

Supplementary judgment to substantive judgment handed down 2nd March 2023, addressing the question of costs.

[2023]GCA009

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

CIVIL DIVISION APPEAL No. 557

29th March 2023

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

Between: **(1) ITG Limited and** **Respondents**
(2) Bayeux Limited

-and-

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

-and-

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

-and-

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

Counsel for the First and Second Appellants, as original parties: Advocate N Robison
Counsel for the First, Second and Third Appellants, as intervening parties: Advocate P Richardson
Counsel for the Respondents: Advocate J M Wessels

Bompas JA:

1. This is the judgment of the Court.

Introduction

2. On 2 March 2023 we handed down our judgment on an appeal from a judgment given on 4 January 2022 by Lieutenant Bailiff Hazel Marshall KC, sitting without Jurats ([2022] GRC 003). We had circulated a provisional, draft, version of our judgment on 15 March 2023 for the parties' comments and to give the parties the opportunity to consider any submissions they might wish to make to us arising out of our judgment; and on 2 March 2023 we heard their oral submissions. These were directed only at the form of the order to be made in relation to the costs of the appeal.
3. In particular, there was no application before us for leave to appeal to the Judicial Committee of the Privy Council, although the RT Parties (an expression defined on our judgment of 2 March 2023) did wish to include in the order to be made following our judgment a direction that they "*must apply for special leave to appeal ... by 30 March 2023*". We might have expected that, if an application were to be made for leave to appeal, it would have been made at the hearing on 2 March 2023. In the absence of an application for leave to appeal, and in the absence of an indication that the RT Parties indeed intend to appeal, we decline to give any directions about appealing.
4. In what follows we use the same expressions as we used in our judgment of 2 March 2023 ("the Judgment"), when we dismissed the appeal for the reasons given in the Judgment. This present judgment sets out our decision on costs.

Discussion

5. In early February 2022 the Lieutenant Bailiff had given an extension of time for appealing her judgment, the 2022 Judgment. On 29 March 2022 she refused the application for leave to appeal which had been made to her by F&B, in their capacity as trustees of the TDT. A renewed application for leave to appeal was made to this Court on 1 April 2022, with F&B as TDAT Trustees and Mr Tchenguiz making on 11 April 2022 their application for leave to intervene.
6. This application of 11 April 2022 was an obvious step, as the Lieutenant Bailiff in refusing Advocate Robison's clients leave to appeal had explained that in her judgment it was unarguable for Advocate Robison to contend that his clients had not received a fair trial of their own claims and disputes because the court did not condescend to demand and hear argument from some other person not party to the proceedings.
7. On the applications made to the Court of Appeal in April 2022 F&B in their capacity as trustees of the TDT were represented by Advocate Robison, with his firm Babbé LLP. On the joinder application, and supporting the application for leave to appeal, F&B in their capacity as trustees of the TDAT and Mr Tchenguiz were represented by Advocate Richardson and his firm, AFR Advocates.
8. The applications were referred to the full Court on these questions of leave and joinder.

9. On 25 July 2022, following the grant by this Court of the applications for leave to appeal and for joinder, grounds of appeal were served by Babbé LLP and were expressed to be on behalf of F&B as trustees of the TDT. No separate notice was served by AFR Advocates on behalf of their clients.
10. Nevertheless after the leave given in July 2022 the appeal was conducted by the RT Parties together, with F&B as trustees of the TDT with one set of representatives, and Mr Tchenguiz and F&B as trustees of the TDT with another.
11. So, for example, on 19 October 2022 the written case on the appeal served by Babbé LLP was settled by Advocate Robison and was expressed to be for F&B as the “*First and Second Appellants’/Intervening Parties’ Written Case*”. On the same day a written case, settled by Advocate Richardson, was served by AFR Advocates; and this was expressed to be for F&B as trustees of the TDT and Mr Tchenguiz as the “*Third to Fifth Appellants’/Intervening Parties’ Written Case*”. The latter document explained how the Court of Appeal had in July 2022 granted permission “*to RT and the TDT Trustees to join in the TDT Trustees’ appeal ...*”, and went on to explain:

“The submissions herein have been prepared following sight and consideration of a draft of the TDT Trustees’ written submission in the appeal, and RT and the TDT Trustees adopt the submissions therein for the purpose of the appeal.”

12. Before us the RT Parties together provided a written submission settled by Advocate Robison and Advocate Richardson jointly, this being expressed to be “*The Appellants’/Intervening Parties’ Submissions on Ancillary (sic) Orders Arising from Appeal*”. In this document the heading appears to characterize as the Appellants (or “*First & Second Appellants*”, the expression used in the text) F&B in their capacity as TDT Trustees: Mr Tchenguiz and F&B as TDT Trustees are referred to together as “*Intervening Parties*”. For reasons explained below, the RT Parties contend that in fact the only appellants on the appeal before us were F&B in their capacity as TDT trustees. In other words, we are now to understand (a point which had to be drawn out in oral argument) that Advocate Richardson was not representing any appellant before us.
13. As I&B had been successful on the appeal Advocate Wessels, who had appeared for I&B on the appeal, submitted to us at the hearing on 2 March 2023:
 - a. that his clients’ costs of the appeal should be paid by the RT Parties as the unsuccessful parties;
 - b. that the costs ordered to be paid by the RT Parties should be taxed on the indemnity basis;
 - c. that the order in sub-paragraph (a) should be without prejudice to any entitlement of I&B to an indemnity from the TDT assets in respect of their costs of the appeal; and
 - d. that F&B should not be allowed any reimbursement from the TDT assets in respect of either the costs they have to pay to I&B or any part of their own costs.
14. As regards the submission in sub-paragraph (d) in the previous paragraph, we consider that there is no issue concerning the position of Advocate Richardson’s clients: it is difficult to see any basis for them to have any right of reimbursement for costs from the TDT assets,

and there has been no indication on their behalf in their draft order or submissions that they should have such a right. What is sought on behalf of the RT Parties is that, as to subparagraphs (c) and (d) in the previous paragraph, questions concerning any right of indemnity from the TDT assets as regards costs, whether I&B's costs, or costs of or which be payable by F&B as TDT Trustees, should be adjourned to be determined by the Royal Court as part of the Priority Proceedings.

15. The first submission made as to costs on behalf of the RT Parties in their joint written submission was expressed as follows:

“...it is submitted that a reserved cost order is appropriate because the Appellants and/or Intervening Parties may (and are within their rights to) appeal the findings in the Draft Judgment. In the event, and if that appeal were successful, there would likely be a need to “unwind” whatever cost orders had been made by the courts below, including by this Court. In the event, otherwise avoidable costs will have to be incurred. Accordingly, it is submitted that the prudent course is simply to reserve the question of costs.”

16. We reject this submission. It is sufficient to say that we see no reason for departing from the court's normal approach: we are satisfied that we should consider the question of costs on the basis that our judgment is final. It would be quite remarkable for a court to reserve costs because the paying party might in the future decide to seek to appeal the judgment concluding proceedings in which the paying party has been unsuccessful and the costs of which proceedings the paying party would on any normal principles be ordered to pay. Here there is no application for leave to appeal before us, and we were not told what might be the basis for an appeal if the RT Parties sought to bring one. Further, were we to order costs to be “reserved”, it is not apparent who the costs would be reserved to or when any decision should be made concerning the costs.
17. In principle we are satisfied that I&B ought to have their costs of this appeal paid to them by the RT Parties. Quite simply there is no reason to depart from the usual rule that in contentious litigation, which this present appeal is, the successful party should have their costs paid by the unsuccessful.
18. Advocate Robison submitted, as to this, that his clients (that is F&B as TDT trustees) should be the only paying parties if (as we have decided) I&B are to have their costs of the appeal ordered to be paid to them.
19. The only explanation offered by Advocate Robison for our directing F&B as TDT Trustees to bear the costs of the appeal, to the exclusion of Advocate Richardson's clients, is that the Notice of Appeal of 25 July 2022 did not name F&B as TDT Trustees or Mr Tchenguizas appellants, and that they were therefore not appellants.
20. Correctly, in our judgment, Advocate Robison did not submit that the case was one in which his clients' appeal was in the nature of a directions application by a trustee, or anything of that kind, so as to avoid any order which might exclude personal liability on the part of his clients for I&B's costs, with or without a right of recoupment from the TDT assets. Neither did he address any submission to us to the effect that I&B's costs should

or may only be payable by his clients to the extent that they can be recovered on a distribution of the TDT assets.

21. We reject Advocate Robison's submission that no costs order should be made against Advocate Richardson's clients. It is difficult to see how F&B could properly be volunteering to subject themselves to be the only paying parties (charging themselves for this exclusively as TDT Trustees) on an appeal conducted collectively by the RT Parties as appellants and with Advocate Richardson's clients unquestionably before us as parties, when F&B as TDT Trustees are not offering to pay the costs personally but are submitting also that what they have to pay to I&B should be paid or indemnified to them out of the TDT assets. We fail to see any reasonable explanation for this submission: while there may be a good explanation which we have been unable to imagine, the aim appears to be to place on the TDT assets, to the risk of all those interested in them, the whole costs of this unsuccessful appeal by the RT Parties. We of course assume that F&B as TDT Trustees have not bound themselves to indemnify Mr Tchenguiz and themselves as TDAT Trustees in respect of any of the costs of the appeal to us. We were certainly not told of any such arrangement.
22. Insofar as it is necessary to address Advocate Robison's point that F&B in their capacity as trustees of the TDAT and Mr Tchenguiz were not named as appellants in the 25 July 2022 Notice of Appeal, we note that the Grounds were in substantially the form of the Notice of Appeal served on 1 April 2022 by Advocate Robison's clients and before Advocate Richardson's clients had applied successfully to be joined in the appeal: their joinder was directed by the Act of Court made by this Court on 11 July 2022.
23. That Act of Court, it may be added acceded to, and gave effect to, the application which had sought the joinder of Advocate Richardson's clients to the appeal proceedings, together with leave for them to appeal the 2022 Judgment "*on the grounds and bases set out in the annexed draft Notice of Appeal served by [the TDT Trustees] on 1 April 2022*". The Court's grant of their joinder application was because the intervening parties were proper parties to be advancing any argument that *they* had been treated unfairly – indeed, as the Court granting leave observed, on the face of it, it was they who had the primary interest in advancing the point. Thereafter they were, together with F&B as TDT Trustees, parties to the appeal brought by the Notice of Appeal seeking to overturn the interim payment order made by the Lieutenant Bailiff. Practically their arguments were, in the event, indistinguishable from those advanced by Advocate Robison for his clients, to the point where it is difficult to see why F&B in their several capacities and Mr Tchenguiz were not simply represented on the appeal by the same single Advocate.
24. On any measure the RT Parties were, all together, adverse, and unsuccessful, parties to the appeal, so that Advocate Richardson's clients and Advocate Robison's clients all ought to be ordered to pay I&B's costs of the appeal.
25. In the result, we order the RT Parties to pay I&B their costs of the appeal. The liability for these costs will be joint and several.
26. This brings us to the principal issue as to costs. This is whether the costs to be paid by the RT Parties, should be ordered to be taxed on the indemnity basis or the recoverable basis.

27. It is accepted on behalf of the RT Parties that we have as a matter of jurisdiction the power to order that I&B's costs, costs that in our judgment should be paid in the first instance by the RT Parties and not simply from the TDT trust assets, should be taxed on the indemnity basis. This power, a discretionary power, is given by section 18(1) of the Court of Appeal (Guernsey) Law 1961. That this Court has the power to order a receiving party's costs to be taxed on the indemnity basis was recognised by this Court in Hulme v Matheson Securities (Channel Island) Ltd (No.2) (1997) 24 GLJ 80 and confirmed by this Court in Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd (unreported, 21 January 2015: judgment 04/2015) and later cases (for example Puma Brandenburg Ltd v Aralon Resources and Investment Co Ltd (unreported, 6 June 2017: judgment 29/2017)).
28. In the Hulme case Southwell JA, giving the judgment of the Court, said that the discretion is not to be fettered or circumscribed beyond the requirement that the exercise of the discretion must be "appropriate".
29. What in the case of any appeal will make the order appropriate is likely to be some feature taking the case away from the usual run of ordinary contested litigation, when costs are normally to be taxed on the recoverable basis. This feature may be found in the paying party's conduct of the appeal and is likely to involve some degree of unreasonableness.
30. The important point, though, is that there must be something to make it appropriate for the court to order the receiving party's costs to be taxed on a basis which displaces in favour of the receiving party the rules in the Court of Appeal (Civil Division) (Costs and Fees) (Guernsey) Rules, 2012 which would apply on the usual, recoverable basis of taxation: the indemnity basis removes the cap on recoverable Advocates' fees, for example, and allows costs unless unreasonable in amount or unreasonably incurred.
31. An obvious example, naturally, of an occasion for an order for indemnity costs would be where the paying party's approach to or conduct of the proceedings has subjected the receiving party to a costs burden which should not have to be borne, even in hard-fought contested litigation. Beyond this we prefer to avoid listing out non-exclusive examples, or further refining the principles to be applied by a court which is to decide whether to order costs on the indemnity basis.
32. In the course of the submissions made to us about costs we were referred to cases from other jurisdictions, as well as from Guernsey, in which courts have considered whether or not to award indemnity costs. While these may be illustrative of situations in which courts have, or have not, awarded indemnity costs, each case will turn on ultimately on its own facts, with the Court having to decide, in light of the principles applicable in this jurisdiction, whether these make indemnity costs appropriate. Providing multiple examples is unlikely to assist the Court.
33. The feature of the present appeal which is said by Advocate Wessels for I&B to make an indemnity basis costs order appropriate is that the pursuit of the appeal was unreasonable. This was because the contention on which the appeal was founded was of no practical value, unless the Court of Appeal could be satisfied that the RT/TDAT Claims were in fact meritorious. The contention was that the RT Parties had been deprived of the opportunity to show the Lieutenant Bailiff in a hearing with oral argument that the claims were meritorious, and this made it wrong for the Lieutenant Bailiff to have arrived at a conclusion on the interim payment application that she should not attach weight to the

claims. This contention combined with an argument that the Lieutenant Bailiff had been unrealistic in gauging the prospect of I&B being able to satisfy an obligation to return all or part of the interim payment, should the risk of there being an overpayment eventuate, was what gave the appeal any reasonable prospect of success.

34. Advocate Wessels submitted: (i) it was central to the attack on the order made by the Lieutenant Bailiff that her appraisal of the value to be ascribed to the claims for the purposes of the interim payment order was wrong, and with that her assessment of the risk of repayment being required from F&B so as to undermine her view that this risk was manageable; and (ii) it ought to have been clear to those appealing her order that they needed to engage with the merits of the RT/TDAT claims.
35. Advocate Wessels reinforced this submission in two ways:
 - a. First, he drew attention to the conclusion expressed in the Judgment, that there was no merit in the single argument advanced in the appeal concerning the RT/TDAT claims, namely that it had been a serious failure on the part of the Lieutenant Bailiff to give her decision without a further oral hearing after 18 November 2021. This argument, weak as it was on the facts as they were demonstrated on the appeal, was hopeless without there being shown to have been purpose in the Lieutenant Bailiff having the oral hearing which, after all, had not been called for by any of the RT Parties.
 - b. Second, he drew attention to what we had said in paragraph [106] of our Judgment, a paragraph which concluded our consideration of the absence of submission from the RT Parties to us concerning the merits of the RT/TDAT Claims and which led on to our consideration of the process by which the Lieutenant Bailiff had given her judgment on the interim payment without any further oral argument after 18 November 2021. In that paragraph we commented that *“the RT parties used the spectre of the RT/TDAT Claims to attempt to frustrate I&B’s application for an interim payment and, failing that, delay it for as long as practically possible”*.
36. The submission on behalf of the RT Parties distils itself into the proposition that the appeal and its conduct was in no way out of the normal run of ordinary contested litigation, not least of all because this Court had in July 2022 given leave to appeal and, as already explained, directed the joinder of Advocate Richardson’s clients. They sought to draw the sting of the conclusion which we expressed in paragraph [106] of our judgment by observing that it was at the request of the Advocate Robison’s clients by letter of 1 April 2022 that the application for leave to appeal had come before this Court as a full appeal court without having first been the subject of a substantive decision by a single judge.
37. In our judgment this is a case in which the costs to be paid to I&B by the RT Parties should be taxed on the indemnity basis.
38. We accept Advocate Wessels’ submission. It was obvious that the Appellants/Interveners would need to engage with the merits of the RT/TDAT Claims. The Lieutenant Bailiff’s decision had given reasons for her conclusion that, for the purposes of an interim payment, no store should be set on those Claims. Only if the conclusion were shown to be open to plausible challenge could it have mattered that at the hearing before the Lieutenant Bailiff

she had not had that plausible challenge explained properly to her. The judgment of this Court giving leave to appeal had noted (at paragraph 52) that the Court was not prejudging argument that any procedural unfairness had no substantive basis. The RT Parties should have recognised that they would face argument on that basis and should have appreciated that they would need to be in a position to address the point.

39. As we observed in our Judgment, the RT Parties did not develop before us any positive case concerning the merits of the RT/TDAT Claims – not even with a view to showing to us that, had they been given an opportunity to address the Lieutenant Bailiff, they would have been able to advance a plausible case in support of those claims or to address her reasons for attributing no value to them. The result was that, even if the procedural point which was argued had been sound (which, on examination it proved not to be), the appeal lacked any substantive merit. The fact that this Court had given leave to appeal did not mean that pursuit of the appeal was reasonable when: (i) the RT Parties have, in the appeal, been at pains to avoid addressing the merits of what lay at the heart of their complaint; and (ii) the Court has, on the basis of the full exploration of the issues during the appeal and the way the appeal was conducted, reached the conclusion about the RT Parties’ purpose in pursuing this appeal set out in paragraph [106] of our judgment. We have taken into account the fact that leave was granted to argue the appeal on the procedural point which was argued. Whilst this entitled the RT Parties to appeal if they chose to do so, the light which the way the appeal was conducted casts on the RT Parties’ purpose in pursuing the appeal justifies the conclusion that they should nevertheless pay costs to I&B on the indemnity basis.
40. We do not consider that the letter of 1 April 2022, referred to above, does draw the sting from Advocate Wessels’ submission in paragraph 38 above. However diligent Advocate Robison’s clients might have been in expediting the application for leave to appeal, the point remains: (i) that the RT Parties chose to limit their appeal, leaving this Court without opportunity to give consideration to the real point (namely the worth of the RT/TDAT Claims as a factor relevant for the interim payment order); and (ii) that the Court has concluded that “*the RT parties used the spectre of the RT/TDAT Claims to attempt to frustrate I&B’s application for an interim payment and, failing that, delay it for as long as practically possible*”. I&B still had to deal with this appeal and were in the meanwhile exposed to the hazard of the interim payment order being set aside with the RT/TDAT Claims still remaining to be evaluated.
41. It was said by Advocate Robison, in answer to the Advocate Wessels’ submission based on paragraph [106] of the Judgment, that the interim payment has in fact been made and, further, that the RT Parties are not interested in delay (as demonstrated by their letter of 1 April 2022). This submission does not, however, engage with the fact that the RT/TDAT Claims had had a difficult gestation in 2019 and 2020, had made no progress thereafter until being raised, without infusion of substance, in effect as a deterrent to the Lieutenant Bailiff’s making of an interim payment in favour of I&B, and were then relied on before this Court in the same way. Little more than the assertion of the claims was to be used to overturn the interim payment order and give I&B the work to do over again if they were to have interim payment while the Priorities Proceedings continue to deal with claims for payment from the TDT assets.
42. So far as this appeal is concerned what was wrong, what takes the appeal away from the usual run of ordinary contentious litigation, is not that the appeal failed and, considered

with hindsight, might be judged to be weak or even very weak. It does not become appropriate to order indemnity costs merely because a proceeding has poor chances of success: pursuing a weak case does not by itself take the matter outside the ordinary run of contentious litigation. What makes this case different is that no attempt was made by the RT Parties on the appeal to engage with the merits of the RT/TDAT Claims – indeed they resisted doing so – even with a view to showing us that the procedural point which they argued had substantive merit, so that this Court has been left with the clear view that the appeal served only to put off the time when there was a definite conclusion to the interim payment application.

43. We accept that this appeal could not have been determinative of the claims themselves for the purposes of deciding whether Mr Tchenguiz and the TDAT Trustees are really entitled to payment from the TDT Assets on the basis of the RT/TDAT Claims. However, this Court was being asked to uphold an allegation that the intervening parties had not been given a fair opportunity to address the merits of those claims in relation to the making of an interim payment from the TDT assets. The question of whether anything substantial would have been advanced had such an opportunity been given bears directly on whether that allegation has substantive merit. Further, this Court could have engaged with the question what, if any, value should be placed on the claims on an interim basis while administering the TDT Assets and pending a final decision on them.
44. Having reached the conclusion that I&B's costs should be taxed on the indemnity basis, the final question for us is whether, as proposed by Advocate Wessels, we should make an order that Advocate Robison's clients are not to be entitled to reimbursement from the TDT assets for their own cost or the costs to be paid to I&B.
45. Section 35 of the Trusts (Guernsey) Law, 2007 allows a trustee to reimbursement from the trust property for all expenses and liabilities "properly incurred" in connection with the trust. Clauses 12.1 and 12.2 of the TDT Trust Deed included in the appeal bundle use the expression "proper expenses" when referring to the TDT Trustees' right of reimbursement. Under Article 26 of the Trusts (Jersey) Law, 1984 (and the TDT is a Jersey law trust) the right to reimbursement is for all expenses and liabilities "reasonably incurred" in connection with the trust. Either way, an expense or liability which is incurred unreasonably should not be reimbursed to a trustee incurring it. We were not told of any sanction or direction having been given by the Royal Court for F&B to pursue the appeal to this Court, or as to the manner of pursuit.
46. Advocate Wessels' submission is almost unanswerable: if (as we have) we conclude that Advocate Robison's clients should pay I&B's costs on an indemnity basis, not only those costs but also F&B's own costs cannot have been reasonably incurred by F&B: F&B should not have brought or pursued the appeal. From the perspective of I&B, as well as from that of other parties interested in the TDT assets, it would be wrong for F&B to be reimbursed from those assets where the reimbursement may diminish what is available for distribution.
47. In seeking to answer Advocate Wessels' submission, the RT Parties cited a passage from Lewin, Trusts, 20th Edition (2000) concerning trustees' rights of indemnity. This includes a paragraph explaining that a trustee may be deprived of litigation costs, or ordered to pay costs, for a variety of reasons including "*his unreasonable costs in bringing unnecessary trust proceedings*" or his conduct in the proceedings. This paragraph only emphasises

Advocate Wessels' point. What Advocate Robison's clients ought to have been concentrating on was the weight to be attached to the RT/TDAT Claims and their possible impact on the TDT assets, and not on pursuing a procedural question in which they had no real standing of their own for reasons explained by the Lieutenant Bailiff when refusing leave to appeal and by the Court which granted the joinder application inter alia on the basis that it was the intervening parties who on the face of it had the primary interest in the argument which it was proposed to advance.

48. It was submitted in the written submission made to us on behalf of the RT Parties, and in oral argument by Advocate Robison, that F&B should not be refused reimbursement of costs, their own or I&B's, in circumstances where this Court had given "*judicial encouragement to an appellant by deciding that its appeal has good prospects of success*".
49. We reject this submission. First, the submission acknowledges that the fact that leave to appeal was given does not absolve F&B from its subsequent pursuit of the appeal, where the manner in which it was pursued leads to an order for costs to be paid by F&B on the indemnity basis. Second, in giving leave to appeal the Court of Appeal held only that the appeal, as then presented, appeared to have a real prospect of success. This Court's giving of leave was not the same as the Royal Court's making an order to assist trustees proposing to embark on litigation, as it might on an application for directions in the nature of that in Re Beddoe [1893] 1 Ch 547. The giving of leave to appeal by the Court of Appeal was not "judicial encouragement" to F&B to pursue the appeal; rather, it was a determination, on the basis of the arguments placed before the court at that time, that the case met the threshold for granting leave. The decision to appeal and its conduct remained the responsibility of the RT Parties.
50. Nevertheless, and with a considerable degree of misgiving, we have decided to leave to the Royal Court hearing the Priorities Proceedings the possibility of allowing F&B in their capacity as TDT trustees a right to claim reimbursement. In this regard we think it should be for F&B to take the initiative in asking for directions for the determination.
51. The costs order in favour of I&B which we have made is for the liability for I&B's costs to be joint and several as between the RT Parties. Insofar as there is to be any reimbursement for I&B's costs from the TDT assets for F&B as TDT Trustees (a matter now for the Royal Court), there may be an issue as to the proportions in which the RT Parties should be ultimately responsible as between themselves. In principle as TDT Trustees F&B's reimbursement should only be for their own relevant proportion. We have not been addressed on what this proportion might be. For example, it might be one third, recognising that when representing one trust F&B are together one single party so that in total there are three unsuccessful paying parties. Or it may be that there are correctly five unsuccessful paying parties of which the TDT trustees are two and therefore ultimately liable for two-fifths of I&B's costs. Or it may be that, as the Court granting the joinder application considered, it was those applying to be joined who had the primary interest in advancing the procedural point taken on appeal, such that, as between those who had made the application for leave to appeal and those who had applied to be joined, it is the latter who should bear the entirety of the costs. But as this issue will only arise if the Royal Court decides that F&B as TDT Trustees have a right to some reimbursement, we refer also to the Royal Court the question (should it arise) as to the proportion of I&B's costs paid by F&B and properly to be reimbursed from the TDT assets.

52. Finally, there is the question of I&B's position, insofar as their costs are not recovered from the RT Parties. As to this, we accept that I&B should be entitled to seek reimbursement from the TDT assets. How that reimbursement is managed will be a matter for the Royal Court in the Priorities Proceedings.

Conclusion

53. In the result we order, on the dismissal of the appeal by the Judgment, that Advocate Robison's clients and Advocate Richardson's clients are to pay I&B's costs of the appeal on the indemnity basis, and that this order is without prejudice to any claim I&B or F&B as TDT Trustees may make to reimbursement from the TDT assets, but with the question whether there should be any and if so what reimbursement (insofar as sought) being for the Royal Court to decide in the Priorities Proceedings.

54. We are confident that, with this judgment, the form of the Act of Court should be settled without difficulty. The only point in the parties' travelling draft which might remain in contention is the first recital. We suggest that this should read "*Upon the appeal ("the Appeal") brought with leave of the Court of Appeal by Act of Court dated 11 July 2022*".