

Application concerning the disclosure of documents relating to the administration of the Trust.

[2022]GCA092

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
ON APPEAL FROM THE ROYAL COURT**

**CIVIL DIVISION APPEAL No. 559
23 December 2022**

Before:

**Clare Montgomery KC, President
George Bompas KC JA
James Wolffe KC JA**

Between:

**(1) Fort Trustees Limited
(2) Balchan Management Ltd**

Appellants

-and-

**(1) ITG Limited
(2) Bayeux Limited**

Respondents

**Advocate P Richardson for the Appellants
Advocate J M Wessels for the Respondents**

Wolffe JA:

This is the judgment of the Court.

Introduction

- 1 The Appellants are the current Trustees of the Tchenguiz Discretionary Trust (“the TDT”). The TDT is a trust established under Jersey law by a trust deed signed on 26 March 2007. Its beneficiaries are Robert Tchenguiz, his children and remoter issue and any person or charity that is added to the class of beneficiaries.
- 2 The First Respondent was the original Trustee of the TDT. The Second Respondent was appointed as a co-Trustee in August 2007. On 1 July 2010, the Respondents were removed

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from office as Trustees of the TDT, and Rawlinson and Hunter Trustees SA were appointed in their stead. Rawlinson and Hunter Trustees SA were later renamed Geneva Trust Company SA and are referred to in this judgment as “GTC”. On 3 October 2017, GTC were removed from office as Trustees of the TDT, and the Appellants were appointed in their stead.

- 3 On 9 June 2017, in proceedings at the instance of GTC, Richard James McMahon, then Deputy Bailiff, issued the following order (“the June 2017 Order”), amending an Order of 18 May 2017 made following a judgment of 30 January 2017, and addressed to the Respondents:

“1. 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 which have already been disclosed and to which no assertion of privilege is made shall be disclosed within 21 days with permission to inspect the same being given thereafter to [GTC] with permission to take copies.

2. 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 [GTC] within 28 days.”

- 4 When responding to the June 2017 Order, the Respondents withheld certain documents on the basis of claims to privilege personal to the Respondents. After sundry procedure, which we describe further below, the Respondents produced an affidavit sworn on 25 August 2017 by Sebastian James Prichard Jones (“the Prichard Jones affidavit”), a partner of Macfarlanes LLP, in support of their claim to privilege in relation to 229 documents (“the 229 Documents”).

- 5 In November 2019 the Appellants made an application (the “Amended Application”) for further orders in relation to the 229 Documents and also to documents listed in a Schedule to an earlier affidavit sworn by Luis Gonzalez on 4 February 2016 (“the Gonzalez list”), and also for disclosure of certain reports generated internally within the Respondents to record work in progress for the purpose of invoicing fees (“the WIP reports”). The Amended Application was in due course supported by the ninth affidavit of Ian Stewart Davis (which we refer to as “the Davis affidavit”) sworn on 21 January 2021.

- 6 The Respondents resisted the Amended Application both on the merits and on the basis that it constituted an abuse of process.

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- 7 The Bailiff heard the Amended Application on 21 and 22 June 2021. In addition to the orders specified in the Amended Application, the Appellants sought at the hearing an order for delivery up by the Respondents of certain insurance documents which, it was said, the Respondents either had or should have had.
- 8 The Bailiff issued his judgment on 26 April 2022. He declined to strike the application out as an abuse of process but dismissed it on the merits.
- 9 The Appellants now appeal against the Bailiff's decision. The Respondents support the Bailiff's judgment on the merits and also contend that he should have struck out the relevant parts of the application as an abuse of process.
- 10 For the reasons which we set out in this judgment we dismiss the appeal.

General background

- 11 There has been considerable litigation relating to the TDT. The Respondents claim that the 229 Documents and the Gonzalez list are protected by legal professional privilege, whether legal advice privilege or litigation privilege, personal to the Respondents.
- 12 Since a central issue in this case is whether the Prichard Jones affidavit provides an adequate explanation of the Respondents' claim that the 229 Documents are privileged, it is convenient to quote the passage in that affidavit in which the deponent sets out the background to the removal of the Respondents from office as Trustees of the TDT, in order to understand the context for the Respondents' claim to privilege. In this passage, the Respondents are referred to as "the Former Trustees" and GTC as "R&H".

"24. The 229 Documents span the date range of August 2009 to August 2010. ...

25. This period was an extremely tumultuous period in the history of the TDT, in circumstances where the trust and the trustees were facing hostile action from a number of sources. In order to provide better explanation of the matters in relation to which advice was being sought in the period to which the 229 Documents relate, it may be helpful to provide some background context to the circumstances facing the trust from mid-2008 onwards.

The relationship with Kaupthing

25.1. Kaupthing, the Icelandic bank, was a major creditor of the TDT structure. By an agreement dated 19 December 2007 known as the Framework Agreement, Kaupthing

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*provided further borrowing to the TDT structure, via Oscatello Investments Limited (**Oscatello**) – and, in particular, so as to allow it to meet various margin calls on its investment positions. Glenalla Properties Limited (**Glenalla**) and Thorson Investments Limited (**Thorson**) were companies which became owned by Oscatello and over which Kaupthing's borrowing was secured. The corporate group over which the lending was secured, following what was known as “the **Oscatello restructuring**” was “the **Oscatello Structure**”.*

25.2. In October 2008 Kaupthing collapsed and was essentially nationalised. In connection with its collapse, Kaupthing exercised rights under the Framework Agreement to liquidate various positions.

25.3. On 10 October 2008, receivers were appointed over the shares of, inter alia, Glenalla and Thorson.

25.4. On 25 November 2008, Kaupthing gave formal notice of termination of the Facility Agreement and demanded immediate repayment of the then outstanding lending of approximately £650m, which the relevant TDT companies were not in a position to repay.

The Somerfield Proceedings

*25.4. One of the investments of the TDT financed by Kaupthing was in the Somerfield supermarket chain. Tazamia Limited (**Tazamia**), a company within the TDT structure, had acquired an interest in Somerfield as one of a consortium of investors in January 2006. Kaupthing itself also owned an interest in Somerfield via its subsidiary, Isis Investments Limited (**Isis**). In March 2008 an issue arose between R20 Limited (the investment adviser to the Former Trustees, of which Robert Tchenguiz was the Chairman) (“**R20**”), and Kaupthing as to whether or not the TDT's interest in Somerfield should be sold – Kaupthing considered that it should be sold, whereas R20 were reluctant to recommend a sale. The sale eventually took place in July 2008. Tazamia ultimately received proceeds of approximately £127m (the **Somerfield Proceeds**).*

*25.6. A dispute arose between Kaupthing and the Former Trustees, which ultimately led to litigation in the High Court in London (the **Somerfield Proceedings**). In essence, it was alleged that an agreement (the alleged **Scott's Agreement**) was reached with Kaupthing whereby R20 (as investment adviser to the Former Trustees) had agreed to recommend the sale of TDT's interest in Somerfield on the basis that the proceeds from the sale were released from the security under the Framework Agreement. Kaupthing denied that the **Scott's Agreement** existed.*

25.7. As the dispute which led to the Somerfield Proceedings was emerging, on 13 November 2008, the Former Trustees entered into a series of transactions with the benefit of the advice

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*of Quinn Emanuel Urquhart Oliver & Hedges LLP (later Quinn Emanuel Urquhart & Sullivan LLP – **Quinn Emanuel**) involving TDT’s interest in the Somerfield Proceeds (subsequently referred to as the **TDT Transactions**). The TDT Transactions were undertaken, and notified to Kaupthing, with the support of the beneficiaries and at a time where the Former Trustees were investigating various claims which might justify the transactions in light of the contractual position and solvency position of the relevant companies.*

25.8. On 2 December 2008, Kaupthing (together with the three TDT companies by then under its control) commenced proceedings in the BVI, inter alia, to set aside the TDT Transactions. The Former Trustees counterclaimed, relying upon the Scott’s Agreement.

25.9. The Somerfield Proceedings were then commenced in England on 27 February 2009 and the BVI Proceedings were stayed pending the outcome of the Somerfield Proceedings; which ultimately came to be the forum for the disputes arising as to entitlements to the Somerfield Proceeds. The Former Trustees were represented by Quinn Emanuel and Stephen Auld QC in the Somerfield Proceedings.

Guernsey 1

*25.10. The proceedings which came to be known as “**Guernsey 1**” related – at least in significant part – to the apparent liability of the Former Trustees to Glenalla, Thorson and Ocatello (together, the **BVI Companies**) pursuant to certain intercompany loan arrangements between them (alternatively in unjust enrichment) (the “**Loan Arrangements**”).*

*25.11. Stephen Akers and Mark McDonald of Grant Thornton (the **Joint Liquidators**) were appointed as joint liquidators over Glenalla and Thorson on 18 August 2009 following a resolution of the members. At that stage, the Former Trustees owed Glenalla approximately £62.8m and Thorson approximately £80.5m under the Loan Arrangements, as a result of which the TDT was apparently insolvent.*

26. Well before October 2009, being the date of the earliest document within the Revised Schedule ... it was apparent to the Former Trustees that they would likely face a claim from the new Kaupthing appointed directors of the BVI Companies and from the beneficiaries in relation to the Loan Arrangements (i.e. the claims that became Guernsey 1). The Former Trustees anticipated that once the new office-holders inspected the books and records of the BVI Companies and found evidence of the Loan Arrangements due to the BVI Companies from the Former Trustees, they would demand repayment of these. Robert Tchenguiz, one of the TDT’s beneficiaries, had made clear in discussions concerning the loans in 2009 that he considered that Kaupthing was not intended to benefit from any loans – ie that any money due

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from the Former Trustees to the BVI Companies was not intended to be part of the security offered to Kaupthing as part of the Oscatello restructuring. As a result if the Loan Arrangements were found to exist and to be repayable, the Former Trustees considered it likely that a claim might be made against them by the beneficiaries.

27. The Loan Arrangements were not the only source of tension between the Former Trustees and the beneficiaries in the relevant period. From early 2009, various proposals in relation to a potential transaction to transfer Mr Tchenguiz's home, the Royal College of Organists (which was owned within the TDT by Iver Resources Limited), out of the structure had been considered. A number of issues arose in connection with these proposals on which the Former Trustees were required to take legal advice. Before 26 August 2009, being the date of the earliest documents in this connection within the Revised Schedule, the Former Trustees anticipated a personal claim against them. R&H [ie GTC] subsequently brought claims against the Former Trustees both in England and before this Court for the shares in Iver Resources Limited to be transferred to another trust structure.

28. Finally, throughout the summer and autumn of 2009, tensions arose between the Former Trustees and Mr Tchenguiz and (following his appointment as protector) Richard Hillier of R&H, concerning the conduct of the Somerfield Proceedings. Well before 27 May 2010, being the date of the earliest document within the Revised Schedule in the category described in paragraph 51.3 below [ie documents created for the dominant purpose of what was to become Guernsey 3] the Former Trustees anticipated personal claims against them in relation to their conduct of the Somerfield Proceedings.

29. With that background in mind, I turn directly to the period covered by the date range of the 229 Documents.

29.1. Uri Moallem (the original protector of the TDT) resigned as protector and appointed Richard Hillier of R&H in his place on 8 October 2009. Mr Hillier appointed Herbert Smith LLP to review the conduct of the Somerfield Proceedings on 15 October 2009. Through the autumn and winter of 2008/9 there were a series of interactions between Herbert Smith and the Former Trustees concerning that litigation, the nature of which suggested that Mr Hillier was critical of their conduct.

29.2. Oscatello was placed into insolvent liquidation on 16 February 2010.

29.3. Guernsey 1 was commenced on 12 March 2010 by the Former Trustees seeking declarations as to the validity, terms and construction of the Loan Arrangements. In advance of that the Former Trustees had – amongst other things – to consider and take advice about

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the extent, nature and effect of the Loan Arrangements and their potential liability in respect of them. Amongst other things, a report was obtained from Deloitte in that regard; which was obtained in contemplation of what became the Guernsey 1 proceedings. Legal advice was also obtained on the Former Trustees' own position in circumstances where Mr Hillier alleged that the Former Trustees were acting under a conflict of interest (i.e. acting for their own benefit and not for that of the beneficiaries), disputed the existence of the Loan Arrangements and argued that Guernsey 1 should not proceed at all.

29.4. *Shortly before Guernsey 1 was commenced, Mr Hillier commenced legal proceedings against the Former Trustees seeking certain injunctive relief in respect of those intended proceedings (the **Hillier Injunction Proceedings**). ... those proceedings were held in camera ... I do not think it is appropriate to say anything more about the detail of the proceedings in this instance: the detail is, however, known to R&H. It is clear from the nature of those proceedings that they were hostile.*

29.5. *Following their appointment, the Joint Liquidators took steps to take control of the companies' books and records and to seek to understand the Loan Arrangements. They accordingly made various requests of the Former Trustees for documents and sought explanations of the Loan Arrangements. That process was primarily conducted by Weil, Gotshal & Manges LLP on behalf of the Joint Liquidators. Mr Hillier undertook the same process and made similar requests, in his capacity as protector.*

29.6. *On 25 March 2010, following the issue of Guernsey 1, the Joint Liquidators sought an undertaking from the Former Trustees that they would not deal with or diminish the trust assets. The Former Trustees agreed a form of wording with the protector which was then provided to the Joint Liquidators.*

29.7. *By letters dated 22 April 2010 (received by the Former Trustees on 7 May 2010) the Joint Liquidators demanded immediate repayment of the Loan Arrangements.*

29.8. *Also in April 2010 (and in circumstances where the Somerfield Proceedings were due to come on for trial in July 2010), Mr Auld QC gave wholly pessimistic advice as to the prospects of establishing any entitlement to the Somerfield Proceeds, and considered that due to Ocatello's insolvent liquidation, the likelihood of the Former Trustees recovering any portion of the Somerfield Proceeds was negligible. On 29 April 2010, the Former Trustees received advice from Harneys which corroborated the advice with respect to BVI insolvency law (For the avoidance of doubt privilege has not been claimed over that advice, which was obtained for the benefit of the trust and paid for from it).*

29.9. *On 13 May 2010, Herbert Smith wrote to Quinn Emanuel to inform them that the protector of the TDT (still at that stage Richard Hillier of R&H) intended to replace the Former Trustees as trustees of the TDT, and requesting that the Former Trustees apply for an*

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adjournment of the trial of the Somerfield Proceedings as they were conflicted in pursuing them. That application was subsequently made by Mr Hillier, but dismissed.

*29.10. On 19 May 2010, the Former Trustees issued further proceedings in the form of an application for directions which came to be known as **Guernsey 2**. The conduct of those proceedings has also been in camera and it is inappropriate to refer to the detail of those proceedings further, although their intended existence and general nature was made clear in the Former Trustees' pleadings in Guernsey 1. The original (unamended) application in Guernsey 1 made clear That the Loan Arrangements themselves were an issue raised in Guernsey 2. The Guernsey 2 proceedings were commenced in view of the potentially competing interests in the trust fund. Mr Tchenguiz and R20 continued to make investment/transactional recommendations to the Former Trustees. Conversely, the Joint Liquidators had sought undertakings from the Former Trustees that there would be no transactions in respect of TDT assets pending the determination of Guernsey 1. In light of the competing interests and the wider solvency issues facing the trusts, as well as the hostile positions adopted by those holding those competing interests, the Former Trustees considered it appropriate in the context of the Guernsey 2 proceedings to take advice on their personal position on the matters raised within it.*

29.11. On 14 June 2010, and following extensive negotiations and written advice from Mr Auld QC on 3 June 2010 that the Former Trustees should settle on the best terms available, the Somerfield Proceedings were compromised.

*29.12. The Former Trustees were aware throughout this period and in the lead-up to the settlement of the Somerfield Proceedings that it was likely that they would face criticism from the beneficiaries and in all probability claims concerning the Somerfield Proceedings and their eventual settlement. Consistent with the approach that had emerged during the earlier interactions mentioned above, Herbert Smith sent a series of letters to Quinn Emanuel and Mourant Ozannes throughout May and June 2010 criticising the Former Trustees for their conduct of those proceedings and taking issue with their lawyers' assessment of the merits of the proceedings. Those claims regarding the Somerfield Proceedings were ultimately brought, as a part of proceedings involving other claims brought by R&H, against ITGL in June 2013 (known as **Guernsey 3**). The Somerfield claims were later struck out by the Deputy Bailiff in a judgment dated 11 November 2015.*

29.13. On 2 July 2010, the Former Trustees were removed as trustees of the TDT. On or around 9 July 2010, R&H commenced hostile proceedings in Jersey seeking a declaration that the Former Trustees had no indemnity against the trust assets, an injunction preventing the Former Trustees from dealing with the trust assets and directions requiring the Former Trustees to vest the TDT assets in R&H (in order to defeat the Former Trustees' claimed lien

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and undertakings given to the Joint Liquidators). The plain intention of these proceedings (service of which on the Former Trustees was set aside by the Jersey Royal Court) was to derail Guernsey 2.

29.14. In August 2010, R&H undertook their first review of the TDT files ...”

- 13 Guernsey 1 and Guernsey 3 were ultimately determined in 2018 by the Judicial Committee of the Privy Council: *Investec Trust (Guernsey) Ltd and Another v. Glenalla Properties Ltd and others; Rawlinson & Hunter Trustees SA v. Investec Trust (Guernsey) Ltd and another* [2019] AC 271 (“the 2018 JCPC decision”). As Lord Hodge’s judgment in the 2018 JCPC decision explains in greater detail, Guernsey 1 ultimately involved various claims and cross claims, including: (i) whether the Respondents were liable to the BVI companies; (ii) whether any such liability could be enforced against the Respondents only to the extent that they held trust assets; (iii) whether the Respondents had an indemnity from the trust assets of the TDT in respect of any such liability; and (iv) whether the Respondents had committed gross negligence breach of trust in their handling of the relationship with the BVI companies. Guernsey 3 included further allegations against the Respondents of gross negligence breach of trust in respect of the settlement of the Somerfield Proceedings. In his judgment (at paragraph 105), Lord Hodge observes that “[a]ll attempts to erect a gross negligence barrier to the enforcement of [the Respondents’] indemnity are now at an end”.
- 14 The assets of the TDT are insufficient to meet the claims on it. Proceedings (known as “the **Priorities Proceedings**”) were initiated in the Royal Court in September 2018 seeking directions as to the distribution of those assets. During the course of those proceedings, the Court has addressed, among other things: (i) the effect of an assignment to the Appellants as Trustees of the TDT of the liabilities to the BVI companies; and (ii) the approach to be taken to the distribution of the trust assets where the Respondents, GTC and the Appellants all have claims to indemnity from those assets. These issues have been the subject of decisions of the Court of Appeal and the Judicial Committee of the Privy Council (*ITG Ltd and others v. Fort Trustees Ltd and another* [2020] GCA 043; *ITG Ltd and others v. Fort Trustees Ltd and another* [2022] UKPC 36) which have largely resolved them.
- 15 The Priorities Proceedings continue before Lieutenant Bailiff Hazel Marshall KC, with an issue concerning an order by the Lieutenant Bailiff for an interim distribution of TDT assets to the Respondents to return to this Court in early February 2023. We understand that in the Priorities Proceedings, the Respondents seek to be indemnified for around £28 million, the bulk of which comprises legal costs, from the assets of the TDT.

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- 16 In opposing that claim of the Respondents, the Appellants contend (according to the Davis affidavit) inter alia that the failure by the Respondents to instruct separate lawyers to advise them personally means that it is not possible to distinguish between costs incurred personally and those incurred qua trustee, and that, for this reason, it is not possible to determine the extent to which the Respondents' costs were reasonably incurred.

Disclosure of documents by the Respondents

- 17 We should also describe the history of disclosure of documents by the Respondents to the GTC and to the Appellants.

Voluntary disclosure and the 2011 Delivery-up Proceedings

- 18 After their removal from office as Trustees of the TDT, the Respondents voluntarily disclosed a substantial volume of documentation – amounting to some 1,300 hard copy files - to GTC. In August 2011, GTC applied for: (i) an order requiring the Respondents, in respect of electronic trust documentation, to search their database against certain parameters, and disclose trust documentation identified by that search; and (ii) orders requiring the Respondents to procure the disclosure of certain files of two firms of lawyers, Quinn Emanuel Urquhart & Sullivan LLP and Mourant Ozannes. In response to this application, the Respondents filed an affidavit by Luis Gonzalez, who is a Director of the Respondents. This affidavit disclosed that the Respondents had retainers with Quinn Emanuel, Mourant Ozannes and Macfarlanes both in their personal capacities and as trustees of the TDT.
- 19 On 10 October 2011 Sir John Chadwick LB granted an order (“the Delivery-up Order”). He required the Respondents to undertake a search of their database for electronic Trust Documentation (defined as “documents relating to the TDT and/or belonging to the TDT”) in accordance with a specification set out in the order and to provide to GTC a database of the documentation disclosed by this search. He also required the Respondents to use their best endeavours to procure that the solicitors' files sought by GTC were passed to GTC. The order provided for the removal of documents which were not Trust Documentation and/or on the basis of privilege.
- 20 The response of the Respondents to the Delivery-up Order resulted, as we understand it, in some 400 lever arch files and some 57,000 electronic documents being delivered up to GTC. A list of documents withheld on the basis of privilege personal to the Respondents from the

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57,000 electronic documents was exhibited to a further affidavit sworn by Mr Gonzalez on 16 January 2012.

The 2016 application and the 2017 Order

- 21 On 8 January 2016 GTC filed an application seeking further orders against the Respondents. GTC sought an order for delivery up or inspection of all documents “relating to, connected with or otherwise concerning” the TDT. Alternatively, they sought an order for delivery up or inspection of all such documents save for any that the Respondents claim a right or duty to retain, and an order requiring the Respondents to file a sworn affidavit containing a list of retained documents and identifying, in respect of each document, the right or duty relied on and “full particulars” of the grounds on which the right or duty is claimed.
- 22 According to an affidavit of Louise Ann Hargreaves, an Advocate with Mourant Ozannes, in response to the 2016 application, the Respondents made 14 boxes of physical files available for inspection by the Appellants. These contained the formal records of the TDT. The Respondents withheld 146 documents from those boxes on the basis of privilege and provided details of those documents in a schedule annexed to an affidavit sworn by Mr Gonzalez on 4 February 2016. These were the documents referred to in these proceedings as “the Gonzalez list”.
- 23 According to Mr Gonzalez’ affidavit of 4 February 2016, 110 of the documents listed in the Gonzalez list were documents over which a claim to privilege had previously been made in connection with the Delivery-up Order. Others were documents over which a claim to privilege had been made in the context of disclosure in Guernsey 1 or were documents created after the Respondents’ removal from office as trustees of the TDT. There were 29 documents for which a claim to privilege was made for the first time.
- 24 The 2016 application was the subject of a hearing before the Deputy Bailiff on 4 and 5 October 2016. The Deputy Bailiff issued a judgment on 30 January 2017 concluding that further documents should be provided by the Respondents. His judgment discloses that he considered the decision to be a finely balanced one. He was critical of GTC, as regards the timing and breadth of the application and the way in which GTC’s position had changed. However, he considered that there remained “a residual concern that the Applicant has not been given everything that it is in principle entitled to and that is a concern that has not been adequately addressed by the former trustees”. He concluded that: “it is a just outcome to direct that the former trustees should fill the gaps that I have found exist in the documents already provided to the Applicant. ... I find that the way in which the questions relating to

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privilege had been addressed and the reviews carried out, even following the specific terms of the Delivery-Up Order, give rise to sufficient concern that there needs to be something more expansive provided to the Applicant”.

25. It is clear that the Deputy Bailiff regarded the scope of what was being ordered as limited and definite. The reference to “filling the gaps” just quoted also appears elsewhere in the judgment of 30 January 2017. For example, the Deputy Bailiff noted that Advocate Richardson for the Appellants submitted that “the underlying purpose of this Application is to fill ... gaps”. Later, on 22 June 2017 when giving an *ex tempore* judgment at a consequential hearing, the Deputy Bailiff noted that the order made on his 30 January 2017 judgment “was very much directed to filling in the gaps of the disclosure that had previously been given by the respondents ...”.

25 On 18 May 2017, the form of the order to be made to give effect to the 30 January 2017 judgment was discussed at a hearing before the Deputy Bailiff. The transcript discloses the following exchange, the starting point for which was the breadth of the order sought in paragraph 4 of the 2016 application (which we have quoted at paragraph 21 above):

“DEPUTY BAILIFF MCMAHON: As I have already said, Mr Richardson, it is the use of the words ‘related to, connected with or otherwise concerning’ ... that continues to be probably the words that give me the most concern. When I try and relate those to, for example, the way it is put in paragraph 23-105 of Lewin on Trusts (19th ed), which you can find set out twice, at paragraph 47 and 47 of the judgment, which talks about:

“A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust.”

ADVOCATE RICHARDSON: I am happy to import ‘all records, books and papers belonging to the trust’ into the order.

DEPUTY BAILIFF MCMAHON: All right. ...”

On 18 May 2017, the Deputy Bailiff issued an order giving effect to his decision of January 2017. He amended the order on 9 June 2017. We have quoted the terms of the amended order (the 2017 Order) at paragraph 3 above.

Disclosure following the 2017 Order

26 According to Ms Hargreaves’ affidavit, following the 2017 Order, the Respondents made available for inspection a further set of physical files that included inter alia I&B’s working

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papers, along with formal records of TDT companies that had gone into liquidation or were (directly or indirectly) under the control of the Joint Receivers. The Respondents removed 240 documents from those boxes of papers, on the basis of privilege. The retained documents were listed in a schedule annexed to the fourth affidavit of Luis Gonzalez, dated 15 June 2017 (“the Gonzalez 4 list”).

27 GTC were dissatisfied with the explanations provided for the assertion of privilege and on 20 June 2017 filed an application seeking an order for inspection of the documents in the Gonzalez 4 list. On 22 June 2017 the Deputy Bailiff rejected that application, although he directed the Respondents to identify the basis on which they asserted a right or duty to retain each document. His judgment stated that he was satisfied that the approach taken in Mr Gonzalez’ affidavit was “broadly consistent with what was expected by the terms of” the 2017 Order, but that the affidavit provided inadequate detail. He pronounced an order providing the Respondents with an opportunity to file a further explanatory affidavit.

28 The Respondents filed a further affidavit by Luis Gonzalez (his fifth affidavit), dated 29 June 2017. An exhibit to this affidavit contained an amended list of 234 documents (“the Gonzalez 5 list”) in respect of which privilege was asserted, with an additional column identifying, under one of four categories, the particular character of the privilege (ie as legal advice privilege or litigation privilege) being asserted for each document. GTC remained dissatisfied, and on 14 July 2017 issued a further application again seeking an order for inspection of the documents. The Respondents sought to have this application struck out as an abuse of process.

29 The Deputy Bailiff considered these applications at a hearing on 9 and 11 August 2017. He issued *ex tempore* decisions dismissing the Respondents’ strike out application and refusing the Applicants’ application for an order for inspection. He was not persuaded that the information provided in Mr Gonzalez’ fifth affidavit “fully discharges” the burden on the Respondents and gave the Respondents an opportunity – which he characterised as “the final opportunity” - to produce a further affidavit.

30 On 25 August 2017 the Respondents responded by filing the Prichard Jones affidavit. Mr Prichard Jones had been one of the Respondents’ legal advisers in their personal capacity throughout the period covered by the 229 Documents. His affidavit explained that five of the documents for which privilege had been claimed in Gonzalez 5 had previously been disclosed to GTC and that privilege was therefore now asserted in respect of 229 documents. The 229 Documents were listed in a schedule annexed to the affidavit (“the Prichard Jones list”).

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31 Following the narrative of the history which we have quoted above, the Prichard Jones affidavit states:

“it can be seen why the [Respondents] reasonably considered that they had to consider and take advice on their personal position in relation both to potential claims about historic trust transactions and any proposed future transactions, or other steps needed to be taken in light of: (i) the requests being made of them by the Joint Liquidators; (ii) the views of the protector and the principal beneficiaries, and the demands and request being made by them; (iii) the divergence of interests and views between those who might ultimately transpire to be interested in the assets of the TDT; and (iv) the insolvency of companies within the trust and, potentially, the trust itself ... I believe it is fair to say that the [Respondents] during this period could not safely take any material step in relation to the TDT without some risk of complaint and potential action being taken against them by third parties.”

32 The Prichard Jones affidavit then goes on to explain which of the Respondents’ lawyers during the relevant period acted personally for the Respondents. It states (paragraph 34) that the Former Trustees paid personally for the 229 Documents. It gives information about the instruction of each of the law firms concerned, including the following.

- (i) Ozannes (later Maurant Ozannes) were instructed by the Respondents both personally and in their capacity as Trustees of the TDT. The engagement letter confirmed this. From the end of September 2009 all advice was billed to and paid for by the Respondents.
- (ii) Macfarlanes initially gave advice to the Respondents in their capacity as Trustees; advice on the Respondents’ personal position was invoiced to the Respondents and paid personally. All work by this firm relating to the period covered by the 229 Documents was undertaken for the Respondents personally.
- (iii) Quinn Emanuel provided advice to the Respondents both in their capacity as Trustees and personally. They issued separate invoices for work explicitly stated to relate to the Respondents’ personal position and these were paid for by the Respondents personally. A reconciliation exercise undertaken in response to queries from Herbert Smith identified that £128,091 of fees had been incorrectly charged to the TDT rather than paid by the Respondents personally. The Respondents have reimbursed those sums to the TDT.

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33 The Prichard Jones affidavit then states (paragraph 49) that the 229 Documents “contain advice and assistance sought by the Former Trustees in relation to a number of areas of personal concern in view of their trusteeship of the TDT.” It explains that the 229 Documents had, for the purposes of the affidavit, been grouped by theme. In the list of documents in the schedule this was identified by a colour coding as follows.

- (i) Green – legal advice privilege for communications with Macfarlanes in relation to advice on the Respondents’ own position, obligations and. Potential liabilities and the steps they might take in light of the position of the TDT;
- (ii) Blue – 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 – 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 – legal advice privilege for communications with or between lawyers in relation to personal advice relating to the Somerfield Proceedings and their settlement;
- (v) Turquoise – 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 – litigation privilege for documents created for the dominant purpose of the litigation which became known as Guernsey 1;
- (vii) Red – 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;

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- (viii) Yellow – 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 – invoices and associated correspondence relating to personally privileged matters.

34 The schedule identifies, in respect of each document, which firm of lawyers' involvement was principally relied upon as the basis of the claim for privilege, the date of the document, the sender and recipients (referred to by initials in the schedule itself, but identified by name, organisation and email address in an attached list) and the category of privilege claimed (under reference to four categories used by Mr Gonzalez). The schedule included an additional column which allowed additional comment on individual documents to be provided. According to the Prichard Jones affidavit, the schedule corrected certain errors which had been made in the previous schedules.

The 2018 and 2019 applications

35 On 7 June 2018, the Appellants (who had been appointed Trustees of the TDT on 3 October 2017) filed an application to remove GTC from the proceedings and to be joined to the proceedings as applicants. The Respondents consented to the joinder of the Appellants but did not consent to GTC's removal. On 1 November 2019, the Appellants filed a further application: (a) seeking directions in relation to the removal of GTC from the proceedings; (b) further delivery-up orders; and (c) orders for costs. Following an exchange of correspondence, on 15 November 2019, the Respondents filed the Amended Application, which is the application currently before the Court.

Disclosure in the Priorities Proceedings

36 We have noted, under reference to Mr Davis' affidavit, that the instruction by the Respondents of the same lawyers to advise them in their capacity as Trustees of the TDT and for their personal interests is one of the issues raised by the Appellants in the Priorities Proceedings. In the Priorities Proceedings, the Lieutenant Bailiff issued directions on 10 December 2019 as to the documents which the Respondents are required to disclose for the purposes of those proceedings. The Respondents responded to the Lieutenant Bailiff's order. The Appellants sought further documentation. Following a contested hearing, the Lieutenant

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Bailiff rejected the Appellants' application in a judgment dated 30 April 2020: [2020] GRC 020. In that judgment, she also discussed inter alia: (i) the question of the Respondents' entitlement to be indemnified from trust assets in respect of legal costs incurred by them in connection with the TDT, including costs incurred in defending themselves successfully against claims for breach of duty; and (ii) the Respondents' assertion of privilege and the effect on that privilege of disclosure by the Respondents of documents pursuant to her directions for the purposes of adjudicating on their claims in the Priorities Proceedings.

The present application

37 Paragraphs 1 to 3 of the Amended Application concerned directions to progress the application which had been made on 7 June 2018 to remove GTC from the proceedings. The Court dealt with this part of the application on 23 January 2020, by removing GTC from the proceedings.

38 Paragraphs 4 to 7 of the Amended Application seek orders in the following terms:

“4. That the [Respondents] shall, within 7 days of the date of any order made in response to this paragraph file copies of the documents set out in the schedule to this application withheld by the Respondents on the basis of privilege (the “Alleged Privileged Documents”) so that the Court can determine whether each claim to privilege is justified.

5. Following the Court’s determination pursuant to paragraph 4 above, the Respondents disclose all Alleged Privileged Documents to the Trustees to the extent that the Court finds such claims to Privilege to be unjustified.

6. That the Respondents shall forthwith provide copies of all WIP reports for the time period specified in paragraph 1 of the order of 18 May 2017 on the basis that such WIP reports are documents falling within this order.

7. That the [Respondents] shall personally pay the parties’ costs of the proceedings including this application and for the avoidance of doubt shall have no right of indemnity in respect of those costs against the assets of the TDT.”

39 The Schedule referred to in paragraph 4 of the Amended Application is in the following terms:

“1. Documents identified in the list of documents exhibited at pages 24 to 41 of the First Affidavit of Luis Gonzalez.

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2. Documents identified in the list of documents exhibited in the list of documents exhibited at pages 21 to 45 of the Second Affidavit of Sebastian James Prichard Jones.”

40 The Amended Application was, ultimately, supported by the Davis affidavit, made on 21 January 2021. It will be evident from the date of the affidavit that there was considerable delay in progressing the Amended Application.

The Bailiff’s decision

41 The Bailiff took the view that the Amended Application was confined to inviting him to consider how far the Respondents had complied with the 2017 Order. As we have said, he rejected the Respondents’ argument that the Amended Application should be dismissed as an abuse of process. He dismissed it on its merits, for the reasons which he set out in his judgment of 26 April 2022. We will briefly outline his reasoning in the context of our discussion of each issue, so far as necessary in order to understand the arguments advanced before us.

42 The Bailiff gave effect to his decision in an Order which dismissed the Amended Application. He further ordered that all issues concerning the entitlement of the Applicants and the Respondents to an indemnity out of the assets of the [TDT] in respect of their costs of and occasioned by the 2011 proceedings which resulted in the Delivery-up Order and by the present proceedings be determined by Lieutenant Bailiff Hazel Marshall as part of the Priorities Proceedings.

Abuse of Process

43 Before us, the Respondents contend that the Bailiff should have dismissed the Amended Application as an abuse of process. They advance the argument on two bases. First, they argue that “the substance of the 2019 application had been abandoned years ago”, that it should have been pursued as part of the 2016 proceedings, and that to insist in it now involves the “unjust harassment and oppression” of the Respondents. Second, the Respondents allege that the true purpose of seeking further disclosure of documents is to advance a collateral attack on the 2018 JCPC decision, in particular the statement by Lord Hodge, quoted at paragraph 13 above that “[a]ll attempts to erect a gross negligence barrier to the enforcement of [the Respondent’s] indemnity are now at an end”. The Respondents contend, further, that any issue in relation to disclosure of documents could and should now be addressed in the Priorities Proceedings. And they draw attention to the fact that the Davis affidavit fails to

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state any practical need, as a matter of administration of the TDT, for the documents now sought. The Appellants have not suggested to us that there was any other evidence suggesting a practical need for the documents sought.

- 44 The Appellants argue that the present proceedings are the appropriate forum for determining whether the Respondents have complied with orders previously made against them in these proceedings. These proceedings are concerned with the handover of documents between former trustees and present trustees, and therefore, they say, have a different purpose and effect to the Priorities Proceedings, which are concerned with priorities between creditors. The Appellants make clear that they wish to recover documents free from the collateral use undertaking which would apply to documents disclosed in the context of the Priorities Proceedings. They reject the argument that the 2017 Order has become stale and contend that the Respondents have “continued to throw obstacles in the way of the Appellants getting the documents belonging to and of the trust” to which they claim to be entitled.
- 45 We have considerable sympathy with the Respondents’ proposition that the appropriate forum for resolving any live issues as regards the disclosure of documents is now the Priorities Proceedings. The question before the Bailiff, however, as now explained by the Respondents in their Respondents’ Notice, was whether the Amended Application was vexatious as being for “the illegitimate purpose to sustain the campaign of egregious litigation conducted since 2010 by ... trustees acting at the behest of Robert Tchenguiz”, together with the proposition that the documents said to have been withheld in breach of the 2017 Order could not now be of any assistance to the Appellants in the administration of the TDT, and also that there had been inordinate delay in bringing forward the contention that there has been any breach of the 2017 Order.
- 46 The Amended Application was, by its terms, directed to securing compliance with the 2017 Order. That order remains extant. If and to the extent that there was in November 2019 a live issue as to whether the Respondents had complied with the order (or as to whether any further steps were required to ensure that the order had been complied with), the Appellants were in principle entitled to bring that question before the Court. It would not normally be appropriate to dismiss as a vexatious abuse of process an application raising a seriously arguable case that the respondent was in breach of a court order. It would, of course, be open to the Court itself, in deciding how to respond to any finding of non-compliance, to take into account any present lack of utility in enforcing the order.

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47 Of course, the Respondents contended before the Bailiff that they had complied with the 2017 Order; and it seems to us that the question whether or not they had done so was appropriately determined by the Bailiff on its merits as a prior question to that of the character of the Appellants' application. For the reasons which we set out below, we have concluded that the Bailiff was correct in finding the Respondents to have complied with the 2017 Order and having done so to dispose of the Amended Application on its substance.

48 In these circumstances, we see no ground for interfering with the Bailiff's decision not to order that the Amended Application should be struck out as an abuse of process.

Claims to privilege

49 The Appellants seek orders in respect of two separate tranches of documents in respect of which privilege has been asserted: those listed in the Gonzalez list (see paragraph 22 above); and the 229 Documents listed in the Prichard Jones list (see paragraph 30 above).

The Gonzalez list

50 The Bailiff concluded that the documents in the Gonzalez list fell outside the terms of the 2017 Order. Because these appeared to be electronic documents they would, he considered, have been covered by the Delivery-up Order. If he was wrong in that view, he accepted that the Gonzalez affidavit did not contain sufficient detail to know whether the claim to privilege could be properly substantiated but would have declined to make a further order without giving the Respondents an opportunity to provide an explanation similar to that provided in the Prichard Jones affidavit.

51 The Appellants contend that there was no evidence to justify the Bailiff's conclusion that the electronic documents in the Gonzalez list had been disclosed to the Appellants. They also criticise the Bailiff's statement that, in any event, he would not have made an order in the terms sought without giving the Respondents the opportunity to explain those documents in a similar fashion to the explanation given in the Prichard Jones affidavit.

52 The Respondents point out that GTC did not pursue any challenge to the Gonzalez list at the hearing in October 2016 which led to the January 2017 judgment (and the June 2017 Order) or at any of the further hearings which took place between June and August 2017. They say

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that no application had been made for further information to be provided and that the Bailiff's decision was unimpeachable as a matter of case management.

- 53 We do not consider that the Appellants have identified a sound basis for challenging the Bailiff's decision in relation to the Gonzalez list. His fundamental reason for not making an order in relation to those documents was that those documents fall outside the terms of the 2017 Order. In this view, he was correct. The 2017 Order was deliberately fashioned to fill any gaps in earlier disclosure. It was accordingly directed only to documents "other than those which have already been disclosed". "Disclosed", in the context of the 2017 Order, means "listed"; that is apparent from the provision made in the 2017 Order for inspection of documents which have been "disclosed". That interpretation of the 2017 Order is consistent with rule 634(1)(d) of the Royal Court Civil Rules 2007, which states that "a party discloses a document by stating that the document exists or has existed". The documents in the Gonzalez list had accordingly already been disclosed (albeit subject to an assertion of privilege) as part of the disclosure exercise in response to the 2016 application, predating the 2017 Order. These documents were accordingly not covered by the terms of that Order.

The Prichard Jones list

- 54 The Bailiff examined the explanations given in the Prichard Jones affidavit for the assertion of privilege in respect of the specific documents on which the Appellants had made submissions to him. In all but two cases, he was satisfied with the explanation. In relation to document 18, his provisional view was that the Respondents had not discharged the burden of establishing that privilege had been properly claimed, and that this was "an example of where more information, or just looking at the document to confirm one way or the other, could be ordered" (paragraph 70 of his judgment). In relation to document 23, he was "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" (paragraph 74 of his judgment).
- 55 The Bailiff observed that although there were, accordingly, "a couple of examples ... 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 ... have been rejected" (paragraph 85). He considered that the Respondents had "set out a suitably principled basis for asserting the types of privilege that are claimed", that "the brief descriptions set out in this schedule are adequate to comply with" paragraph 2 of the 2017

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Order. He took the view that the Respondents should be treated as having complied with the Order.

56 The Bailiff considered that any review by the Court should be a last resort. He considered whether he should nevertheless agree to review at least some of the documents with a view to bringing finality to the question and concluded that he should not. Since he was “generally satisfied” that the Respondents had complied with the 2017 Order, there was no principled basis for conducting such a review. It would involve applying judicial resources to “an exercise that I am satisfied would be without merit”. The historical difficulties which had been encountered did not justify going behind the Prichard Jones affidavit, which, the Bailiff reiterated, complied with the 2017 Order.

57 The Appellants contend that the information provided to justify the claim for privilege “did not begin to comply with what was required”. They state that it is essential to be able to establish whether the line drawn between advice for the Respondents’ personal benefit and advice given to the trust had been correctly drawn. They point to examples of particular concern set out in the Davis affidavit. They contend that the Bailiff, in substance, reversed the proof. They also criticise his conclusions on individual documents.

58 The Respondents contend that these issues should be addressed in the Priorities Proceedings and, in any event, that because the current application is of “no relevance to any extant issue” the Bailiff’s conclusions may safely be upheld without considering the individual claims to privilege. They also support his conclusions on the individual documents in relation to which the Appellants make submissions.

59 There is an initial question as to whether paragraph 2 of the 2017 Order required an affidavit to be produced in relation to documents for which the Respondents asserted personal privilege. On the face of it, there is a question as to whether such documents would be “papers belonging to the Trust which relate to the administration of the trust”.

60 The Prichard Jones affidavit explains that the Respondents took the view, following advice, that this would be an overly restrictive reading of the 2017 Order, which would not be consistent with the Deputy Bailiff’s intentions. They make the point that for them not to identify documents over which they claimed privilege would render paragraph 2 of the Order otiose. This was a responsible approach and the Respondents have not taken any point before

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us that paragraph 2 did not require to be complied with in relation to personally privileged documents. We accordingly proceed on the basis that we require to assess whether the affidavit complied with paragraph 2 of the 2017 Order.

- 61 Paragraph 2 required the production of a “detailed affidavit”, which explained, in respect of each document retained “the right or duty relied upon to justify retention”. In assessing the level of detail required by this paragraph of the 2017 Order, we bear in mind the observations of Beatson J in *West London Pipeline* 2008 2 CLC 258, paragraph [53], where he explained that an affidavit in support of an assertion of privilege:

“should be specific enough to show something of the deponent’s analysis of the documents, or in the case of claim to litigation privilege the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect”.

- 62 At the same time, we recognise that it is of the nature of a claim to privilege that the information which can properly be disclosed about any individual document will often be limited. The Court must not have unrealistic expectations as regards the level of detail which can or should be furnished in order to support a claim to privilege. It is of the nature of such a claim that the Court must rely, to a considerable degree, on the good faith and care with which the analysis of the claim has been carried out.

- 63 Whilst a claim to privilege may be supported by evidence from any appropriate witness, it is highly desirable that, where the claim to privilege is disputed or challenged, a supporting affidavit should be sworn by a qualified lawyer who is in a position to vouch for the exercise which has been carried out. In swearing such an affidavit, the lawyer, though instructed by a client, must, of course, comply with the professional obligations incumbent on any lawyer, to act with personal integrity and professional independence. Such a lawyer will appreciate the significance which the Court will attach to the affidavit, and in particular that the Court is likely, in the absence of contrary information, to rely on any statements of primary fact in the affidavit, and to proceed on the basis that the claims to privilege are supported by the deponent in good faith and following a legal and factual analysis of the documents for which the lawyer, by swearing the affidavit, personally vouches.

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- 64 In this case, the Prichard Jones affidavit was sworn by a solicitor qualified in England & Wales who had been personally involved in the provision of advice personally to the Respondents at the relevant time and who was also personally involved in the analysis which supported the claim to privilege supported by his affidavit. He was therefore, on the face of it, in a good position to be able to confirm whether the documents listed did indeed, as he asserts in terms, “contain advice and assistance sought by the Former Trustees in relation to a number of areas of personal concern”. We are also entitled to note that the assertions of privilege which Mr Prichard Jones supports have, in the face of challenge, been supported both before the Royal Court and before us by an Advocate who is an officer of the Guernsey Courts and who accordingly has professional responsibilities as regards the administration of justice in this jurisdiction.
- 65 These considerations do not absolve the Respondents of the requirement to provide sufficient explanation of the claims to privilege to give the Court confidence that those claims should be accepted. Nor do they mean that the Court should not examine with appropriate care the claims made, and any criticisms which may be advanced of the adequacy of the explanations advanced.
- 66 Having considered the criticisms which the Appellants have levelled at the Prichard Jones affidavit, we agree with the Bailiff that the affidavit satisfied the requirements of paragraph 2. It was a “detailed affidavit”, which explained, in respect of each document retained “the right or duty relied upon to justify retention”. As we have described above, it provided significant information about each document for which privilege is claimed, including the colour-coded categorisation which we have described.
- 67 The Schedule listing the 229 Documents further required to be read in the context of the information set out in the body of the affidavit. This explained the background to the removal of the Respondents from office as Trustees of the TDT and gave a substantial basis for the assertion made by Mr Prichard Jones that, at the time when the documents were created, the Respondents were alive to the potential, or indeed the actuality, for allegations to be made, and claims advanced, against them personally. It gave colour both to the general assertion that the Respondents were taking advice about their personal position on various issues and to the specific claims to privilege made in the Prichard Jones affidavit. This was further reinforced by the information in the affidavit about the payment of the various firms of solicitors by the Respondents personally.

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68 The Appellants rely on the previous history of document disclosure, in particular the fact that the Prichard Jones affidavit was produced only after previous affidavits produced by Mr Gonzalez had been found to be unsatisfactory. The Appellants appear to suggest that the history would justify us in approaching the Prichard Jones affidavit with scepticism or suspicion. We do not agree. If the Prichard Jones affidavit provides sufficient explanation to justify the claims to privilege, that is not undermined by the fact that earlier affidavits did not give the same detail. Insofar anything is to be taken from the history, it could be taken to enhance, rather than to cast doubt on, the credibility of the exercise undertaken by Mr Prichard Jones that he has added significant additional information to that which was previously provided, and that he has removed, with an explanation, certain documents from the list of those for which privilege was previously claimed.

69 We do not agree with the Appellants that the Bailiff, in substance, reversed the burden of proof. We recognise that at paragraph 84 of his judgment, commenting on seventeen documents identified in Schedule 3 to Mr Davis' affidavit as documents circulated internally to the Respondents, the Bailiff states: "I am not persuaded that the Applicants have been able to demonstrate that the Respondents' assertion to privilege in respect of the 17 documents ... is unfounded". But the Bailiff immediately goes on to explain: "Instead I find that the explanation offered through the Affidavit of Mr Prichard Jones is such that the Respondents' assertion of privilege ... is justified". Our reading of this passage is that he has addressed whether the explanation provided by the Respondents is sufficient, has considered the criticisms advanced by the Appellants, and has not been satisfied that the Appellants' criticisms displace the explanation. This is unexceptionable, and, on a fair reading of his judgment, it is the general approach which he has taken throughout his discussion of the claims to privilege asserted in the Prichard Jones affidavit.

70 The Appellants argue, in effect, that it was irrational for the Bailiff to accept that the Prichard Jones affidavit satisfied the requirements of the 2017 Order when he had found the explanations given for documents 18 and 23 unsatisfactory. He should, they say, at least have examined those two documents. We do not agree. The Bailiff stated that his view on document 18 was merely "provisional", and that his comment on document 23 was "quite marginal". He rejected the Appellants' submissions on all of the other documents to which they had drawn attention. In these circumstances, he was entitled to be "generally satisfied" that the Respondents had complied with the 2017 Order. He was, against that background,

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entitled both to conclude that there had been substantial compliance with the 2017 Order and to take the view, in the exercise of his case management powers that it would not be appropriate for him personally to examine any of the documents.

71 In any event, for our own part, we consider that the Prichard Jones affidavit gave sufficient explanation of the basis for the privilege asserted in relation to documents 18 and 23.

(a) Document 18.

72 According to the Prichard Jones affidavit, Document 18 was an email dated 29 December 2009 from “VM” (an individual with an email address within the Respondents) to “SJYB” (an individual at Macfarlanes). It is coloured blue and is therefore in the category of documents for which legal advice privilege is claimed 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. The document is said to be “Re: valuation of Piccadilly Investments”.

73 Before the Bailiff, the Appellants questioned how privilege could reside in a valuation. The Respondents’ position was that the title was no more than an indication of the subject matter where the privilege being asserted relates to the chain of communications about this topic. The Bailiff recognised that the date of the document was such that it could well be personal advice taken by the Respondents but went on to observe (paragraph 70) but added: “However the way it is put in this schedule leaves rather more open than is necessary whether this is properly the case”.

74 We accept the Respondents’ explanation that the title of document 18 bears to indicate its subject matter. We do not consider that it necessarily implies that the document itself is a valuation. Mr Prichard Jones has placed document 18 in the blue category, which involves an assertion by him that it concerns legal advice by Macfarlanes in relation to the Respondents’ personal position as regards one of the matters referenced by that colour coding. He tells us that the document passed between the Respondents and a solicitor in his own firm, at a date when, as the Bailiff recognised and the Prichard Jones affidavit explains in considerable detail, the Respondents had reason to be reasonably apprehensive about their own personal position. The document dates from a period when, according to the Prichard Jones affidavit, all work undertaken by Macfarlanes was billed to and paid for by the Respondents personally.

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In these circumstances, we do not consider that there is any good reason not to accept the claim that this document is privileged.

Document 23

- 75 Document 23 is a briefing note prepared by Macfarlanes, undated but said by Mr Prichard Jones to date from 6 January 2010. It is described as “Note to prospective expert on the subject matter of the Loan Arrangements”. The entry for the document in the schedule to the Prichard Jones affidavit is coloured orange, and he therefore asserts it to be a document created for the dominant purpose of the Guernsey 1 litigation.
- 76 The Bailiff observes that if evidence had been led from the expert, the terms of the expert’s instructions would normally be set out in the expert report and, in any event, the expert could be questioned about the instructions. He also states that at the time the Respondents were contemplating Guernsey 1 in their capacity as incumbent trustees of the TDT. He observes: “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 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”.
- 77 The first point mentioned in the preceding paragraph is not, in our view, conclusive as regards the question of whether this is a document to which privilege attaches, particularly if the expert did not in fact give evidence. The second point has to be set against the statements in the Prichard Jones affidavit, for which plenty of colour is given, as to the Respondents’ apprehension in January 2010 that they were liable to be subject to claims against them personally. Indeed, as Guernsey 1 unfolded, the question of whether the Respondents had been guilty of gross negligence and were entitled to an indemnity from the trust assets was a live issue. Though not noted by the Bailiff, the Prichard Jones affidavit states (paragraph 40) that the last invoice paid to Macfarlanes from TDT assets was in September 2009 and related to work done in the period ending 31 July 2009. The affidavit states that all invoices for work thereafter (implicitly including Document 23) have been met by the Respondents personally. Although we recognise that the decision by the Respondents to pay personally for a particular piece of advice does not necessarily mean that the advice was not taken on behalf of the trust,

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it is an adminicle which reinforces the conclusion that enough has been said to support the assertion of privilege in this document.

78 Before us, the Appellants renewed the submissions which they had made to the Bailiff about other documents. We reject those submissions for the following reasons.

(a) *Document 31.*

79 Document 31, dated 23 November 2009, is described as a draft affidavit. The Schedule discloses that it was never used in proceedings and “contains questions from lawyers for the purposes of seeking updated instructions”.

80 The Appellants argue, under reference to *Re RBS Rights Issue* [2017] 1 WLR 1991, that a draft affidavit will not normally be subject to legal advice privilege. They assert that the only litigation for which a draft affidavit could have been prepared at the date of this document was litigation on foot involving the trust or the claims filed by the Respondents in Kaupthing’s insolvency proceedings in Iceland, where the pleadings state that the Respondents were acting as trustees of the TDT.

81 The Respondents state that this draft affidavit was not prepared for use in proceedings, but, as the purple coding indicates, for the purposes of taking advice. Their case, for which Advocate Wessels is responsible, states that the Appellants’ inference that the draft was prepared for litigation already on foot is not only not supported by the colour coding, but is “incorrect in fact”.

82 We note that the Schedule states in terms that this document “contains questions from lawyers for the purposes of seeking updated instructions”. Content of this character is on the face of it such as attracts legal advice privilege. Having regard to that explanation, and the other information provided about this document, we do not consider that the Bailiff’s conclusion that he should not go behind the assertion of privilege in relation to this document can be impugned.

(b) *Document 4*

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- 83 Document 4, an email dated 23 December 2009 from a member of staff of the Respondents to an insolvency partner at Macfarlanes, is described as “Advice re. terms of engagement with other advisers”. It is coloured green.
- 84 The Appellants say that “it is at best unclear whether the advice was for the trust or in their personal capacity” and that it is highly likely in the context of the proceedings on foot and which followed that the other advisers would have been engaged by the Respondents on behalf of the trust. They state that the identity of those involved is consistent with advice required for the TDT following the commencement of the Somerfield Proceedings and prior to the commencement of the Guernsey 1 proceedings.
- 85 We do not consider that the Appellants provide any sufficient basis for impugning the Bailiff’s conclusion in relation to this document. It bears to concern advice and is addressed to a professional lawyer. The Prichard Jones affidavit asserts, through the colour coding, that it relates 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. It dates from a period when, according to Mr Prichard Jones, all advice from Macfarlanes was invoiced to and paid for by the Respondents personally.

(c) Documents 137 to 141

- 86 Documents 137 to 141 are draft documents, dating from March 2010, relating to “service out”. They are coloured orange and are accordingly said to be documents created for the dominant purpose of the litigation which became Guernsey 1. The solicitors concerned were Mourant Ozannes.
- 87 The Appellants state that Guernsey 1 was a proceeding brought by the Respondents seeking declaratory relief in relation to the Loan Arrangements and that there was no suggestion that litigation was in reasonable prospect against the Respondents in March 2010. The Respondents state that the Respondents were personally paying the costs of Guernsey 1 and the proceedings concerned their personal liability “on all fronts”. They also state that the contention that no litigation was in reasonable prospect against the Respondents personally at the relevant date “is completely divorced from reality”, pointing out that Richard Hillier, a director of GTC and the protector of the TDT, obtained an *ex parte* injunction (making allegations of wrongdoing) against the Respondents within days of these drafts.

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88 We do not consider that the Appellants have identified a basis for impugning the Bailiff's conclusion in relation to these documents. The documents clearly concerned anticipated litigation. The only question is whether the Court can and should go behind the assertion that the litigation privilege relied on is personal to the Respondents, rather than a privilege of the trust. As we understand it (see the 2018 JCPC decision, paragraph 41), when the Respondents initiated Guernsey 1, they sought: (i) determination of the question of whether they were liable to the BVI Companies; (ii) declarations that they had no personal liability in respect of any monies due to the BVI Companies, that any claims which the latter had extended only to the trust property, and were enforceable against the Respondents only to the extent that they held trust property. Whilst we were not favoured with any specific analysis of the position, on the face of it these claims were directed to protecting the Respondents' personal interests. As the Guernsey 1 litigation developed, of course, it included claims that the Respondents had been guilty of grossly negligent breach of duty. And the Prichard Jones affidavit tells us that work undertaken by Mourant Ozannes at the date of these documents was paid for by the Respondents personally.

(d) Documents 200 to 206

89 Documents 200 to 206 appear in a separate section of the schedule to the Prichard Jones affidavit which deals with invoices. They are covering letters concerning invoices over which privilege is claimed. The Appellants' essential complaint is that insufficient particulars are given to entitle the Bailiff to accept the assertion of privilege. The Bailiff took the view that these documents were prima facie part of an "ongoing continuum" with the invoices themselves and accepted the assertion of privilege. We do not consider that he can fairly be criticised for taking that view.

(e) Appendix 3 to the Davis affidavit

90 Appendix 3 to the Davis affidavit identifies seventeen documents which were circulated internally within the Respondents. The Appellants argue that there is no privilege in internal documents circulated between non-lawyer staff of the Respondents. They note that the examples from these documents given by the Bailiff concern the Royal College of Organists and the Somerfield Proceedings. They state that there has never been hostile action against the Respondents in relation to the former and that the latter proceedings were against the trust not the Respondents personally. They question why legal advice relating to the Respondents

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personally in relation to these matters would be circulated internally. They assert that Macfarlanes was acting for the trust.

91 The Respondents rely on Phipson on Evidence (20th edn, 2022), para. 23-17, for the proposition that the internal dissemination of a record or summary of advice is privileged. They state that there had been proceedings both in England & Wales and in Guernsey against the Respondents relating to the Royal College of Organists. They also state that Quinn Emanuel acted for the trust in relation to the Somerfield Proceedings; so that it should be obvious Macfarlanes would have been advising the Respondents personally. “That such advice might be needed in the face of a beneficiary and protector urging the pursuit of hopeless litigation,” they observe, “can hardly be a surprising proposition”.

92 We do not consider that the Bailiff’s conclusion that the explanation given in relation to these documents was acceptable can be impugned. Phipson on Evidence (20th edition, 2022) states, at paragraph 23-17, that “where a record of advice given is disseminated internally, within a company”, “the law is clear that privilege may be claimed”. The Appellants do not advance any basis for doubting the soundness of this legal proposition. Nor do we consider that there is general reason to be sceptical that advice taken by the Respondents personally would be circulated within the Respondents’ organisation. The general context set out in the Prichard Jones affidavit gives colour to the proposition that the Respondents had reason to take legal advice on their own account at the relevant dates in relation to a variety of matters.

(f) Other documents

93 The Appellants allege that there are other documents in the Prichard Jones list, not referred to by the Bailiff, in respect of which a question arises as to why the Respondents could claim privilege. They point specifically to Document 167, which refers to advice in relation to solvency issues, and question why, given the protection given to trustees by Guernsey law, the Respondents would require personal advice in relation to solvency issues. The Respondents note that the entry in the schedule to Document 167 refers to three companies in the TDT structure and submit that where there are insolvency issues within a trust a professional trustee will be astute to ensure it is acting appropriately. They contend that where a trustee is facing allegations of wrongdoing, it is obvious why it might wish to seek advice on its personal position. They observe that by the time this advice was sought, Robert Tchenguz had removed the Respondents from office as Trustees of the TDT.

94 The Bailiff cannot fairly be criticised for not discussing a document or documents upon which the Appellants did not advance submissions before him. In any event, the information about

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Document 167 is quite sufficient to justify the assertion of privilege. It is described specifically as advice about solvency issues and there is a reference to three named entities. The Respondents' submissions explaining why they would wish to take advice personally about solvency issues arising within the TDT are, in the context of the background information set out in the Prichard Jones affidavit, entirely intelligible.

Should the Bailiff have inspected the documents?

- 95 Notwithstanding his conclusion that the Prichard Jones affidavit generally complied with paragraph 2 of the 2017 Order, the Bailiff addressed whether he should inspect the documents, or at least some of them, himself, “as a means of being able to satisfy the [Appellants] that what the Respondents assert as privileged material is justified”, and thereby to bring some finality to the issue. He concluded that he should not order production of the documents for inspection by him. Under reference to Phipson on Evidence (19th edn), paragraph 23-48, he considered that any review by the court should be a “last resort”. He referred to *UTB v. Sheffield United* [2019] EWHC 914 (Ch) as an example of the English court expressing the need for caution before the court inspects documents. He did not consider that devoting “some judicial resources to an exercise that I am satisfied would be without merit” would be consistent with the over-riding objective.
- 96 The passage in the 19th edition of Phipson on Evidence, on which the Bailiff relied, has been superseded by the decision of the Court of Appeal of England & Wales in *WH Holding Ltd v. E20 Stadium LLP* [2018] EWCA Civ 2652. In *WH Holding Ltd*, the Court of Appeal explained (paragraph 39) that “the power to inspect a document is a matter of general discretion”. It seems to us that this is a correct description of the nature of the power which the Royal Court may exercise to direct a party to produce to it for inspection a document for which privilege is claimed under rule 76 of the Royal Court Civil Rules 2007 or where the Court is regulating the disclosure of documents by a former trustee to a present trustee under Articles 68 and 69 of the Trusts (Guernsey) Law 2007 or in the exercise of its inherent powers.
- 97 It follows that it is not appropriate to characterise the power as one to be exercised as a “last resort” as if that phrase reflected a rule of law defining the power and its scope. Nevertheless, this is not a power which should be exercised lightly. The Court of Appeal of England & Wales observed in *WH Holdings Ltd* (paragraph 40):

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“The court may inspect the documents in relation to which privilege is claimed in order to see whether the test has been correctly applied, although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context. The discretion must be exercised in accordance with the overriding objective, which requires balancing dealing with cases justly, proportionately and at proportionate cost and allocating an appropriate share of the court’s resources. Among the factors which will be relevant to the exercise of discretion are (a) the nature of the privilege claimed (b) the number of documents involved and (c) their potential relevance to the issues.”

98 We agree that the Court must be cautious about exercising this jurisdiction. It must be alive to the implications of making such an order. The validity of a claim to privilege may not always be manifest from the face of a document. To determine whether or not the claim is valid, a Court which has seen the documents may need to make further inquiry as to the circumstances. The Court would need to consider carefully how it could and should inform itself of the relevant circumstances in a manner which is fair to the parties and which does not disclose the very information which is protected by the privilege. It would also need to consider the possibility that a judge who has seen privileged material might have to be recused from subsequent involvement with the substantive issues in the case. These are significant considerations when considering whether an order for production of the documents to the Court would be consistent with the over-riding objective.

99 It follows, in our view, that whilst it would not be consistent with the nature of the discretionary power to lay down an absolute rule as to how issues of privilege are addressed, the starting point for the Court should be to require information and explanations from the party claiming privilege, and to consider whether that information is sufficient to vouch the claim to privilege. If the information provided is sufficient, there would require to be some very compelling reason to justify the Court in ordering production of the documents so that it could inspect them itself. If the information provided is not sufficient, the Court should consider whether it should direct further information to be provided, as the Bailiff wisely did in this case.

100 We are of the firm view that it would not, in this case, be appropriate to make an order for production of the documents for inspection by the Court. For the reasons we have explained, we are satisfied that the Prichard Jones affidavit complies with paragraph 2 of the 2017 Order. That affidavit has been sworn by a professional lawyer with personal knowledge of the circumstances within which the documents were generated. If the Court were to inspect these documents, there would be a very real risk that it would require to make further inquiries so

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as to be properly informed as to their context, and that the Court would be drawn into difficult questions as to how it should undertake that task. Nor would it be appropriate to impose on the parties (and potentially on the trust estate) the cost of instructing independent counsel for that purpose. The live issues between the parties are the subject of adjudication in the Priorities Proceedings. The Lieutenant Bailiff in those proceedings is best placed to determine the potential relevance of documents to those issues, and to manage issues of privilege in a fashion which is appropriate to the nature of those proceedings. In all these circumstances, it would be inconsistent with the over-riding objective for the Court to order production of the documents so that it could inspect them.

The WIP reports

101 The Bailiff had before him an example of a WIP report. He took the view that this was an internal document generated for the Respondents' own purposes. It appeared to be designed to enable invoices to be generated. In these circumstances, he concluded that the WIP reports were not papers "belonging to the Trust" and accordingly did not fall within the terms of the 2017 Order. Even if he was wrong in that conclusion, he would not have been minded to order disclosure at this time. He would have enquired into whether the information on the reports had been translated into invoices already available to the Appellants. He considered that there would be no utility in making an order in relation to these documents at this time.

102 The Appellants argue before us that:

"... the WIP reports do fall directly within the [2017 Order]. They fall within the categorisation in *Tiger v. Barclays Bank* [[1951] 1 All ER 85], where the English Court of Appeal held that a trustee can be required to produce to his successor office entries relating to the administration recorded by him in a diary or other document. So too Lewin [20th edn 21-119]. ... Further, the order requires disclosure of *all documentary records which relate to the administration of the Trust*. 'Belonging to the Trust' in the order does not go with "all documentary records"."

The Respondents support the Bailiff's conclusion that the WIP reports are internal documents generated for the Respondents' own purposes.

103 The Appellants' argument is plainly misconceived. It is correct, as the decision in *Tiger v. Barclays Bank* demonstrates, that the Court *may* order an outgoing trustee to disclose to an incoming trustee information and/or documents which are not property of the trust, but which

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are nevertheless relevant to its administration. But the 2017 Order did not do this. The Order is clearly limited to documents “belonging to the trust”. As the transcript of the hearing at which the terms of the order were settled, which we have quoted at paragraph 20 above, discloses, this qualification was deliberately inserted, with the explicit agreement of the Appellants’ Advocate, in order to narrow the terms of the Order.

104 In these circumstances, the Appellants could only succeed in challenging the Bailiff’s conclusion in relation to this category of documents if they could successfully challenge his view that the WIP reports were internal documents generated for the Respondents’ own purposes and therefore not documents “belonging to the trust”. They do not, in fact, seek to challenge that finding. Nor, having ourselves seen a copy of the WIP report which was before the Bailiff, do we consider that they could successfully advance such a challenge.

105 The Appellants criticise the Bailiff’s observations to the effect that the entries in the report had been converted into invoices and that there would be no utility in ordering disclosure of WIP reports. The Bailiff made these observations in the context of explaining why, even if the documents had been encompassed within the 2017 Order, he would not have made any order. Since we agree with the Bailiff that the WIP reports were not encompassed within the 2017 Order, we do not need to address those criticisms.

Insurance documentation

106 The Davis affidavit states that a review of the books and records of the TDT passed to the Appellants by the Joint Receivers had disclosed the absence of any insurance documents for the TDT companies. The physical file structure for each company contains a tab labelled “insurance”, but there were no documents behind these tabs. The affidavit states that despite requests for clarification the Respondents had not provided any substantive response.

107 The Bailiff took the view that the insurance documents did not fall within the terms of the November 2019 application. Even if they had done so, he would not have granted any order. He took the view that the explanation which had been provided in correspondence sufficed. He was inclined to agree with the Respondents that the fact that a standard-form folder has a tab that refers to “insurance” does not justify the inference that it contained such documents. The Joint Receivers had stated that they did not remove such documents before passing the files to the Appellants; and there would have been no reason for the Respondents to have done so before passing the files to the Joint Receivers. In any event, given the passage of time, he would not have ordered a further search for these documents.

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108 The Appellants argue that if insurance documentation exists it would be property of the trust and therefore fall within the terms of the 2017 Order. The passage of time is not, say the Appellants, sufficient reason for relieving the Respondents of a requirement to disclose such important documents. The Appellants contend that it is obvious that the Respondents would have taken out insurance; if they had not, this would raise questions about their administration of the trust. There is, they say, an obvious inference from the empty folder marked “insurance” that such documents existed. If they do exist, they would be important for the administration of the trust and should be disclosed.

109 We reject the Appellants’ criticism of the Bailiff’s decision in relation to insurance documentation. The Appellants do not challenge his primary reason for rejecting this aspect of their case; namely, that insurance documentation, if it exists, is not covered by the 2019 application. Had they advanced such a challenge, it would plainly fall to be rejected. At the hearing on 21 June 2019, there was an exchange between the Bailiff and the Appellants’ Advocate in the following terms:

“BAILIFF MCMAHON: Now, they are not expressly covered under the terms of the application, are they?”

ADVOCATE RICHARDSON: No. ...”

We have quoted the relevant paragraphs of the Amended Application above (paragraph 38). These are directed to: (i) paragraph 2 of the 2017 Order; and (ii) WIP Reports. The Bailiff was clearly correct to state that insurance documentation was not covered by the application. He was entitled on that basis alone to decline to make any order in relation to this category of documents. In these circumstances, it is irrelevant whether insurance documentation, if it exists, would be encompassed within the terms of the 2017 Order. In any event, the Bailiff was entitled to take the view: (i) that the Appellants should be satisfied by the explanations given; and (ii) that, in light of the passage of time, he would not, in any event, have granted an order.

Costs

110 The Bailiff ordered the Appellants to pay the Respondents’ costs of the application and directed that any issues as to whether either party was entitled to an indemnity from the assets of the TDT in respect of the costs of the proceedings, or the earlier proceedings before Sir John Chadwick were to be determined in the Priorities Proceedings.

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- 111 In the context of the submissions to the Bailiff on costs, the Appellants contended that they were entitled to include in any costs order against the Respondents the costs incurred by GTC in the earlier proceedings before Sir John Chadwick and the present proceedings. The Bailiff rejected that submission. He held that when GTC were removed from the proceedings without any reservation in relation to costs, the court's ability to make any *inter partes* order for costs in their favour disappeared. He noted that there had been no suggestion that there was any principle of trust law that meant that a successor trustee could pursue a costs order which could have been applied for by a predecessor in office.
- 112 The Appellants challenge that view. They contend that both GTC and the Appellants have an indemnity from the trust in relation to costs incurred in legal proceedings during their trusteeship. They argue that there is no reason why, if GTC would be entitled to their costs against the Appellants in relation to the period of their trusteeship, those costs, currently borne by the trust, should not be claimed against the Respondents in these proceedings. They contend that it is unnecessary to bring GTC back into the proceedings to make such a claim.
- 113 The Respondents support the Bailiff's analysis. They point out that a trustee is a separate person from a former trustee. They argue that the authorities confirming the distinction between a trustee and the trust make it plain that a trustee cannot recover *inter partes* costs incurred by a previous trustee. The claim to GTC and the Appellants to an indemnity would fall to be made in the Priorities Proceedings.
- 114 Although the discussion of this issue before us has been limited, we agree with the Bailiff's analysis of this issue. As Lord Hodge explained in the 2018 JCPC decision, paragraphs 59 to 61, a Jersey trust is not a legal person. Subject to the effect of Article 32 of the Trusts (Jersey) Law 1984 as amended, it is the trustees who (as natural or legal persons) assume legal rights and liabilities in relation to the trust. Further, successive trustees are separate legal persons. It follows that it was for GTC to seek and enforce any award of costs in respect of litigation to which it was party. Had GTC obtained an award of costs in its favour, it would (in the absence of any assignment of the right to payment under the award) have been for GTC to enforce that award, albeit that GTC would presumably require to account to the trust in respect of any recovery under the award. In a context where the trust assets are insufficient to meet all the liabilities which fall to be met from those assets, issues could arise as to the interaction between GTC's obligation to account for any recovery and GTC's indemnity. These were not discussed before us. For our own part, we do not consider that the Appellants can be in a better position in respect of litigation undertaken by GTC but in which no costs

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award in favour of GTC has been sought by GTC than they would have been in had a costs award been made in favour of GTC.