

Appeal against the decision of the Lieutenant Bailiff to give a direction for the release to the Respondents of the sum of £5 million by way of an interim payment from a fund.

[2023]GCA004

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

CIVIL DIVISION APPEAL No. 557

2 March 2023

Before:

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

Between:

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

Respondents

-and-

**(1) Glenalla Properties Limited
(2) Thorson Investments Limited
(3) Eliza Limited
(4) Oscatello Investments Limited
(5) Geneva Trust Company (GTC) SA
(formerly Rawlinson & Hunter Trustees
SA)**

Defendants

-and-

**(1) Fort Trustees Limited
(2) Balchan Management Limited
(3) Robert Tchenguiz**

Appellants

-and-

**(1) Mrs Helen Green
(2) Mr Kelvin Hudson**

Joint Receivers

**Advocate N Robison for the First and Second Appellants as original parties
Advocate P Richardson for the First, Second and Third Appellants as intervening
parties**

Advocate J M Wessels for the Respondents

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Bompas JA:

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

Introduction

2. We have before us an appeal from the 4 January 2022 judgment and order of Lieutenant Bailiff Hazel Marshall KC, sitting without Jurats ([2022] GRC 003). That judgment (“the 2022 Judgment”), which was given following a hearing in November 2021, dealt with a multitude of issues, as explained later. The sole issue with which this appeal is concerned is the decision of the Lieutenant Bailiff to give a direction for the release to the Respondents of the sum of £5 million by way of an interim payment from a fund, the Preserved Sum, in the hands of Receivers appointed by the Court and forming part of the assets of the Tchenguiz Discretionary Trust (“the TDT”).
3. It is common ground that the Lieutenant Bailiff had power, in supervising the management of claims on the Preserved Sum and in the exercise of her discretion, to order the interim payment.
4. This £5 million payment would be a provisional and partial payment on account of what the Respondents, as former trustees of the TDT, might ultimately be entitled to receive out of the TDT in respect of upwards of £27.5 million of claims for costs, expenses and remuneration. The proceedings in which the order for interim payment was made have been referred to as “the Priorities Proceedings”. These are, to all intents and purposes, now a process under the supervision of the Royal Court for the ascertainment of proper claims on the TDT and distribution of the TDT assets. This process, the so called ‘proofs process’, started with an order of 15 October 2018, described later.
5. The Preserved Sum is a fund worth somewhat less than £40 million still retained by the Receivers out of assets of the TDT worth, perhaps, upwards of £55 million. The £55 million figure we take from [62] of the judgment of the Lieutenant Bailiff given in this matter on 9 December 2019 ([2019] GRC 064) (“the 2019 Judgment”), referred to below; although we were told at the hearing of this appeal on 1 February 2023 that the gross assets had been valued at somewhat less than that £55 million figure.
6. The Preserved Sum was constituted pursuant to an order of the Royal Court, made in October 2019 following an application by the First and Second Appellants, Fort Trustees Ltd and Balchan Management Ltd (in this judgment referred to together as

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“F&B”) made in August 2019, when the Receivers released back to F&B part of the assets under their control. The explanation for the Preserved Sum is set out in the 2019 Judgment at [68]-[74]. Essentially, the TDT’s assets are subject to substantial claims by or through entities which are or have been trustees of the TDT and the Preserved Sum was intended to provide a measure of security to certain of the claimants on the assets of the TDT, including the Respondents.

7. It is the Appellants’ case before us, as it was on an appeal to the Judicial Committee of the Privy Council (referred to below), that the assets of the TDT are insufficient to meet these claims, so that there will be nothing remaining for beneficiaries.
8. The 2019 Judgment lies at the heart of the immediate dispute. It dealt with two main issues, referred to respectively as “Assignment” and “Priorities”.
 - a. The decision on the Assignment issue, explained in the 2019 Judgment at [80]-[132] was appealed to this Court and the appeal was dismissed for reasons explained in the judgment of this Court ([2020] GCA 043) at [44]-[64]. In summary, the basis of the decision was that where trustees of the TDT took an assignment from a creditor of a debt payable out of the TDT, the result was the extinction of the debt. The context of the decision was the taking in March 2019 by F&B as trustees of the TDT of an assignment of debts of over £230 million due by the TDT.
 - b. The decision on the Priorities issue was also the subject of an appeal to this Court, and in due course to the Privy Council ([2022] UKPC 36), which on 13 October 2022 reversed that aspect of the 2019 Judgment (but not the decision on the Assignment issue).
9. There was no other appeal from the 2019 Judgment. So far as the Assignment issue was concerned, the Royal Court’s Order of 10 December 2019 giving effect to the 2019 Judgment rejected proofs of debt from F&B for the assigned debts. What was decided in respect of the Assignment issue by the Royal Court is now conclusive on that issue, as we explain below. However, the 2019 Judgment has not put an end to claims by the RT Parties (referred to below) concerning the TDT assets connected with the assignment of the debts, as appears from what follows.
10. The Respondents, ITG Ltd and Bayeux Ltd, who together are referred to in this judgment as “I&B”, were until July 2010 the trustees of the TDT, a trust connected with Mr Robert Tchenguiz and his family. On 2 July 2010 Mr Tchenguiz, who had become the protector of the TDT, used his powers as that protector to remove I&B and

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replace them with successor trustees, Rawlinson & Hunter Trustees SA, now known as Geneva Trust Company SA (“GTC”). In 2017 Mr Tchenguiz removed GTC, and GTC was replaced by F&B.

11. The present appeal has been brought by F&B in their capacity as trustees of the TDT. On this appeal they are represented by Advocate Robison, with his firm Babbé LLP. On an appeal which this Court heard in December 2022 brought by F&B as TDT trustees, they were represented by Advocate Richardson and his firm AFR Advocates, as they had been on their application in late 2019 to the Royal Court concerning the TDT which had given rise to that appeal. However, before us on this appeal Advocate Richardson appears representing his same clients, F&B, but this time in their capacity as trustees of another Tchenguiz family trust, the Tchenguiz Discretionary A Trust (“the TDAT”). He also represents Mr Tchenguiz personally. We refer to these parties (that is F&B in their two different capacities and Mr Tchenguiz) together as “the RT parties”, an expression used by Ms Nicole Martin (referred to in the next paragraph).
12. A further entity, R20 Advisory Ltd (“R20”) should also be mentioned. It is described in the 2019 judgment as “*an investment advisory company to the interests of Mr Tchenguiz [which] claims ‘about £9Mn’ in respect of legal expenses claimed to have been paid by it on behalf of GTC or F&B as Trustees of the TDT at various times*”. Ms Nicole Martin, who has made many affidavits in these proceedings, usually explains that she makes the same with personal knowledge, and that she is authorised to make the affidavits on behalf of F&B and Mr Tchenguiz; and in many she attributes her authorisation also to R20. She has described herself as “Head of Legal” for R20 with her address at R20’s office. Her evidence, in particular her 12th and 15th Affidavits, advanced argument in support of the proofs of claim of TDT, TDAT, Mr Tchenguiz and R20; while her 26th Affidavit provides the most detail concerning the Assignment.
13. The following extract from an Affidavit sworn on 3 February 2022 by Wati Qalotaki explains: “*The Head of Legal at R20 Advisory is Ms Nicole Martin. Ms Martin has been engaged by the trustees of the TDT and Mr Robert Tchenguiz, the protector of the TDT and a beneficiary, since 2014. Accordingly, Ms Martin has intimate knowledge of this litigation which has been before the Guernsey Courts. ... As regards the general conduct of these proceedings, Ms Martin consults with F&B and Mr Tchenguiz and approves all steps taken in these proceedings. ...*”
14. Central to the objection made to the order directing the I&B interim payment out of the Preserved Sum is a contention that, between them, the RT parties have a claim or claims

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against the assets of the TDT arising from the assignment we have already mentioned. This was the assignment of certain debts and claims amounting to more than £230 million made by an Assignment dated 22 March 2019 (with notice of assignment given on 26 March 2019), and that, if allowed, these claims would result in £5 million having been an overpayment to I&B out of the Preserved Sum, and perhaps also out of the TDT assets generally, so as to require a repayment by I&B of some part of the £5 million.

15. Leave to appeal from her decision concerning the interim payment of £5 million was refused by the Lieutenant Bailiff, for reasons explained on 29 March 2022. It was given, however, by this Court on 11 July 2022 in an order which in terms limited the appeal to two grounds, and also allowed the joinder as parties to the appeal of Mr. Tchenguiz and F&B (again), this time as trustees of the TDAT. The order giving leave to appeal limited the appeal to two grounds.

- a. The first of the two grounds is that “*the Lieutenant Bailiff did not have a proper basis for taking the view that [I&B’s] insurers would respond in the event that the interim payment was an overpayment*”.
- b. The second is that the Lieutenant Bailiff “*did not give the RT parties a fair opportunity ... to address the substantive merits of the ‘RT/TDAT Claims’*” as defined.

16. We explain and discuss these grounds later in this judgment.

- a. The first distils itself into a contention that the Lieutenant Bailiff misdirected herself as to the facts when evaluating the risk of the payment of the £5 million turning out to be an overpayment which would be irrecoverable in whole or part.
- b. The second raises the question whether it was open to the Lieutenant Bailiff to make the interim payment order without having heard separate argument on behalf of F&B in their capacity as trustees of the TDAT (and not simply on behalf of the same entities in their capacity as trustees of the TDT) and on behalf of Mr Tchenguiz. Lying behind this question of procedure is the substantive question whether any value was appropriately to be placed on the RT Parties’ claims connected with the debt assignment. The RT Parties have firmly maintained the position, in their submissions before us, that this question – the question of whether the Lieutenant Bailiff was correct to place no value on the claims - is not a matter to be entertained by this Court on this appeal.

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17. In order to consider in detail the arguments advanced on this appeal, it is necessary to go into some of the history surrounding the TDT. Unhappily, over the last decade and more there has been a remarkable number of applications and appeals to the Royal Court and this Court concerning the TDT. The reader of this judgment may gain a bare outline of the saga from the descriptions in a judgment of the Lieutenant Bailiff given in April 2021 [2021] GRC 007 at [4]-[12], and from this Court's judgment given on 21 August 2020 [2020] GCA 043 at [5]-[14]. A fuller account of the background relevant to the present appeal is at [1]-[74] of the 2019 Judgment.
18. The TDT was itself set up in 2007 by a Declaration of Trust of 26 March 2007, on a division of assets of the Tchenguiz family. The TDT was for the benefit of the branch of the family headed by Mr Robert Tchenguiz, and had as assets various companies through which businesses were carried on or assets held. Four of these companies, namely Glenalla Properties Ltd, Thorson Investments Ltd, Eliza Ltd and Ocatello Investments Ltd, being companies incorporated in the BVI ("the BVI Companies"), became embroiled in litigation against I&B as the trustees of the TDT, after the Icelandic bank, Kaupthing HF, appointed receivers over shares in three of these and all four went into liquidation. Kaupthing had become involved as a banker and funder of Tchenguiz businesses and properties. An aspect of the relationship between the TDT and the BVI companies was that there were large inter-company debts, with the TDT being indebted to the BVI companies. In due course certain of the BVI Companies obtained judgments against the trustees of the TDT. The judgment debts, with costs and interests, ran to hundreds of millions of pounds.
19. A time came when the Royal Court appointed the Receivers to get in, hold and protect assets of the TDT. On 15 October 2018 the Royal Court gave directions for a process analogous to an insolvency procedure, conducted by the Receivers, to ascertain the claims to be met out of the TDT's assets.
20. The directions of 15 October 2018 were given following a judgment of the Judicial Committee of the Privy Council ([2018] UKPC 7) which had resolved various appeals, among other matters establishing that under the applicable law relevant to the TDT (Jersey law), the trustees (including the former trustees I&B) were liable to third parties to whom they had incurred liabilities only to the extent of TDT assets, if the third parties knew that the trustees were incurring the liabilities as trustees. Trustees, including former trustees, had a right of indemnification, with a lien, for their costs and expenses, and with a lien for remuneration, even after they had ceased to be the current trustees. The claims of creditors could not be brought directly against the trust assets,

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but only in right of and by way of subrogation to the rights of the trustees to indemnification.

21. I&B, although no longer trustees of the TDT, are among those entitled to have the TDT assets applied in satisfaction of claims which they have against those assets, the claims being their proper claims arising by reason of their trusteeship. I&B contend that these claims now amount to more than £27.5 million and that these continue to increase by reason of the prolonged litigation connected with their trusteeship in which they are involved (and, I&B say, with which they are being harassed).
22. There are also other competing claims for indemnification. For example, both GTC and F&B have claims arising from their position as trustees of the TDT. There are other third-party claimants as well, for example English counsel who have advised the trustees. These other claimants include Mr Tchenguiz and R20, as well as the TDAT by its trustees (F&B).
23. It appears that by the time of the 2019 Judgment the process of inviting claims, or proofs, and challenges to the proofs, with a view to finally resolving the claims on the TDT assets had resulted in some 15 proofs of debt being submitted by the parties to the proceedings and by third parties.
24. At [39] of the 2019 Judgment the Lieutenant Bailiff explained that “*under the law as found by the Board only present and former Trustees of the TDT had a free-standing right to appeal and make claims in this Application. Third party ‘trust creditors’ would be required to join the Trustee against whom their cause of action arose into any claim which they wished to make*”. This remains the case, even following the 2022 decision of the Privy Council (below) on the question whether claims on trust assets rank as between successive trustees and those claiming through them by time or (as the Privy Council held) *pari passu*.
25. The process of submitting proofs of debt in the Priorities Proceedings, followed by requests for information and objection was going forward, and exchanges of evidence were due, when on 22 March 2019 the Assignment was made between F&B as trustees of the TDT and the BVI Companies (and their Liquidators) of the latter’s judgment debts and claims against trustees of the TDT. On that day Ms Martin made her 9th Affidavit, saying “*As of this morning, there has been a significant change in the ... position [of F&B] as a result of the BVI Companies having assigned to F&B their judgment debts in these proceedings and their costs orders in these and other proceedings The Assignment materially impacts upon the future conduct of these proceedings, since F&B is now the majority creditor of the assets held by the Joint*

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Receivers and the BVI Companies no longer have an interest in those assets.” She did not suggest that by some process the Assignment had given anyone other than F&B any interest in or claim on the TDT assets.

26. On 9 April 2019 Ms Martin made her 10th Affidavit, exhibiting a version of the Assignment so heavily redacted as to be unintelligible. In this affidavit she explained that the Assignment was made pursuant to a confidential settlement agreement with Kaupthing. She explained also that she had met the Receivers with a view to proposing an arrangement for the Receivers to retain sufficient assets to deal with claims “*excluding the claims made by F&B and related parties*”, allowing any surplus assets to be distributed in specie to F&B after valuation in partial satisfaction of their claims, and once the third party claims had been dealt with “*any residual assets will be distributed to F&B as the majority creditor*”. This proposal was in due course developed into the transfer plan ordered in October 2019. In this formulation the related party claims were to include “*the BVI Companies’ proof of debt for £227,657,792.19 amended to show F&B in their capacity as trustees of the TDT as creditor to reflect the Assignment ...*”. Exhibited to her affidavit was a proof of debt signed by her on behalf of F&B “*as trustees of the Tchenguiz Discretionary Trust*”, this proof being for £229.7 million. The particulars of “*how and when debt incurred*” referred to an attached Notice of Assignment dated 26 March 2019.
27. The Notice of Assignment, signed by the BVI Companies’ Liquidators as well as on behalf of F&B as trustee of the TDT, explained that the assigned debts and claims had been assigned to F&B “*in their capacity as co-trustees of the [TDT] and for the benefit of the beneficiaries of that Trust ...*”. This Notice of Assignment was in the form set out in Schedule 1 to the Assignment and required, by Clauses 2 and 3 of the Assignment (as to which, see below) to be served on “*the Joint Receivers, R&H [that is GTC] and I&B and any other party to the Guernsey Proceedings, including any of the courts in which the Guernsey Proceedings have been undertaken, as may be appropriate*”.
28. It appears that on 23 April 2019 I&B served notice of objection to F&B’s claim in respect of the assigned debts and claims, asserting that the Assignment had discharged those debts and claims, as the effect of the assignment was to cause them to be held by the same person (F&B) in the same capacity (as trustees of the TDT).
29. An Order of May 2019 directed that further particulars should be given in relation to claims to payment out of TDT assets. There was also in May 2019 a direction for a hearing to determine among other matters the effect of the Assignment and the validity of F&B’s proof of debt in respect of the assigned debts and claims.

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30. On 7 June 2019 Ms Martin made her 12th Affidavit. In this affidavit she set out to give particulars of, among other matters, the assigned claims from the BVI Companies. She also exhibited a less savagely redacted version of the Assignment. She explained that the Assignment involved an agreement for the assignment by the BVI Companies of various debts and claims relating to the TDT to F&B as trustees of the TDT. She went on to say *“The BVI Assignment Agreement gives rise to a liability against the assets of the TDT which was assigned to F&B as TDT trustees in the administration of the TDT. This is evidenced by the terms of the BVI Assignment Agreement, which expressly identify F&B as parties to the agreement in their capacity as ‘co-trustee of the Tchenguiz Discretionary Trust’ and ‘as such acting on behalf of all beneficiaries and trustees and/or potential or future beneficiaries of the TDT’”*.
31. It is submitted by Advocate Wessels on behalf of I&B that the Assignment itself is inconsistent with any claim on the TDT assets arising from the assignment of the BVI Companies’ debts and claims, other than by F&B as assignee. In his written submission he draws attention to various of the provisions of the Assignment. We note that the Assignment is between the BVI Companies and their liquidators on the one hand and F&B as trustees of the TDT on the other. Each party appears to undertake obligations to the others, although the precise detail of the obligations undertaken by F&B is obscured by F&B’s redactions. Recital (7) explains that the assignment of the BVI Companies’ debts and claims was in consideration of the benefits set out in this Assignment. In other words the Recital conveys that from the point of view of the BVI Companies it was what was provided in the Assignment which supported their making the Assignment. Clauses 2.1 and 3.1, making the assignments, do so in terms reflecting Recital (7). Clauses 4 and 5 made provision for F&B to do various things – precisely what is not of consequence, it would seem, as the clauses are significantly redacted. Clause 9 is an entire agreement provision. There is also a provision stipulating that no-one who is not a party to the Assignment was to have any right to enforce its provisions.
32. The Assignment recited, in Recitals (6) and (7), that it was made pursuant to a Settlement Deed of 15 October 2018 between Kaupthing, Mr Tchenguiz, GTC, F&B and R20 (with another company called R20 Ltd). Ms Martin did not exhibit the Settlement Deed. It is not included anywhere in the evidence before us on this appeal, although it was referred to by Ms Martin in her 26th Affidavit as a confidential exhibit. What we know of its provisions is to be gleaned only from various references to it or to its provisions in the materials which are before us, as it was removed from the court file following the hearing before the Court of Appeal in August 2020 (referred to below).

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33. Thus far there had been no case made by any of the RT Parties that the making of the Assignment might have given rise to anyone having any claim in respect of the TDT or its assets other than F&B as the assignee of the liability to the BVI Companies. This remained the position when Ms Martin swore her 15th Affidavit on 30 July 2019 giving particulars of, among other matters, F&B's claims (these being not only as trustees of the TDT but also as trustees of the TDAT) and those of Mr Tchenguiz, as well as information about the transfer proposal which led to the setting out of the Preserved Sum and the transfer of other TDT assets by the Receivers. One of the claims advanced by F&B was for some £230 million as trustees of the TDT by the "BVI Companies Assignment".
34. We should explain here that we have seen the Order made in October 2019 (and later amended) constituting the Preserved Sum and allowing the release of assets to the TDT Trustees. On the face of it the Preserved Sum was to be ring-fenced for the benefit of non-RT Parties, with any payment to those claimants related to RT Parties to come from any remaining surplus and participation in the property released to the TDT Trustees. This would be consistent with what had been sought by Ms Martin with her 10th Affidavit. We were invited however by the parties before us to proceed on this appeal on the basis that the Preserved Sum is no more than a secure cash amount which will be shared along with the other TDT assets among all those with claims to payment out of the TDT assets.
35. The hearing before the Lieutenant Bailiff in October 2019 which led to the December 2019 Judgment was listed for four days, and was to deal with a variety of issues. For example, the Skeleton Arguments provided by Advocate Robison on behalf of F&B addressed arguments in support of claims from the RT Parties. As regards the Assignment, the contention was that the trustees of the TDT had the right to claim the benefit of the assigned debts and claims. There was no suggestion by him in the written arguments that F&B or Mr Tchenguiz might have a claim in respect of, or related to, the assigned debts and claims.
36. However, in the course of oral argument Advocate Robison stated that if I&B were correct and the assigned debts and claims were no longer maintainable as a result of the Assignment, there could be further proofs submitted "*to meet the cost of the assignment. The assignment was not free. It came at a price and ... for example, if there was a third party payer then that person might have a proof to lodge*". However, Advocate Robison did not at that time identify any third party payer, or indeed state that there was in fact any such payer. He certainly did not allude to any arrangement to which F&B might be party for the sharing or division of the assigned debts, or their

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proceeds, such that the assignment was not in fact to F&B as TDT trustees “*for the benefit of the beneficiaries of the Trust*”.

37. As we have explained, in the December 2019 Judgment the Lieutenant Bailiff held that the assignment of the BVI debts and claims has extinguished those claims.
38. On 25 November 2021 Mr Richards, of AFR Advocates, swore an affidavit in the Priorities Proceedings (this being the affidavit referred to in [301] of the 2022 Judgment and described below) explaining that he was authorised to make the affidavit on behalf of Mr Tchenguiz as well as F&B. He exhibited, among other documents, F&B’s Notice of Appeal to the Privy Council: this included a description of facts dated 18 December 2020 (and so well after the December 2019 Judgment and after the events of 2020 described below) signed by Leading Counsel and Advocate Robison. It described, among other things claims on the TDT assets by F&B for the TDAT and by Mr Tchenguiz (a claim for indemnity amounting to £887,000 arising from his position as Protector of the TDT). The same document, it is relevant to record, still stated that F&B have a claim for “£231m as trustees of the TDT as assignee of the BVI Debts”. This claim was by far the largest listed. There was no reference to any other claim in respect of the assigned debts and claims, and in particular no reference to claims by F&B as TDAT trustees or by Mr Tchenguiz connected with the Assignment. We were told by Advocate Robison that the expression used in the Notice of Appeal was merely an inaccurate précis of the claims.
39. On 31 January 2020 F&B gave notice of appeal from the December 2019 Judgment. At paragraph 15 the Notice of Appeal put forward a new and alternative case in addition to that argued before the Lieutenant Bailiff concerning the claims arising from the assignment of the BVI Companies’ debts and claims. This case, relying on the Settlement Deed, was that the assignment of the debts and claims was obtained at a cost to the RT Parties, so that: “*In the circumstances, it follows that F&B hold the benefit [of] the Assignment of the BVI Debts by way of a resulting or constructive trust in equal shares for the RT Parties*”. The cost explained in the Notice of Appeal was said to be the withdrawal of proceedings the RT Parties had against, among others, Kaupthing and the BVI Companies.
40. This case, it will be noted, included F&B as trustee of the TDT as one of the beneficiaries of the resulting or constructive trust, and was to the effect that those beneficiaries were the RT Parties for the whole of the £230 million odd. It is, strictly, a different case from that which appears to have developed since January 2020, namely a case that the claims rest only with Mr Tchenguiz and F&B as trustee of the TDAT

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for somewhere in the order of £75 or £80 million each: these claims have been labelled “the RT/TDAT Claims”, as they appear to exclude any claims on behalf of the TDT.

41. On 4 February 2020 Ms Martin made her 21st Affidavit. This supported a claim to amend proofs of claim from the RT Parties. She said that the claims of the TDAT trustees and Mr Tchenguiz were, as regards the BVI Companies’ assigned debts and claims, for one third each, and that they were made “*against the TDT assets via the TDT Trustees’ right of indemnity*”, arising “*against the trust fund ... directly as a consequence of the settlement with Kaupthing where all three RT parties parted with good consideration in order to obtain the BVI Companies Assignment*”.
42. In April 2020 an unsworn 23rd Affidavit from Ms Martin was brought forward. This was to deal with criticisms made by I&B concerning the evidence from the RT Parties as to their debts and claims, and in particular in relation to their application to amend their proofs. In this draft Affidavit there was reference to the ground of appeal at paragraph 15 of the Notice of Appeal, with a statement that, arising from the settlement made by the Settlement Deed, “*the TDT Trustees hold the benefit of the BVI Companies Assignment on trust in equal shares for each of the TDT Trustees, Mr Tchenguiz, and the TDAT Trustees*”. It was then conceded that the effect of the December 2019 Judgment was that the TDT Trustees’ own claim was extinguished, but not that of Mr Tchenguiz or the TDAT Trustees, so that the TDT Trustees remain holding two-thirds of the debts and claims as valid debts and claims. According to the Affidavit, F&B as TDAT Trustees and Mr Tchenguiz could file their own proofs if the Court determined that to be procedurally correct.
43. There was a hearing of four days before the Lieutenant Bailiff at the end of April 2020, at the end of which the Lieutenant Bailiff gave a lengthy judgment ([2020] GRC 020) (“the April 2020 Judgment”). There were several matters before the Court. Two are relevant for present purposes. First, there was an application made by F&B to rely on an amended proof of debt. Second, there was an application by I&B for the making to I&B of an interim payment from the Preserved Sum, an application which the Lieutenant Bailiff allowed with a payment of some £1.6 million. There appears to have been no suggestion that the Lieutenant Bailiff had no jurisdiction to make that order without a hearing attended by each and every person claiming or intimating a claim to payment from the TDT assets.
44. The amendment application, as explained by the Lieutenant Bailiff, was so far as now material for the addition of claims by F&B as TDAT Trustees and by Mr Tchenguiz each to have a one-third share of the value of the assigned BVI debts (so, some £80 million each), also for the addition of costs claims said to have been incurred by F&B

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as TDT Trustee in relation to the now settled proceedings in England, and finally for the addition of a “finance claim” from the RT Parties in financing money borrowed to acquire claims. The Lieutenant Bailiff refused to allow the amendment on the basis that the claims presented did not disclose any sufficiently clear or obvious basis of claim which might pass a strike out and, consequently, did not put forward claims which should be allowed to be introduced.

45. So far as the claims to one-third share of value went, it would appear that the legal basis for the claim was explained by F&B by Advocate Robison as being constructive or resulting trust. What the Lieutenant Bailiff said in her judgment on the point was:

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

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

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

42. It is asserted that consideration for the purchase of the debt is to be found in RT’s and the TDAT’s involvement in the broad settlement with Kaupthing and the BVI Companies under which they (RT and the TDAT Trustees) gave up

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their claims and thus forewent the costs incurred in the relevant litigation, thereby enabling the BVI assignment to be procured. But this was a global settlement of a complex set of claims, debts, alleged debts, and so forth, and I cannot, at present, see how the situation could ever be analysed to give RT or the TDAT trustees any enforceable claims against the TDT assets for a sum equal to one third of the face value of the BVI Companies' combined debts.

43. Lastly, F&B as the TDT Trustees are fairly obviously part of the RT "camp" in this matter. They have even described themselves as one of the "RT parties", and it generally appears that they tend to act in accordance with the wishes of RT. The fact, therefore, that F&B as the TDT Trustees are prepared to say that they accept these claims does not seem to me to be enough to mean that they should be admitted for potential argument as provable debts of the TDT assets at this stage, potentially to the detriment of other parties who would be prejudiced by their being included in, and inflating, F&B's claim as TDT Trustees."

46. There was no appeal from the April 2020 Judgment.
47. On 23 July 2020 and in advance of the hearing of the appeal from the December 2019 Judgment Ms Martin made her 26th Affidavit. This was expressed as being to support the application of F&B as trustees of the TDAT and Mr Tchenguiz to be joined as parties to the appeal. She gave a description of the negotiation of the Settlement Deed, saying (for example) that F&B had no direct involvement in the negotiations as the authority was "*within certain parameters*" given to her. She described the rationale for the assignment of the BVI Companies' debts and claims to F&B as TDT trustees rather than to the RT Parties separately in equal shares (this being, she said, because that was of greater value than had the debt been assigned jointly to the claimants); and she also stated, as to the suggested equal shares: "*Rather than conduct a complicated and potentially hypothetical exercise to determine precisely what share each would receive, it was simply agreed that the benefit flowing from the BVI Judgment Debts would be split equally between them*". She did not say when this supposed agreement was made or recorded, or how it was effected as between F&B and itself in its capacities as trustees of different trusts, when F&B was apparently not directly involved in the negotiation other than through her. She did not explain how it might have featured in the provisions of the Settlement Deed and, if it did not, how it might have been consistent with the express provisions of that agreement, including the entire agreement provision referred to below.
48. Before the Court of Appeal in August 2020, at the hearing of the appeal of the Assignment issue and the Priorities issue, Advocate Robison advanced argument on behalf of F&B as TDAT trustees as well as on behalf of Mr Tchenguiz, explaining that these wished to be joined in the Royal Court proceedings to which the appeal relates

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because their claims differ in that they “*are quite differently asserting a proprietary interest, a resulting trust, an [inaudible] directly against the assets that were or should be in my client’s hands.*” The case, in other words, seemed to be that, rather than the debts or claims as assigned being the subject of some resulting trust (the case set out in F&B’s Notice of Appeal), the underlying TDT trust assets had become impressed with a trust in favour of the TDAT trustees and Mr Tchenguiz. He also sought to rely on further evidence, not before the Lieutenant Bailiff for the hearing in October 2019, which was said to support the resulting trust case. The Court of Appeal rejected the admission of this evidence, noting that it could and should have been deployed for the hearing in October 2019 and had been held back on the basis of a tactical decision.

49. It appears from the transcript of the hearing, as well as from the judgment of the Court of Appeal, that fresh evidence included the provision to the Court of Appeal of a redacted copy of the Settlement Deed. As mentioned above, we have not been provided with a copy of the Settlement Deed. It was not shown to the Lieutenant Bailiff at the hearing before her in October 2021 or thereafter. This is surprising, as the foundation of the claims now being advanced in respect of the RT/TDAT Claims lies in the settlement, effected by the Settlement Deed – to which, according to the Assignment, Kaupthing, Mr Tchenguiz, GTC, I&B and R20 were parties - and carried into effect with the Assignment.
50. The Court of Appeal refused to allow the joinder, or to consider on the appeal new argument concerning reasons for the assignment not to have extinguished the assigned debts. In their judgment the Court of Appeal expressed “*reservations about the propriety of Ms Martin deposing to two quite different cases in sworn evidence*”, adding that “*it is not strictly necessary to our rejection of these evidence applications to form a conclusion as to whether the fresh evidence is apparently credible ...*”. They also went on to say that their decision would not preclude F&B, as co-trustees of the TDAT, and Mr Tchenguiz from pursuing their arguments about the constructive or resulting trust before the Royal Court, adding: “*Without giving any encouragement as to the wisdom of doing so, we do not consider that our decision precludes them from that course of action and the proper manner in which to deal with those arguments rests with the Lieutenant Bailiff*”.
51. These passages in the Court of Appeal’s judgment have been relied upon before us by the RT Parties as indicating that the RT/TDAT Claims remain open and valuable. We think, rather, that they should have made it plain to the RT Parties that any serious pursuit of the RT/TDAT Claims ought to be based on more than had been so far presented for the claims to have merit. This becomes obvious when the Court of

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Appeal set out their reasons for rejecting the Assignment appeal. These were prefaced with the following:

“52. We look first at the Assignment (taking that by the BVI Companies as applicable to the others). The parties were the BVI Companies, the Joint Liquidators of the BVI Companies, ‘Fort Trustees Limited in its capacity as co-trustee of the Tchenguiz Discretionary Trust....’, and ‘Balchan Management Limited in its capacity as co-trustee of the Tchenguiz Discretionary Trust....’ The Assignors were the BVI Companies and the BVI Joint Liquidators. The Assignees were F&B. Unsurprisingly given the specification set out in the designation of parties, at clause 2.1, the assignment is merely to F&B. The assets being assigned are ‘the Judgment Debts’ being, essentially, the orders for payment as made by Lieutenant Bailiff Chadwick on 6 December 2013, as varied and confirmed both by this court and by the Privy Council.

53. Some other provisions are also noteworthy. There is an ‘entire agreement’ clause. It is also made plain that no person not a party to the assignment has any right to enforce any of its terms. Whilst many other individuals and entities are recorded in the defined terms, few appear in the unredacted portions of the Deed before us. It is also made clear that the Assignment proceeds pursuant to a Settlement Deed dated 15 October 2018. A copy of that Deed was made available to the court and to Advocate Wessels, but on conditions of confidentiality and it will not be placed on the court file. However, Advocate Robison read out to us clause 5.1.1 the opening words of which state ‘the BVI Joint Liquidators shall assign to [F&B] (in their capacity as the cotrustees of the TDT and for the benefit of the beneficiaries of the TDT) the judgment debts owed pursuant to the [Glenalla and Thorson] Loans’. Here, the specification of the capacity in which F&B were to receive the assignments was apposite: because in the rehearsal of parties, each of F&B were designed ‘in its capacities as co-trustee of the [TDT] and co-trustee of the Tchenguiz Discretionary A Trust’. Specification of capacity at 5.1.1 was therefore required; and that specification was carried into the Assignment where it was given in the designation of parties.

54. It is seen, therefore, that each of F&B were without doubt receiving the benefit of the assignment of the judgment debts in their capacity as co-trustees of the TDT and, as would in any event be presumed, irrebuttably, for the benefit of the beneficiaries of the TDT. Mr. Tchenguiz was a party to the Settlement Deed.”

52. As mentioned, there was no appeal to the Privy Council from the Court of Appeal’s judgment of August 2020 so far as concerns the Assignment issue. There was, however, a successful appeal as regards the Priorities issue: the conclusion of the Privy Council, given on 13 October 2022, is that participation in the trust assets of the TDT for “creditor” claims is not dependent on the timing or sequence of the claims’ arising.
53. On 23 July 2020 Advocate Richardson on behalf of F&B and Mr Tchenguiz applied to the Royal Court to intervene in the Priorities Proceedings, relying for this on the

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RT/TDAT Claims which had been the subject of the April 2020 judgment. At the same time these parties submitted proofs of claim dated 23 July 2020. This application was withdrawn, with the payment of indemnity costs, in advance of a directions hearing brought on by I&B and listed for 18 September 2020. The letter from Advocate Richardson on behalf of the applicants stated that: *“Our clients currently intend to bring, alternatively support, an appeal against the decision of the Court of Appeal to dismiss our clients’ application dated 29 July 2020 to be joined as parties to the appeal”*. However, there was no appeal from the decision of the Court of Appeal on the Assignment issue, or on the Court’s disposal of the alternative arguments sought to be made by the RT Parties as to the basis of claim and to joinder.

54. In December 2020 there was a lengthy hearing before the Royal Court to decide numerous detailed issues in the Priorities Proceedings, these being concerned with I&B’s proofs and, in particular, whether a host of objections to the proofs might be struck out. The judgment following the application ([2021] GRC 007), given in April 2021, runs over 400 paragraphs spanning 90 odd pages. I&B was almost entirely successful. In October 2021 this Court refused F&B leave to appeal.
55. In November 2021 the Lieutenant Bailiff heard further argument over four days concerning the substance of the remaining objections to I&B’s claims. At the same time she considered I&B’s application for an interim payment. It is her judgment on this application which is the subject of the present appeal.
56. In his skeleton argument of 5 November 2021 in support of the interim payment Advocate Wessels drew attention to the history of the RT/TDAT Claims, including that in January 2021 AFR on behalf of F&B and Mr Tchenguiz had stated in correspondence that they intended to make a further application to be joined to the proceedings and to rely on a proof of debt for the claims, that I&B’s lawyers had written to say that that would be an abuse of process, and that no application had been made. He also pointed out that F&B had not relied on the claims as having any bearing on the payments to be made.
57. In opposition to the application, and supporting a case that an interim payment could not appropriately be ordered in the face of numerous uncertainties surrounding the claims which would ultimately need to be settled, Advocate Robison appearing before the Lieutenant Bailiff, argued that one of the uncertainties was the RT/TDAT Claims.
58. In her judgment at [295]-[299] the Lieutenant Bailiff explained how the RT/TDAT Claims came to life in the hearing before her:

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“294. On 17 September 2020, Mr Tchenguiz and F&B as Trustees of the TDAT discontinued their application of 23 July 2020 to be joined in these proceedings in order to make out their supposedly arguable case for the validity of the RT/TDT claims, and consented to pay indemnity costs in respect of it. This was in the face of applications by I&B to have the application listed for an immediate hearing.

*295. On 22 January 2021, AFR on behalf of Mr Tchenguiz and F&B as the TDAT trustees stated that they still intended to file an application to be joined in these proceedings and to rely on the RT/TDAT claims, but, relying on my previous comment that this was not material unless and until the correct order of priorities was held to be *pari passu*, they would not intend to do so until after the determination of the appeal (now) to the Privy Council. Mourant, for I&B objected that this would now be an abuse of process. Neither party took any action before this court at that time.*

296. In the meantime, the process of gradually identifying undisputed or indisputable costs and charges to which I&B, as a creditor, and potentially the priority creditor of the assets of the TDT, were entitled, continued, in particular with my judgment of 23rd April 2021.

297. The RD/TDAT claims were not raised in the arguments at this hearing until I&B sought to forestall a possible argument from F&B on their claim for interim payment, by asserting that the RT/TDAT claims, coupled with the continuing lack of resolution of F&B’s final appeal on the Priorities Decision, could not be used as a factor to militate against any interim payment being made, in the light of the above history.

298. Unsurprisingly, however, F&B then did so. Advocate Robison argued, that I&B were well aware that the position of Mr Tchenguiz and themselves as trustees of the TDAT was that the RT/TDT claims would be brought if, but only if, their appeal to the Privy Council on the Priorities Issue were successful, relying on my previous comments as authority for this course. In consequence he argued that no interim payment to I&B could be appropriate.

299. Advocate Wessels submitted, as indicated, that I had previously held that the claims themselves were apparently unarguable on the basis on which they were advanced in April 2020 and no information supplied since then had effected any improvement. Mr Tchenguiz and F&B as trustees of the TDAT were given a second chance to make good their asserted claims on their own account, but they have not taken it, even though they once started to do so. Instead they withdrew, before they had to make out and support any legal argument. He submitted that I therefore can, and should, affirm my previous decision now and refuse to have any regard to those asserted claims as factors of any influence upon the consideration of whether I&B ought to have some interim payment.”

59. This is how the Lieutenant Bailiff describes the order she made at the hearing, and the response of F&B and Mr Tchenguiz by Advocate Robinson:

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“300. I stated in the course of the hearing, that it seemed to me to be wrong that Mr Tchenguiz and F&B (with their TDAT trustee hat on) could simply block I&B’s claim to an interim payment on the basis of a “worst case” minimum to which they really must be entitled even on a pari passu basis by asserting claims which I had already said appeared to be completely unarguable, without any attempt to show that their claims did, in fact, have some substance or merit. I had declined to direct them to do so in April 2020 because at that time I&B’s claim was insufficiently defined so as to provide any basis for an interim payment, but matters had now changed, and the assertion of the existence of the RT/TDAT claims without any attempt to justify them was having a practical impact. Even with the decision of the Privy Council expected imminently (the appeal had been heard in June, and the decision must surely be given before long), I did not think it right to allow this situation to continue. I therefore ordered F&B – who were parties to the hearing before me, even if they might choose to instruct other Advocates in relation to advancing the RT/TDAT claims together with Mr Tchenguiz – themselves, and to convey the same to Mr Tchenguiz, that if they were indeed minded to pursue these claims at all, they must, within 7 days (of 18 November 2021, when I made that order) file such claim, together with a sufficient explanation of how the claim was composed, plainly with a view to my assessing whether it disclosed any reasonable claim or cause of action. As stated above the issue had ceased to be a totally academic one, with the potential availability of a worthwhile interim payment to I&B having become appropriate.

301. What actually occurred was that, in fact on 25 November 2021 at 15.38, AFR filed an application on behalf of their clients to be joined in these proceedings for the purpose of deciding whether they should be permitted to rely on their respective proofs of debt, but this was together with an application to adjourn such application until after the conclusion of the appeal in the Privy Council, to be heard on the papers, supported by an affidavit which did not explain the basis or composition of the proof of debt at all, but simply recited the history of the matter from 9th December 2019 in great detail and concluded by questioning the utility of their having to do so before the decision of the Judicial Committee had been handed down, since that might make that claim academic.

302. On 9th December 2021, Mourant objected that the above was in blatant defiance of my order (as I think it was) and that accordingly, as I should now disregard and disallow the RT/TDAT claims as being unarguable, Mr Tchenguiz and the TDAT having had a long time, and a clear last chance, to try to justify the basis for their claim and not having done so, and I should in effect, treat such claims as struck out and disallowed.

303. On 16th December 2021, Advocate Richardson of AFR, on behalf of Mr Tchenguiz and F&B as trustees of the TDAT, submitted a skeleton argument, once again reiterating their grounds for seeking an adjournment of their application to be allowed to rely on their debts until after receipt of the decision of the Judicial Committee, but also, highly belatedly, condescending to set out a basis for their argument that these claims had sufficient potential validity that they could not simply be dismissed as unarguable.

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304. By a letter dated 17th December 2021, Mourant noted the contents of this Skeleton Argument, and simply requested me to proceed to determine I&B's interim payment application without regard to these purported claims, or to list a hearing for the determination of that point as soon as possible. (It will be appreciated that since the end of the hearing on 18th November, I had been engaged in making my decisions and writing my judgment on the main matters above.)”

60. What, in our judgment, emerges is that the RT Parties had been directed, by an order of 18 November 2021, to provide a “*claim, together with a sufficient explanation of how the claim was composed*”. This, in our judgment, would ordinarily require a reasonable reference to the facts founding the claims along with an explanation of the legal basis for the claims. This direction was summarised in a letter from Mourant on behalf of I&B on 9 December 2021 as being a direction to F&B “*within 7 days to file and serve their (and Mr Tchenguiz's) claims and an explanation of those claims, in order to explain the issues in the light of the submissions which had been received*”. This the RT Parties all knew. The purpose of this direction was to allow them the opportunity to furnish a supportable basis for the arguments concerning the impact of those claims being run by Advocate Robison in opposition to the making of an interim payment to I&B. Mr Richards' affidavit of 25 November 2021 at paragraph 42 referred in terms to the order. Not only had Advocate Robison been present before the Judge on 18 November 2021 (see below), but his firm to whom the 9 December 2021 letter was copied did not contradict what was said in the letter.
61. At the hearing before the Lieutenant Bailiff, in the morning of 18 November 2021, the Lieutenant Bailiff explained in discussion with Advocate Robison that she was going to make an order that if the RT/TDAT Claims were to be taken into account, those claims should be put before the Court within 7 days.
62. The way she explained this was as follows:

“... You are using it [sc. The RT/TDAT Claims] at the moment as effectively as a mechanism of saying, ‘Oh, [the] court cannot really make an order on the basis of a sum that it could be sure is the minimum that they are going to be entitled to because we have not yet had that point decided’, but the reason we have not had that point decided is because the persons you are associated with have not actually put that claim in. They have stepped up to the brink and they have stepped back again and I do not think that is right. ... At the end of the day, I am going to direct you to contact TDAT, yourselves as TDAT trustees, and Mr Tchenguiz and say that the claim has got to be put in in seven days. You were doing it before, you contemplated doing it before, so you must have contemplated the case that you were going to make before, and you put it in with a statement of how it is actually composed ... ”

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63. Advocate Robison said nothing, in response to the Judge, concerning any problem of communication among the RT Parties, or as to a need for a further oral hearing of the interim payment application, and neither Mr Richards in his affidavit nor Advocate Robison suggested that there would be any difficulty in complying with the order, other than an unsubstantiated assertion in the hearing before us that the RT Parties were concerned about the costs of advancing the claim (an assertion which does not begin to justify any delay or reticence if the RT Parties perceived the RT/TDAT Claims to be worth in the region of £160 million).
64. The application of 25 November 2021 by F&B and Mr Tchenguiz (described in paragraph [301] of the 2022 Judgment, above) recited that “*on 18 November 2021 [the Court] ordered that the Applicants make their claims of entitlement against the TDT assets within seven days*”. It went on to ask for joinder “*for the limited purpose of determining whether the Applicants will be permitted to rely on their respective proofs of debt*”, while asking for the application in that regard to adjourn, and also for any directions about it to be adjourned, until after the determination of the Priorities appeal before the Privy Council. It did not ask for joinder for the purpose of the interim payment application, or indeed for any other order or direction concerning that application; and it did not request any opportunity to participate in that application or to address the Court on it.
65. A feature of the landscape, as it was at the hearing before the Lieutenant Bailiff in mid-November 2021, was that over a year had elapsed since this Court had given judgment on the Assignment issue, and much longer since the consequences of the Assignment had been determined by the Royal Court. Although there had been a certain amount of posturing by the RT Parties, nothing concrete had been done to advance the RT/TDAT Claims since August 2020. As they were deployed by Advocate Robison at the hearing in November 2021, they had the character of a chimera to deflect the Royal Court from making a second interim payment order.
66. Before us, as before the Lieutenant Bailiff at the hearing in November 2021, Advocate Robison submitted that an observation made by the Lieutenant Bailiff in the April 2020 Judgment, when she refused leave to amend the F&B proof of debt for the assigned debts and claims, meant that they had no reason to put forward any further case for the admission of the RT/TDAT Claims to proof in the Priorities Proceedings until after the Privy Council’s giving of its decision. At paragraphs [46] to [48] of that Judgment she summarised the position as follows (emphasis added):

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*“46. ...However, it again seems to me that in the circumstances where the TDAT and RT are really part of the same group and under similar control, a simple “mirror” assertion by F&B with their TDT hat on, that they accept a liability to make payments to RT and to the TDAT, on behalf of the TDT, would not be enough. Once again therefore, **unless and until a properly arguable claim is formulated on behalf of the actual recipient parties then, in my judgment, it should not be allowed into the proofs in this matter at this stage, to muddy the waters and complicate things on such an insubstantial basis F&B can pursue their own individual claims, but in my judgment it should be left to Mr Tchenguiz and the TDAT Trustees, if they can, to make any claim individually on their own behalf and demonstrate its legal justification.** Of course, they will only be able to recover against the TDT assets in respect of such items through subrogation to the lien of F&B qua Trustees of the TDT, but that is not, in my judgment, sufficient in itself to justify allowing F&B to introduce into their own proof, by amendment, claims by others which do not disclose a sufficient arguable basis in law.*

47. To sum up, therefore, to allow F&B to introduce these claims here, there would, in my judgment, have to be disclosed a clearly arguable case that F&B had incurred the liabilities alleged in their capacity as Trustees of the TDT; F&B would need to show at least an arguable case that they have expended this money or that they are claiming the wherewithal to meet, claims for which there is a clearly arguable case that they are liable. As to the first item, the “one third shares of the BVI debts” for which permission to amend is requested, I cannot see any arguable case that any such liability or claim even really exists. As to the third and fourth items, I cannot see, and there is not even mounted, any clear case, that any such expenditure or claim is recoverable against the TDT assets by the relevant third parties. If the third parties can make out a case for recovery of their own identified expenditure or loss as a liability of the TDT incurred through the Trusteeship of F&B as Trustees, that would be a necessary step, but they have not done that, and in the situation where the basis for F&B accepting the TDT’s liability for the claims being advanced by third parties is not made clear on the face of the proof, it is, in my judgment, appropriate to require the third party to make out his/its claim as to how such liability arises, so that it can be examined by those with a direct interest in challenging it.

*48. This may well become material later, as regards any general conclusions about the procedural progress of this whole matter. This is because, **until the appeal is determined there is no point dealing with disputes about claims which will only have any material effect if the appeal succeeds.** Adjudicating on challenges to the claims of I&B, and possibly those of GTC, all of which take a degree of priority over those of F&B and those claiming through them as matters stand, can be usefully progressed because they will need to be determined in any event, **but disputes with regard to the validity or extent of claims made by or through F&B at present have no practical consequence – at least not directly.** This will need to be taken into account in future directions.”*

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67. Advocate Wessels submitted that what was said in the emphasised passages, above, was not *carte blanche* for the RT Parties to do nothing at all about the RT/TDAT Claims, and that at the latest by early 2021 there were practical reasons for the claims to be brought forward even if they were disputed. We agree, and reject the contrary submissions made on behalf of the RT Parties. For example, there had already been an interim payment ordered in favour of I&B in the first half of 2020, as mentioned above. It was to be predicted that I&B would seek a further such payment, once they had made progress with establishing their proofs of debt against the assets of the TDT; and this they had done by April 2021. The RT/TDAT Claims could be material, if perceived to be of substance, to any decision concerning an interim payment. That was crystal clear before November 2021, when the interim payment application was to be considered by the Royal Court, yet even at that stage nothing was done about the claims until after 18 November 2021.
68. The application made on 25 November 2021, which at last conveyed a wish at some future time to advance the claims, referred to Ms Martin's 26th Affidavit, to Mr Richard's Affidavit of 25 November 2021, and to three other affidavits made at the same time as Ms Martin's (by officers of F&B and by Mr Tchenguiz, which confirmed Ms Martin's: the content of these appears from the transcript of the hearing before this Court on 5 August 2020). There was accordingly nothing new by way of evidence in addition to what had been put forward in 2020 and considered by the Court of Appeal. Indeed, there was rather less, as the Settlement Deed was not before the Lieutenant Bailiff.
69. Significantly, while the application did ask for "the Applicants" to be permitted to join the Priorities Proceedings for the limited purpose of having it decided whether their proofs should be admitted, and also to be allowed to rely on their proofs, it also sought to have a decision on these reliefs adjourned until after a decision on the appeal of the Priorities issue before the Privy Council. The application did not invite, and no request was made by the applicants for, the grant of an opportunity to address oral argument to the Lieutenant Bailiff on the interim payment application before she reached a decision on that application.
70. The skeleton argument filed on 16 December 2021 on behalf of the RT Parties stated that it was filed "*in support of the application ... filed on 25 November 2021*". Under the heading "*Decision on substantive relief should be adjourned*" the skeleton contained the following text:

"4. *the Lieutenant Bailiff on 18 November 2021 directed the Applicants to make their claims against the Tchenguiz Discretionary Trust (TDT) assets*

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within seven days. In the circumstances, the questions of the joinder of the Applicants and whether they can rely on their respective proof of debt fall to be considered again. The Applicants wish to advance the claims articulated in their respective proofs, but they are conscious of the following circumstances which may impact upon the utility of doing so.

5. First, assuming that the RT-TDAT Claims only arise through subrogation to F&B's rights of indemnity to the trust estate ... unless and until the Intervening Parties' appeal to the Judicial Committee of the Privy Council ... in relation to the priorities issues is determined in their favour, the Applicants' joinder application is academic. ...

6. Second, and alternatively, the Applicants contend that their claims do not only arise through subrogation to the Intervening Parties' lien on the trust funds, with the consequence that the RT-TDAT Claims will be academic unless the Intervening Parties' appeal to the Privy Council is successful. At paragraph 41 of her judgment of 20 April 2020, the Lieutenant Bailiff correctly observed that '[o]ne has to remember that such claims are a form of proprietary interest claimed to exist in, or to be imposed upon, an asset'. This is fundamental: if the Applicants' claims are valid, it gives them a proprietary interest in the BVI Debts arising out of a common-intention constructive trust based on the expectation of F&B as trustee of both the TDT and the TDAT and RT. As explained in the evidence already filed by F&B, both the TDAT and RT gave up valuable claims and otherwise contributed in order to secure the Kaupthing settlement, including the assignment and assumption of the benefits and obligations in relation to the loans made by the BVI Companies. As between F&B and RT the expected result was that one-third of the recovery would accrue to each of the TDT, the TDAT and RT. Alternatively, by reason of their contributions to the purchase of the company debts, a resulting trust arose to the same effect. On either analysis, the TDT and its other creditors would be unjustly enriched at the expense of the TDAT and RT if the Applicants' trust based claims are not recognised. Those trust-based claims prevent the Applicants' share of the debts from ever falling into the TDT funds, with the consequence that the doctrine of merger does not apply (even on the legal findings in the Lieutenant Bailiff's judgment of 9 December 2019). The Applicants therefore do not need to claim through the lien of the Intervening Parties for the reason identified by the Lieutenant Bailiff herself.

7. If, however, the Court were to find against the Applicants in relation to the argument outlined above in paragraph 6 because the Court has held (in dealing with the Assignment Issue) that no property in fact accrued to the TDT as a result of merger, the Applicants' claim will survive against the TDT and be recoverable by way of subrogation to the TDT's lien. On this hypothesis the Applicant's interest in the debts themselves has been defeated and cannot be traced through to identifiable property in the hands of the TDT or others. But the TDT and its other creditors or beneficiaries remain in the position of having been unjustly enriched at the expense of the TDAT and RT because of the elimination of liability on the loans. In these circumstances, the remedy for the Applicants' thwarted expectations lies in unjust enrichment and the Court will fashion a remedy for that purpose. The question will then be whether that claim

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is proprietary, giving the Applicants priority over other creditors, or whether they rank with other creditors. Those are complex questions and raise some novel points of law, whether that be Guernsey, Jersey or whatever law is found to govern the law of unjust enrichment in these circumstances. The Applicants' primary argument will be that such a claim is to be characterised as proprietary in order to reflect the proprietary nature of their claims. The claim in unjust enrichment seeks to remedy the Applicants' loss by awarding comparable alternative compensation. These arguments will of course be the subject of more detailed analysis and argument in due course in accordance with directions to be given by the Court if the application needs to proceed following the Privy Council's judgment.

8. In those circumstances the applicants make the Second Royal Court Joinder Application [ie the application of 25 November 2021] because they consider it important that the Royal Court and other parties are aware that the Applicants have not abandoned their claims and still wish, notwithstanding the effluxion of time since the withdrawal of the First Royal Court Joinder Application, to advance them in respect of their proofs. However, they submit that the more appropriate way of dealing with their Application is to adjourn it sine die pending the outcomes of both the F&B JCPC Appeal from these proceedings and the appeal from Re Z II Trust to the Judicial Committee.”

71. We make the following observations at this stage.

- (i) The Skeleton Argument was presented in support of the application of 25 November 2021. Insofar as an explanation is provided of the RT/TDAT Claims it is provided as part of the argument in support of that application. In the face of the Lieutenant Bailiff's direction on 18 November that the RT Parties “*make their claims of entitlement against the TDT assets within seven days*”, those parties expressly declined to make those claims, choosing instead to advance the application of 25 November 2021, and then in the Skeleton Argument to reiterate that application.
- (ii) The explanation of the RT/TDAT Claims contained in the Skeleton Argument is presented at a high level of generality. There is no reference to evidence (other than a general reference to evidence already filed) or to authority. No attempt is made to grapple with the difficulties with the constructive and resulting trust arguments which the Lieutenant Bailiff had previously identified. Although the claim is also, apparently for the first time, presented under reference to unjust enrichment, the Skeleton Argument acknowledges that such a claim would involve “*complex questions*” and “*novel points of law*”. Yet it declines to identify those questions, or to engage with any of the issues which would require

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to be addressed before the Court could begin to assess the validity of such a claim.

72. The Skeleton Argument explicitly invited the Lieutenant Bailiff to decide the 25 November 2021 application on the papers.

73. Following the filing of the Skeleton Argument, Mourant wrote the letter of 17 December to which the Lieutenant Bailiff refers at paragraph [304] of her judgment. This was addressed to the Greffe and copied to both Advocate Robison and Advocate Richardson. It referred to the Skeleton Argument and to an earlier letter of 9 December, and continued:

“... we ask the Court to proceed to determine the interim payment application without regard to these purported claims. If, however, the court is not minded to determine the issue without a hearing, we would ask that a hearing be listed as soon as possible.”

74. The Lieutenant Bailiff did not fix a hearing. We were told at the hearing of the appeal that she issued her judgment in draft to the parties on 22 December 2022.

75. The Lieutenant Bailiff approached her decision on the interim payment application on the basis that she could *“order an interim payment to be made out of the Preserved Sum in respect of a sum which it appears that the claiming party is sufficiently certainly going to recover out of the Preserved Sum, so as not to keep the party unreasonably out of his/its entitlement for any longer than necessary”*.

76. With this in mind, she arrived at the £5 million figure on the basis that the interim payment should be less than the minimum to which I&B would be entitled on a worst-case basis. The headline aggregate amount of I&B’s claims was taken to be £27.6 million although the Lieutenant Bailiff recognised that this could reduce to £16 million. The Preserved Sum was taken to be worth £34.7 million, seemingly with an assumption being made that the property passed to F&B with the transfer of October 2019 would not realise any value. It was assumed that all the debts and claims, other than the I&B ones, which had been brought forwards in extant proofs of debt in the Priorities Proceedings (that is, including RT Parties’ proofs) would be established in full. On this basis the total claims were £68.1 million.

77. The calculation made no provision for the RT/TDAT Claims. The Lieutenant Bailiff disregarded them on the basis that, as she put it at para [309], *“they do not disclose the*

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availability of any sufficiently reasonable claim or cause of action to justify according them any weight whatsoever at this stage”.

78. In arriving at this conclusion the Lieutenant Bailiff gave consideration, at paras [310] to [315] to what had been presented to the Court concerning the claims. Included in this consideration was attention to the way Advocate Richardson sought to articulate the claims in his Skeleton Argument of 16 December 2021.
79. We set out below what the Lieutenant Bailiff said about the formulation of the RT/TDAT Claims in Advocate Richardson’s Skeleton Argument. We would emphasise that neither in their written cases for this appeal nor in oral argument when being pressed by the Court, have the Appellants made any reasoned criticism of any part of the Lieutenant Bailiff’s analysis.

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

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

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

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

315. Most importantly, though, it seems to me, that it is also necessary to recall what the claims (of F&B as trustees of the TDAT and of Mr Tchenguiz) actually are, that have to be shown to be capable of being mounted in the exercise now being considered, because this tends to get lost in the generalities of description in the skeleton argument. The arguable claims which I am concerned to identify are ones which are claimed to be advanced against the assets of the TDT, through its relevant Trustees (F&B). Any claim in unjust enrichment would have to show that the assets of the TDT themselves were “unjustly enriched” in a manner at which Mr Tchenguiz and/or the TDAT trustees (remembering that they are in fact the same entities as the TDT trustees) would be entitled to complain. It is not enough, nor does it found a claim against the TDT assets, for Mr Tchenguiz or the TDAT trustees to complain that I&B has been “enriched” because of the falling away of a competing claim, because any such allegation is, in effect, the mounting of a claim in “unjust enrichment” directly against I&B, and that is not what is happening. I do not see, and it has not been explained to my satisfaction, how either of these applicants could mount any claim in unjust enrichment against F&B as Trustees of the TDT, as to £79.5Mn odd each, which is what is required to be shown. ...”

80. A little later in the 2022 Judgment the Lieutenant Bailiff explained that her decision did not involve striking out the RT/TDAT Claims which had been intimated: her point was that she considered it “sufficiently safe, as to doing justice rather than causing any real risk of injustice”, to allow an interim payment. She had not, in other words, made

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a determination that the RT/TDAT Claims were now barred from being pursued in the Priorities Proceedings by way of proof or by any other means, for what merit or otherwise they might have, by the RT Parties.

81. What the Lieutenant Bailiff did conclude, after considering what was set out in Advocate Richardson's Skeleton Argument, was that there was nothing in the RT/TDAT claims as then presented. We have already quoted what she said at [309] of the 2022 Judgment. And, as she explained at [315] in relation to the unjust enrichment basis of claim, she could not see how the claim could be mounted, adding "*I think it fanciful to suggest that they could do so, certainly to the extent that the outside possibility of any such argument ever succeeding should be seen as a sufficiently potent factor as to be worthy of preventing a reasonable interim payment being made to I&B at this stage out of the Preserved Sum, if that is otherwise justifiable*".
82. On the other hand, the calculation of the interim payment to I&B made the assumption, which turned out to be correct, that F&B's appeal of this Court's decision on the Priorities Issue would succeed. The upshot would be that I&B might expect an absolute minimum of about 0.50p in the £1: the minimum dividend was put at £8.2 million. Of this I&B had received already by way of the previous interim payment some £1.6 million. The resulting net sum was rounded down by a further £1.6 million as a margin of error to £5 million.
83. Before us, other than as regards the RT/TDAT Claims, the only criticism of the Judge's approach concerns what she said in the 2022 Judgment concerning the prospect of I&B being unable to repay any overpayment of the interim payment, should the risk eventuate of there having been an overpayment. As to this, she took the view that there could well be countervailing claims and in the administration of the TDT assets and surrounding litigation, which might be set against the repayment obligation. She also thought recovery a realistic possibility.
84. Her judgment on this is at paragraph [318] where she said:

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

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interim, and there is the outside possibility that something might have to be repaid.”

Appeal Ground 1

85. The Appellants’ case, set out in the written argument of Advocate Robison which Advocate Richardson adopts for this purpose, is that there was no evidence before the Lieutenant Bailiff concerning the identity of any insurers or their willingness to repay any overpayment to I&B, insofar as it reached their hands.
86. The I&B contention is that the Lieutenant Bailiff, so far as she made observations on recovery of any overpayment, was not founding on anything more than a point that an order for repayment should not be thought to be necessarily fruitless. She was not basing her decision on a false premise, that there would be certainty or even a high degree of assurance of repayment. Rather, she was stressing the point that the recipient of the interim payment, likely to be I&B’s insurers, should appreciate that there could possibly be, however remote the possibility, a call for repayment and therefore should be mindful of that when dealing with the payment.
87. We prefer the argument of I&B on this ground. In our judgment the Lieutenant Bailiff did not found herself, when exercising her discretion, on a mistaken view that repayment of any overpayment was assured, and by the same token did not make any finding or proceed in arriving at her decision on the basis of a mistaken fact concerning I&B or its insurance. As to this last point, there is no dispute that I&B have insurers who are supporting the litigation by I&B. Given the sums involved, it is a reasonable inference that the insurers are substantial and reputable. In the circumstances it was a reasonable inference that those receiving the interim payment would be likely to deal with it responsibly such that return of an overpayment was a realistic possibility, if ordered.
88. In reality, Ground 1 of the appeal only has significance if the Lieutenant Bailiff was mistaken in thinking that it would be safe for the interim payment to be made, without any real risk of a need for repayment, because the RT/TDAT Claims could be disregarded. But that would be because, if the claims had substance, there would be a real risk of a £5 million interim payment turning out to be an overpayment, without a commensurate degree of assurance that there would be a repayment.
89. This, then, leads to Ground 2. Here the question before us is simply whether it was open to the Lieutenant Bailiff to make any order on the interim payment application,

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other than an order dismissing the application or adjourning it, unless and until the RT Parties had presented the RT/TDAT Claims to the Court, whether by way of an application in the Priorities Proceedings, or by commencing their own proceedings outside the Priorities Proceedings (assuming appropriate defendants could be identified) laying claim to TDT assets, and those claims had been adjudicated upon following an oral hearing. The question, as it has been presented to us, is not whether, on the materials before her, the Judge was mistaken to consider (as she did) the claims as being of no substance. Neither the Appellants nor the Intervening Parties have challenged the Judge's assessment to that effect; and they have consistently and firmly maintained the position that it is not an issue before us.

Appeal Ground 2

90. In 2020, the Lieutenant Bailiff considered the RT Parties' claims connected with the Assignment, that is the RT/TDAT Claims, and considered them unarguable on the materials then presented. Those claims were later discussed in the course of argument before this Court and it is apparent that, on the basis of the materials so far before the Court, the claims were, at the least, unpromising.
91. Against that background, it is unsurprising that the Lieutenant Bailiff issued the direction which she made on 18 November, requiring the RT Parties to put in their claim "*with a statement of how it is actually composed*". She could reasonably expect that, if she was to take into account the RT/TDAT Claims, she should be presented with a properly articulated claim, which set out a reasonably worthwhile explanation of the factual and legal basis for it. Further argument by a different advocate repeating Advocate Robison's submissions was merely going to add to cost and delay.
92. Yet, in the face of that direction, the RT Parties filed an application for joinder for the limited purpose which we have described above and invited the Lieutenant Bailiff to adjourn consideration of that application. Eventually, almost a month after making the order of 18 November, she was given Advocate Richardson's Skeleton Argument, in further support of the 25 November application and which condescended, for that purpose, to describe the claim in the terms which we have quoted above.
93. Given the procedural background, the Lieutenant Bailiff would have been entitled, in our view, to refuse to receive the Skeleton Argument. She chose not to do that, but to consider its terms. For the reasons which she explained in her judgment, she concluded that there was nothing presented in that Skeleton Argument which justified her in

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placing any value on the RT/TDAT Claims in the context of assessing whether to direct an interim payment.

94. On behalf of I&B, Advocate Wessels makes the simple submission that the Judge cannot be considered to have been unfair in proceeding to reach her decision and give judgment on the interim payment application on the basis of the materials before her and with the representation already before her. In particular, he submits, there is no question of there having been any breach of any principle of natural justice. Shortly stated:

- a. The decision to make the interim payment involved nothing more than directions as to the administration of TDT assets in which the Lieutenant Bailiff had to decide whether it might be appropriate or not to allow a payment out which would diminish those assets available for creditors and which, if there was an overpayment which could not be recovered from I&B, might result in a shortfall in distributions. In this context the Lieutenant Bailiff was not concerned to make binding determinations as the validity or otherwise of claims, but only to attempt to make appropriate predictions as to the way the Preserved Sum would ultimately fall to be distributed so as to arrive at an amount which might fairly be paid to I&B on an interim basis.
- b. For the purpose of the exercise before her, it was sufficient to have on the one hand I&B as applicant for the payment and on the other a suitable representative of all the other claimants for debts or claims payable out of the TDT assets to argue against the making of a payment which might jeopardise the payment of the other claimants' debts and claims. The obvious parties to be this representative were F&B, the TDT trustees.
- c. At the time of the hearing before the Lieutenant Bailiff in mid-November 2021 the RT/TDAT Claims had simply been put into abeyance by the RT Parties. There was no reason to hold the claims back, and every reason to press them urgently and to articulate them (if they had any weight) at the hearing. Advocate Robison could perfectly well have made submissions at the hearing concerning the merits of the claims.
- d. When ordered to bring forward the RT/TDAT Claims within 7 days from the 18 November 2021, nothing was done to give any substance to the claims beyond an application by F&B (already represented before the Court) and a party to the Priorities Proceedings, and by Mr Tchenguiz, to join as parties to the Priorities Proceedings. But that did nothing to clothe the claims with any

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substance, absent some proper explanation and evidence; and none was forthcoming.

95. Also on behalf of I&B, Advocate Wessels has submitted that the RT/TDAT Claims are demonstrably unsustainable, even it may be vexatious, on the grounds

- a. that they could and should have been presented by way of proofs in the Priorities Proceedings as long ago as 2019, when F&B as TDT trustees were seeking to introduce an amended proof in reliance on the Assignment,
- b. that Ms Martin's evidence supporting the RT/TDAT Claims was inconsistent with her evidence put forward in support of the F&B amendment of their TDT trustees' proof, and
- c. that the claims should have been presented or advanced at the latest in the second half of 2020 and certainly well before November 2021 when the interim payment application was being brought on for hearing and when Advocate Wessel's Skeleton Argument for the hearing, that of 5 November 2021 (referred to above and also noted in one of the extracts from the 2022 Judgment quoted above) cautioned as follows:

“101. F&B have made no attempt in their skeleton argument [sc. for the hearing] to rely upon the TDAT Claim and it has never previously been suggested that it should have any bearing on the enforcement of the order for payment of the Undisputed Invoices and the Remaining Invoices. Notwithstanding this, given F&B's penchant for raising new arguments at the last possible minute, I&B make clear that it is not open to F&B to rely on the TDAT Claim for this (or any) purpose in circumstances where F&B's previous attempt to rely on the TDAT Claim was dismissed by this Court, in its judgment dated 30 April 2020, on the ground that there was no arguable basis for the TDAT Claim ([2020] GRC 020 at [47] ...). It is, in particular, not open to them to say that they are not already before the Court in their capacity as trustees of the TDAT and that there is somehow some issue which cannot be determined at this hearing.”

96. Advocate Robison's Skeleton Argument in support of the present appeal draws attention to what had been stated in Advocate Richardson's Skeleton Argument of 16 December 2021 concerning the basis for the RT/TDAT claims, and argues that the making of the interim payment order was unfair, because the Lieutenant Bailiff “*did not convene a further hearing for the purpose of oral representations, nor invite further written comment - whether from I&B, the TDT Trustees or RT and the TDAT Trustees*”. He also submits that, while he appeared at the hearing in November 2021 representing

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F&B, that was in their capacity as TDT trustees only, and that he could not represent the interests of the TDAT and RT. He relies for this on the proposition that the Lieutenant Bailiff had previously decided that the TDT trustees could not advance the interests of the TDAT trustees and RT, which had to be advanced by those parties.

97. Advocate Robison's second argument, concerning his position at the hearing in November 2021, is difficult to accept. It is understandable that the Lieutenant Bailiff made the point in 2020, at [46] of the April 2020 Judgment (quoted above), that the RT/TDAT Claims were for the TDAT trustees and Mr Tchenguiz to pursue. If successful, those claims would diminish the pool of assets available for the TDT trustees to meet claims, and would in all probability eliminate any conceivable prospect of a return for the TDT beneficiaries (of whom Mr Tchenguiz is just one). On this basis Advocate Robison ought to be supporting I&B in contending that the RT/TDAT claims are of no substance. There is therefore a straightforward conflict of interest between the TDT trustees (including F&B) and the TDAT trustees and Mr Tchenguiz, so far as that goes.
98. When this point was put to him in argument at the hearing of this appeal, Advocate Robison was disposed to accept it. Later he sought to qualify the point by saying that the conflict was not real, only seeming, because F&B knew all the circumstances of the making of the Settlement Deed and the Assignment and what had been arranged in that regard, having been involved at the outset. The difficulty with this suggestion is that, if correct, it would emphasise that he can have had no possible basis for disclaiming at the hearing before the Lieutenant Bailiff any willingness to present the factual and legal basis for the claims: again, he was taking a tactical position for his clients.
99. However, Advocate Robison appears before us, as he did before the Lieutenant Bailiff, opposing the interim payment, and this on the basis of the RT/TDAT Claims having substance. As we have observed, it might be expected that on behalf of the TDT it would be F&B's aim to ensure that the claims to be met out of the TDT assets are as small as possible. On this basis, one might expect Advocate Robison to support I&B in contending that the RT/TDAT Claims are of no substance. But that was not, and is not, his position in the context of the present issue; and in our judgment he is justified in this. This is because in the proceedings before the Lieutenant Bailiff in November 2021, and on this present appeal, Advocate Robison can properly advance the case that opposition to the interim payment is appropriate, if and to the extent that there might be a real risk in the claims eventuating and in consequence diminishing the return to be

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made to F&B as TDT trustees in respect of their own claims and to TDT beneficiaries. That case would not involve him in a conflict if he is putting forward materials which explain why the claims are genuinely expected to be pursued and are seriously arguable, being of real substance, and hence to be taken into account as regards the interim payment, even if they may ultimately fail (and, indeed, even if his position on behalf of F&B as trustees of the TDT is that those claims should be rejected). Quite simply, Advocate Robison was in a position before us, as he was before the Lieutenant Bailiff, to address argument on behalf of all those interested in seeing that the TDT assets are not distributed (including by way of an interim payment) so as to diminish the ultimate return to creditors.

100. We accordingly do not accept that Advocate Robison was in any difficulty, before the Lieutenant Bailiff, in addressing her on everything which F&B (his clients after all, who as he reminded us had been involved in the making of the Settlement Deed and the Assignment) or Mr Tchenguiz might have in the form of factual or legal argument to support the RT/TDAT Claims. His position, rather, as put forward in oral argument on 17 December 2021, was that because F&B as the TDAT Trustees and Mr Tchenguiz were not before the Court, and because the RT/TDAT Claims were yet to be determined, and because it was not for him to explain the RT/TDAT Claims, the correct course was simply to defer further consideration of any interim payment until after the decision of the Privy Council on the Priorities issue. This led to the Lieutenant Bailiff making the direction she did on 18 November 2021, explained in paragraph [300] of her Judgment (quoted above). We cannot help feeling sympathy for her in the face of what had all the hallmarks of a tactic directed to forestalling the making of an interim payment.
101. Advocate Robison's first argument is not one for him to make. He did not submit to the Lieutenant Bailiff, when she gave her direction on 18 November 2021, or at any time thereafter that in fairness to his clients as the TDT Trustees or to others interested in the destiny of the Preserved Sum a further oral hearing was needed before the Lieutenant Bailiff reached a decision on the interim payment application.
102. In his Skeleton Argument Advocate Robison offers the following concerning the way the Judge analysed the arguments put forward by Advocate Richardson in his 16 December 2021 Skeleton Argument on the merits of the RT/TDAT Claims: "*The Lieutenant Bailiff's analysis is noteworthy; however it is irrelevant to the present appeal, which concerns her substantive failures to hear the relevant parties that necessarily renders her conclusions judicially impermissible*". In short, Advocate Robison does not challenge the Lieutenant Bailiff's analysis of the claims, while at the

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same time disputing the result of the interim payment application on a basis which in our judgment is not one for him to advance.

103. In his written contentions for this appeal Advocate Richardson is careful to avoid commenting on the strength or otherwise of the RT/TDAT Claims, or on the manner in which the Lieutenant Bailiff's judgment had dealt with those claims (including what had been said in Advocate Richardson's Skeleton Argument of 16 December 2021). He explains:

“Whether the RT/TDAT Claims have merit is not relevant to the appeal, and it would be a clear and obvious misdirection for I&B to seek to turn the appeal into a mini-trial or summary judgment hearing. The issue in the appeal is not the merits of the RT/TDAT Claims; it is the way in which the Lieutenant Bailiff has approached those Claims and the fact that she did not do so ...”

In oral argument before us Advocate Richardson was not willing to go further as to the merits of the RT/TDAT Claims than to direct us to what is set out in his Skeleton Argument of 16 December 2021 and in the evidence of Ms Martin. He made no criticism of any part of the Lieutenant Bailiff's substantive analysis of the claims.

104. Under reference to Frey v. Labrousche [2012] 1 WLR 360, he argues that the Lieutenant Bailiff should have given the RT Parties an oral hearing before “*dismissing their claims*”. He contends that she “*invited the RT and TDAT Trustees to file submissions as to the RT/TDAT Claims, which they did and which went further than the previous articulations of the RT/TDAT Claims, and then dismissed those submissions – including the further arguments that had not previously been raised – and, by extension, the RT/TDAT Claims without even affording RT and the TDAT Trustees an opportunity to speak to those (or any) submissions and any concerns/objections which the Court had at the time.*” He then contends that the Lieutenant Bailiff has in this way materially prejudiced RT and the TDAT Trustees by devaluing the RT/TDAT Claims.
105. We were told that in the year since the Lieutenant Bailiff gave the 2022 Judgment (and notwithstanding the intervening decision of the Judicial Committee of the Privy Council on the Priorities issue) there has been no further progress with the Priorities Proceedings and no further attempt by the Appellants to articulate, develop or present the RT/TDAT Claims.
106. In the result we prefer the arguments of Advocate Wessels. What is more, we are left in no doubt that the RT Parties used the spectre of the RT/TDAT Claims to attempt to

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frustrate I&B's application for an interim payment and, failing that, to delay it for as long as practically possible.

107. In our judgment the RT Parties have not demonstrated any failure of the Lieutenant Bailiff to observe principles of natural justice, or more prosaically ordinary principles of fairness, in the conduct of the interim payment application and in her order. Nor has there been any breach of their rights under the European Convention on Human Rights. Contrary to Advocate Richardson's submission, the Lieutenant Bailiff has not "*dismissed the RT/TDAT Claims*" nor has she "*determined the merits of the RT/TDAT Claims*". Those claims were not before her for determination. She has made no ruling adjudicating on them for admission as claims on TDT assets. She has determined only that she sets no store on those claims in considering the exercise of her discretion as to whether to allow I&B to have an interim payment out of the TDT assets held by the Receivers. If the RT Parties should seek to file a claim, it will be for the Lieutenant Bailiff then to determine whether or not she should receive it, in light of the procedural history and other relevant considerations, and, if she does receive it, then to adjudicate on it.
108. The RT Parties had plenty of opportunity to set out their stall on the RT/TDAT Claims before the Lieutenant Bailiff gave her judgment on the interim payment application and arrived at conclusions about the worth of those claims for that limited purpose. Indeed the Lieutenant Bailiff expressly gave them an opportunity, by way of her direction of 18 November 2021, to provide her with further information about those claims. The response of the RT Parties to that direction was unimpressive for the reasons explained by the Lieutenant Bailiff. When, eventually, the RT Parties filed the Skeleton Argument, they did so not, on the face of it, in connection with the question of an interim payment, but in support of their own application to be joined as parties and for that application to be adjourned. They expressly invited her to determine that question on the papers. The explanation of the RT/TDAT Claims given in the Skeleton Argument did not provide the Lieutenant Bailiff with the evidential and legal basis which she would, having regard to the nature of those particular claims, reasonably require if she were to attribute value to them. The RT Parties did not at the time seek either to have any further opportunity to address the judge orally on the matter of the interim payment in the light of what they had provided. Nor did they contend in their application of 25 November 2021 and supporting written materials that no interim payment could be ordered until there had been a substantive determination of the merits of the RT/TDAT Claims.

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109. We were taken to several authorities dealing with occasions where a person had been denied an oral hearing and that had been found to constitute a denial of justice or a breach of Article 6 of the Convention. These were deployed by the RT Parties to contend that an oral hearing is required where a court is to adjudicate upon a person's rights. A threshold objection to this submission is that the question before the Royal Court was not whether or not the RT/TDAT Claims should be dismissed or allowed, but whether a payment might be ordered, as a matter of discretion, from a fund being administered by the court in which a number of persons had an economic interest. As we have explained, the TDT Trustees, the trustees of the TDT assets, were able appropriately to advance argument on behalf of all the TDT creditors (including the RT Parties) with the exception of the applicant for the payment (that is, I&B).
110. As we have mentioned, Advocate Richardson relied on Frey v Labrouche [2012] 1 WLR 3160. In this case, the judge had dismissed an application without giving the applicant any meaningful opportunity to make submissions. The Court of Appeal set aside the judge's decision and remitted the application to be heard by a different judge. However, Advocate Wessels drew our attention to paragraph [33] in which Lord Neuberger or Abbotsbury MR said:

“... This should not be taken as any sort of precedent to support the notion that a party will be able to appeal a decision on the ground that a judge took an inappropriate procedural course where the party had not made it clear to the judge that he objected to that course. It is only very rarely that a party should be permitted to appeal a decision on a ground which was open to him, but he did not take, before the judge. The judge, not the Court of Appeal, is the primary fact-finder and the primary controller of procedure. Hence this court should be reluctant to interfere with a judge's finding of fact, exercise of discretion, or procedural and case management decisions. The Court of Appeal's function in this connection is to correct what it regards as mistakes made by the judge, not to make fresh decisions. Where the judge has not had the opportunity of knowing that a decision is objected to by a party, it is hard to characterise the decision as one which can normally be appealed.”

111. Advocate Wessels submitted that this exposition by Lord Neuberger demonstrates why there is no merit in the RT Parties' appeal concerning the absence of any further hearing of the interim payment application. If they had really wanted an oral hearing to persuade the Lieutenant Bailiff of the validity of the RT/TDAT Claims in the context of her consideration of the interim payment, it would have cost nothing to ask and would have been the obvious course to take. If there was more material that would advance the RT/TDAT Claims the RT Parties had only to provide it.

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112. We agree. The RT Parties had ample opportunity both to provide information and submissions in support of the RT/TDAT Claims and to ask to be heard in the context of the interim payment application. Thus:
- a. The RT Parties could have asked for a further oral hearing of the interim payment application when the application and affidavit of 25 November 2021 were served.
 - b. They could have asked for an oral hearing in response to Mourant's letter of 9 December 2021.
 - c. A request, and representation about any need for an urgent oral hearing in respect of the interim payment application or any unfairness in the absence of one, could have been included in Advocate Richardson's Skeleton Argument of 16 December 2021.
 - d. Mourant's letter of 17 December 2021, which we have quoted above, was an obvious occasion for the RT Parties to request an oral hearing, if one was wanted, and to do so urgently.
 - e. On Wednesday 22 December 2021, the draft of the 2022 Judgment was circulated to the parties for consideration. On receipt of the draft, the RT Parties did not object to the fairness of what had transpired, or say anything to the Court concerning the need for any oral hearing of the interim payment application.
113. Ultimately, we are left with the clear view that there is no merit in the contention that there was unfairness in the Lieutenant Bailiff's conduct of the interim payment application. The requirements of the right to be heard, whether under Article 6 or under reference to common law principles of fairness or natural justice, depend on the particular circumstances. We doubt whether there was any *contestation* or determination of the RT Parties' civil right, such as to engage Article 6. But we need not decide that question. The context of any adjudication must be considered for the purpose of determining whether the Article 6 principles identified in Ramos Nunes De Carvalho E Sá v. Portugal ECtHR (Applications Nos. 55391/13, 57728/13 and 74041/13) see [188-192] are engaged or the right to a fair hearing has been violated. In all the circumstances, the Lieutenant Bailiff did not require to give the RT Parties an oral hearing or any further opportunity to address her before deciding whether to direct an interim payment.

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114. We consider the following points are material to the context:

- a. The RT/TDAT Claimants had a full opportunity to present their case in accordance with the proofs process but chose not to develop their claims or provide any fresh evidence or analysis to the Lieutenant Bailiff at any stage before December 2021;
- b. Advocate Robison had the opportunity to address the Lieutenant Bailiff on the RT/TDAT Claims in November 2021 but chose not to do so;
- c. notwithstanding the Lieutenant Bailiff's direction of 18 November 2021, the RT Parties chose not to submit a claim, but to apply to be joined and to seek an adjournment of that application and invited her to determine that issue on the papers;
- d. although they did provide an explanation of the RT/TDAT Claims in the context of that application, the explanation was at a very high level of generality and, as we have observed above, did not provide the Lieutenant Bailiff with the evidential and legal analysis which she would reasonably require if she were to attribute any value to them;
- e. neither Advocate Robison nor the RT/TDAT Claimants asked the Lieutenant Bailiff to hold a further oral hearing or postpone her decision on the interim payment application in order to allow the RT/TDAT Claims to be considered further at any point in December 2021;
- f. the Lieutenant Bailiff did not make any final ruling on the merits of the RT/TDAT Claims;
- g. there was nothing in the reasoning of the Lieutenant Bailiff that took the parties by surprise or that would not have been anticipated and could not have addressed by the RT/TDAT Claimants in Advocate Richardson's skeleton argument (*cf.* *Cepek v Czech Republic* ECtHR (Application No. 9815/10) at [45] and *Vegotex International SA v Belgium* ECtHR (Application No. 49812/09) at [134-136]);
- h. to the extent that this Court can judge the matter on the evidence as it stands, the questionable economic value of the RT/TDAT Claims has not been shown to have been impaired by the interim payment; and

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- i. in any event the Appellants had the opportunity to address the merits of the RT/TDAT Claims and the value of any impairment in the hearing before this court or by filing the RT/TDAT Claims before the Lieutenant Bailiff but have chosen not to do so.

Conclusion

115. In the result, we dismiss the appeal. The interim payment order was one which it was open to the Lieutenant Bailiff to make. The procedure which she adopted exhibited no unfairness, breach of natural justice or incompatibility with Article 6 of the European Convention.