient information.

66. The first item is a document given the number 31. It is coloured purple and relates to an unapproved draft affidavit being dealt with by Mourant Ozannes. The date given is 23 November 2019. The commentary given is that it was never used in proceedings and contains questions from lawyers for the purposes of seeking updated instructions. The Applicants comment that

> "*It is unclear what privilege resides in a draft affidavit. Investec claim "legal advice privilege". There is no legal advice in a document setting out facts. The "questions from lawyers" which are allegedly contained in the document are capable of being redacted in the event and to the extent that they disclose legal advice.*"

67. I have some sympathy with the Applicants' comments. An Affidavit should be confined to setting out facts. Too frequently, though, the material included in an Affidavit used in this jurisdiction strays into argument. It is possible, therefore, that there were questions being raised

as to the inclusion of material in this draft affidavit that would also seek further instructions on legal matters. In any event, seeking instructions on what should be included in the evidence is a form of giving and receiving advice. I expect that legal advice privilege is being asserted because the material never had to be used and so claiming litigation privilege would not be warranted. However, the counter-argument from Advocate Wessels is that a draft document is a paradigm example of where privilege relating to it can be claimed. There is often a back and forth approach taken when preparing documentation for use. It is not usually possible to go behind a credible claim to privilege and the Court should not permit the Applicants to attempt to do so in relation to a document such as this.

68. In relation to this single document, I prefer the analysis of Advocate Wessels. I think it is important to remember the overarching principle that these documents have been listed because they were removed from the boxes of papers within which other material relating to the TDT was held. The primary reason for removing this document appears to me to be because it did not belong to the TDT anyway. The description given for purple documents is that the Respondents were taking advice about their own position. The confusion exists because, as both Lieutenant Bailiff Chadwick and I have commented, the Respondents did not keep the material relating to the TDT and their own positions separate. There have been instances where the funds of the TDT were used to pay for advice to the Respondents personally, although that has since been rectified. As a result, I start from the premise that the explanation has been offered now but was not strictly required, because this was not a document that fell to be disclosed as belonging to the TDT. In any event, this is the type of assertion to privilege that I consider can generally be justified and the Applicants should have acknowledged that rather than attempting to undermine the position advanced by the Respondents.

69. The second item in Appendix 2 is the document numbered 18. It is coloured blue and apparently relates to the valuation of Piccadilly investments. The Applicants query how privilege can reside in a valuation. Advocate Wessels submitted that this is no more than an indication of the subject-matter where the privilege being asserted relates to the chain of communications about this topic.

70. I take the view that the position here is less clear than for the first item. It may well be an example of where the brief description given is not as helpful as it would have been had there been something further. This colour-coding relates to communications about the Respondents' own position in light of the insolvency issues. The date is 17 December 2009, which means that it could well be that this is personal advice being taken by the Respondents. However, the way it is put in this schedule leaves rather more open than necessary whether this is properly the case. On the basis that the person asserting privilege bears the burden of establishing it has been properly claimed, my provisional view is that the Respondents have not discharged this. It may, therefore, be an example of where more information, or just looking at the document to confirm one way or the other, could be ordered.

71. The third item is numbered 4 and is coloured green. The schedule states that this relates to advice about the Respondents' own position, obligations and potential liabilities and steps they might take in light of the position of the TDT. For the Applicants, the question arises as to what privilege can reside in advice about advisers, before adding that this is advice about the Respondents' personal position without stating whether or not it relates to that personal position. Advocate Wessels submitted that there is a clear purpose to what this covers and that it is not enough for the Applicants to suggest that no such advice was needed.

72. Although the Applicants have expressed doubts about the way in which privilege has been asserted, this example strikes me as being a step too far for the Applicants. If the Respondents chose to take advice on their own position, that is a matter of choice for them. In principle, this document does not fall within the terms of para. 1 of the 2017 Order because advice to the

Respondents obtained personally does not belong to the TDT. It has been explained in this schedule out of an abundance of caution and I disagree with the Applicants that what has been explained is inadequate. This is an example of the Applicants seeing problems where none exists and they should have been satisfied with the explanation given.

73. The fourth item is numbered 23 and is coloured orange. It is an undated briefing note prepared by Macfarlanes, but thought to be around the start of 2010, to be provided to a prospective expert on the subject of the Loan Arrangements. The comment from the Applicants is that such a note "*would set out facts rather than opinion. It would neither provide advice nor seek it, not least given the prospective expert's potential duties to the court.*" Advocate Wessels submitted that was a bad objection and that it was flawed to suggest that the facts would be extracted out of the document. Further, at this time Guernsey 1 had not yet commenced and those proceedings have since completely ended.

74. This orange category relates to the Guernsey 1 case. I have some sympathy, therefore, with the Applicants because, if expert evidence had been led, it would arguably have been possible for other parties to want to know the instructions given to the expert whose evidence would then be before the court. I am conscious that, at this time, the Respondents were contemplating what became Guernsey 1 in their capacity as the incumbent trustees of the TDT. As a result, this appears to be the type of document that would pass with the trusteeship. Indeed, those instructions would normally be set out in the expert's report and, if not, questions about them could then properly be asked. Whilst it is possible that the note may contain additional background information about the case as a means of informing the prospective expert the reasons why that expert was being approached, and the note itself might not have been finalised, I am more inclined than not to think that this is a further example of where a review of that document might be warranted, although it really is quite marginal.

75. The fifth item is numbered 24 and is again coloured green. It relates to an e-mail with a draft note said to contain advice on issues affecting a Respondent personally in relation to its trusteeship *inter alia* of the TDT. The Applicants' complaint is not about the claim in respect of the advice but rather about the covering e-mail which they argue is not itself prima facie privileged.

76. In respect of this covering e-mail, Advocate Wessels has pointed out that, before the advent of technology, this would have been a letter. He suggests that legal advice privilege covers a continuum. In doing so, he refers to how it is put in *Phipson on Evidence* (19th ed., at para. 23-18):

> "*Legal advice privilege is narrower in ambit but can be claimed more widely. It protects communications between client and lawyer which are part of the continuum of the giving and getting of legal advice. It does not require the existence or contemplation of legal proceedings.*"

Advocate Wessels also submits that this continuum is part of the back and forth of such communications between client and lawyer and that the privilege does not only attach to the magic moment of providing advice.

77. I agree that there is no merit in requiring the Court (as para. 4 of the Application would seek to do) to look at a covering e-mail to which is attached the advice about which the Applicants acknowledge that privilege is capable of being asserted. This would be an excessive exercise and will serve no purpose. I cannot imagine that the distinction would be drawn by those advising the Applicants between a paper letter enclosing a paper copy of advice and the simple manner of using e-mail to provide the note of advice electronically under cover of the equivalent

of a letter. I agree with the Respondents that this is a very bad example of trying to unpick what Mr Prichard Jones' evidence sets out.

78. The sixth item covers multiple documents numbered 137 to 141. These five items are coloured orange. They are dated 3 March 2010 and the Respondents' schedule explains that they are linked because this was in the context of an application within what became known as the Guernsey 1 proceedings. The Applicants suggest that the draft affidavit would be confined to setting out facts and would not contain advice and litigation privilege would not normally be claimed, extending also to the draft application and skeleton argument. Advocate Wessels suggests that there is nothing here that can be said to be insufficient information. The proceedings needed to be commenced against foreign persons and so an application for leave to serve out of the jurisdiction was required. As the Respondents can properly assert litigation privilege over the drafts before whatever was then put before this Court to commence those proceedings, this is a valid assertion of that privilege and cannot be questioned by the Applicants. These are also issues being addressed in the proceedings currently before Lieutenant Bailiff Marshall where a partial waiver of privilege might follow to enable the claim for reimbursement to be supported.

79. I agree with the Respondents that this is not a sound complaint on behalf of the Applicants. The proceedings that became Guernsey 1 are well-known to the parties. Given that the companies to be convened were in the British Virgin Islands, an application for leave to serve out would follow unless an address for service were to be volunteered. Accordingly, the Respondents' assertion of privilege in relation to the drafts before that application was made clearly has, in my view, a sound principled basis of the type to which I referred in 2017. Accordingly, I think that this is another poor example chosen by the Applicants to seek to support their contention that the Court should now review whether the Respondents can properly maintain privilege on the basis set out in the schedule to Mr Prichard Jones' Affidavit.. It is clear that conducting such a review would confirm that privilege is properly asserted and would add nothing further to the process. Indeed, it would seem to be pointless to consider doing this.

80. The seventh and final item also covers multiple entries numbered 200 to 206. These relate to the section of the schedule dealing with invoices. The Applicants' complaint is that it is not clear how covering letters to invoices are documents over which legal advice privilege can be claimed. Advocate Wessels suggests that the invoice relates to the advice over which privilege is asserted and the covering communication benefits from the same type of continuum already mentioned.

81. Having indicated that I was not much interested in the invoices until a picture emerged about the main documents themselves, I can deal with this example quickly. I am satisfied that the covering letters are all part of that ongoing continuum and so would fall within the privilege asserted even if, when viewed in isolation, there is nothing on the face of such a document giving any indication of the actual advice to which it relates. In my view, this is another bad point being taken by the Applicants.

82. Turning to Appendix 3, 17 examples are given of documents that relate to them being circulated internally within the Respondents. It seems most were circulated by Mr Gonzalez. The Applicants argue that circulating materials to individuals who are non-lawyers cannot justify the Respondents' claim to privilege. In response, Advocate Wessels points to the short explanation offered at para. 52 of Mr Prichard Jones' Affidavit, noting that the document itself is identified in the schedule as an internal e-mail with an added comment as to what was being circulated. Advocate Wessels also refers to the distinction drawn in *Phipson* about circulating something externally to a third party and internal circulation. Paragraph 23-24 deals with dissemination of privileged material:

> "*There are two situations to distinguish. The first is where a record of advice given is disseminated internally, within a company. Here the law is clear that privilege may be claimed. The other case is where privileged material is disseminated to third parties. Here also there should be no problem to long as the material is disclosed in confidence.*"

83. If I take a couple of examples, the first in time of the internal e-mails to which Appendix 3 relates is document numbered 15. This involved circulating advice received from Macfarlanes in respect of the Royal College of Organists, including in relation to hostile action by beneficiaries. I am satisfied that this is an example of where the assertion by the Respondents of privilege is one that can be maintained. It is listed as the Respondents taking advice on their own position. It did not really need to be disclosed anyway as not belonging to the TDT. The circulation internally of advice obtained from a firm of solicitors will, in my view, be covered by the same privilege as the document being circulated. The second example relates to document numbered 143. I have chosen to refer to this one because it relates to litigation privilege rather than legal advice privilege. It forwarded advice received from Macfarlanes in relation to correspondence received from another firm of solicitors about the conduct of the Somerfield Proceedings. Again, the underlying advice seems to me to be properly claimed to be covered by privilege and so for Mr Gonzalez to forward what he received to one of his colleagues does not, in my view, offend the principle that the same litigation privilege will continue to apply. I do not need to comment further because I am satisfied that the same principles will apply to the other documents to which Appendix 3 relates.

84. In these circumstances, I am not persuaded that the Applicants have been able to demonstrate that the Respondents' assertion to privilege in respect of the 17 documents found in Appendix 3 to the Affidavit of Mr Davis is unfounded. Instead, I find that the explanation offered through the Affidavit of Mr Prichard Jones is such that the Respondents' assertion of privilege for internal circulation of legal advice it has received is justified. There is no need for any further review of these materials.

85. Although there are a couple of examples from Appendix 2 where I have commented that having a look at those documents might just be justified, it is fair to say that the balance lies against doing that because the majority of examples given in that Appendix have been rejected. I have, however, looked carefully at the full list of documents set out in the schedule exhibited to Mr Prichard Jones' Affidavit and I have reached the conclusion that I think the Respondents have set out a suitably principled basis for asserting the types of privilege that are claimed. The Applicants have been in office for a while now. They will have reviewed the documents that were passed to them by GTC (and if they have chosen not to do so, they would face the criticisms levelled at GTC by Lieutenant Bailiff Chadwick) and so the Applicants and those advising them should understand better than I can what it is that was going on during this relevant period when the Respondents were the trustees of the TDT. I am satisfied that the brief descriptions set out in this schedule are adequate to comply with para. 2 of the 2017 Order. Whilst it may be possible to go through the entirety of it with a fine-tooth comb and spot areas where it might be that the claim is questionable (eg, items numbered 18 and 23), when reviewing each entry in the schedule I did not spot other documents leaping out at me where I felt compelled to question whether the Respondents' claim could properly be asserted. Indeed, the review that was undertaken in 2017, using the colour-coding as a helpful guide, reinforces my view that the Respondents should be treated as having complied with the Order made in 2017.

86. I have also reminded myself that any review by the Court should be a last resort. I will refer to the summary found at para. 23-48 in *Phipson* on the basis that it says as much as is needed for the purposes of this judgment:

> "*Whilst the court has power to inspect documents and may do so in order to determine a disputed claim for privilege, this is now regarded as a solution of last resort. First, there is a real danger in the court looking at documents out of context. Secondly, if it is suggested that the side whose documents are in question may make submissions but the other side may not see the documents, which will usually be the case in relation to inspection by the court, there is a danger of inequality of arms and this will rarely be a satisfactory solution.*"

I further note that there has been a recent example of the English court expressing the need for caution before a court inspects documents (*UTB v Sheffield United* [2019] EWHC 914 (Ch)).

87. Having concluded on all the material that I have considered that I am generally satisfied that the Respondents have complied with the terms of the 2017 Order, meaning that there is no principled basis for conducting the type of review sought by para. 4 of the Application, and sharing the concern about the caution that should be exercised before taking such a step, I have still gone on to consider whether I should nevertheless agree with the Applicants to conduct that review, at least of some of the documents, as a means of being able to satisfy them that what the Respondents assert as privileged material is justified. I have decided that it would be wrong of me to adopt that course of action. Whilst it may be a means to bring some finality to these delivery-up orders, conducting such a review would entail devoting some judicial resources to an exercise that I am satisfied would be without merit. That would not be a good use of my time and so would, I think, also be contrary to the terms of the overriding objective found in rule 1 of the Royal Court Civil Rules, 2007. Even if not done by the Court, it would entail spending money, presumably from the TDT, for someone to perform this task when I have found that it is not warranted. Moreover, as I have just explained, the merits are not with the Applicants anyway and this would in some ways be pandering to them just because the manner in which documents have been provided by the Respondents to GTC and the assertions of privilege have shifted from time to time in the past. I do not think that the historical difficulties that the trustees of the TDT have encountered is a good reason for going behind the schedule exhibited by Mr Prichard Jones which, I repeat, I find complies with the 2017 Order I made.

88. The outcome, therefore, is that I will dismiss para. 4 of the Application. It necessarily follows that para. 5 is also dismissed.

**Costs**

89. Paragraph 7 of the Application as amended seeks an order that the Respondents pay the parties' costs of these proceedings. I am treating that as an application by the Applicants for the costs that have been incurred by any party to the proceedings. It also seeks a declaration that the Respondents be deprived on their entitlement to an indemnity in respect of the costs of these proceedings.

90. Advocate Richardson contends that an analysis of who won and who lost will show that the Respondents lost and so costs should follow the event. He further suggests that the evidence in the Ninth Affidavit of Mr Davis supports the Applicants' claims that the acts or omissions of the previous CEO of the Respondents, Mr Clifford, shows that the Respondents have acted in such a way that indemnity costs pursuant to rule 83 of the 2007 Rules could be awarded against them.

91. Advocate Wessels points out that the Applicants were only joined to these proceedings in January 2020. When GTC was removed as a party to the proceedings, any reservations of costs in respect of the proceedings in which it had been engaged would have needed to be dealt with before GTC's removal or can now be regarded as having fallen away. As regards depriving the Respondents of the indemnity otherwise available to them, this aspect could be addressed in the

proceedings extant before Lieutenant Bailiff Marshall. Although it is clear from her decisions in that matter that the learned Lieutenant Bailiff was prepared to leave the costs of the delivery-up proceedings to the Court as seized with those matters, the better approach would be to adopt a similar regime for dealing with any remaining questions about whether the usual indemnity can be relied upon.

92. I propose to take a simple approach to the question of costs. When Lieutenant Bailiff Chadwick made the first delivery-up order, costs were reserved. The parties were GTC (then known as R&H) and the Respondents. The Order I made in May 2017 also included the reservation of costs for that application. When an extension of time was given to the Respondents the following month, costs were reserved. Following the hearing in August 2017, costs were also reserved. The parties were GTC and the Respondents. The first issue, therefore, is how to resolve all those reservations of costs.

93. I agree with Advocate Wessels that the Applicants cannot pursue the costs that were reserved at a time when they were not parties to these proceedings. Although the Applicants have tried to argue that they were substituted for GTC, I take the view that rule 37 of the 2007 Rules shows that the process involves adding and removing parties. GTC was eventually removed because it had ceased to be a proper party. If there had been any outstanding issue relating to the costs that then stood reserved, they should have been addressed in the terms of the order removing GTC as a party. The implication, therefore, is that the ability of this Court to make any inter partes order for the costs that had been reserved disappeared. It has not been suggested, for example, that the ability to pursue a costs order against the Respondents had been assigned to the Applicants by GTC. There has also been no suggestion that there is anything within the Trusts Law that means a successor trustee is empowered to pursue a costs order that could have been applied for by a predecessor in office. Accordingly, the Applicants cannot seek an order that the Respondents pay to them the costs of those earlier proceedings. That is a separate issue from whether or not the Respondents should lose any entitlement to an indemnity.

94. The Applicants could pursue a costs order if they were so minded in respect of the present Application to which they are clearly parties. Given that the outcome has been adverse to them, they may wish to think twice about doing so. If they maintain that these delivery-up proceedings should be viewed as a form of hostile litigation, the successful parties now appear to be the Respondents. Whilst the Respondents may also be minded to seek an order for costs against the Applicants, both sides may realise the merits in leaving these matters to be resolved within what I have called the Priorities Claims.

95. As I explained in January 2017 and have repeated in this judgment, I am satisfied that the proper basis for seeking a delivery-up order and enforcing the terms of such an order made can be found in the Trusts Law. In effect, an incoming trustee is seeking an order under the supervisory jurisdiction of this Court for documents that have not been provided voluntarily to be ordered to be disclosed and capable of being inspected. Although this might be an area where the costs for doing so fall to come from the trust, such an application may well take the actions of the reluctant trustee in declining to assist an incoming trustee into a position where it would be ordered to pay the costs incurred by the new trustee in seeking an order from the Court. An example of that is the decision of the Royal Court of Jersey in *Ogier Trustee (Jersey) Limited v CI Law Trustees Limited* [2006] JRC 158, where costs on the indemnity basis were awarded. It would, I think, necessarily follow that this would entail depriving the party against which indemnity costs have been awarded of an ongoing indemnity from the trust fund for the costs to be paid and its own costs.

96. In the context of the application made by GTC resulting in the 2017 Order, as subsequently modified, although the then trustee of the TDT was successful, it did not get an Order in the wide terms that it had sought. There would, therefore, be a valid argument on behalf of the

Respondents that they were entitled to resist the ambit of the relief being sought by GTC because it was couched too broadly. Against that, it could be said that the Respondents should have been more willing to engage and try to reach a basis on which further material, subsequently provided to GTC, was made available. As the Applicants now suggest, their stance throughout might be said to be one of erecting barriers to what should be a straightforward exercise. It may well be that the Respondents' position has been borne out of the way in which such extensive litigation has taken place over so long a period that they could no longer see the wood for the trees.

97. In the context of the first delivery-up order, and without commenting on the argument that might be made about how long a reservation can continue in the light of our rules about prescription, it is difficult to know quite what a judge seized with that order would make when it came to where the costs should lie. GTC (as R&H) was successful. It obtained an order but its subsequent conduct in relation to those documents has been called into question. Whether there would have been a costs order in GTC's favour and, if so, whether it would have resulted in the view being taken that the conduct of the Respondents was such that they should be deprived of their indemnity is, in my view, quite a difficult assessment to make more than a decade later.

98. In the light of these comments, I take the view that the better forum to consider whether any indemnity survives will be in the Priorities Claims. I have offered the brief comments that I have just made to indicate that it does not necessarily follow from GTC being successful (and the Applicants being unsuccessful) that the Respondents should be deprived of any indemnity on which they could otherwise rely. As matters stand, the removal of GTC means that there are no inter partes costs orders as between GTC and the Respondents. I have not heard submissions on the outcome of this latest Application, but have indicated that the Applicants are unlikely to get a costs order in their favour. If the parties to this Application want a decision on the costs of this Application, then they can either agree how that determination is to proceed or can bring that issue to a mutually convenient Interlocutory Court. Against that background, if the Applicants still want to run the type of argument that any indemnity available should not be available to the Respondents, rather than me determining whether or not there should be any such deprivation of indemnity, I consider that it is preferable for that issue to be dealt with in the Priorities Claims, adopting the process that has been set out there and with which the parties are already familiar. Accordingly, I am not minded to make any order on para. 7 of the Application.

**Conclusion**

99. For the reasons I have given, the Applicants will not get any relief on their Application. I am satisfied that the Respondents complied with the terms of the 2017 Order. In the absence of non-compliance, there is no basis for going behind their assertions of privilege and the WIP reports (and also the insurance documents) were not covered by the Order and so cannot now be pursued. Finally, in relation to the costs that were reserved, these are not claimable by the Applicants and I prefer to leave the question of whether the Respondents should be deprived of any indemnity to be resolved in the other proceedings currently before Lieutenant Bailiff Marshall because these issues are better suited to what is happening there.