Appeal regarding the proper interpretation of a bespoke order made in the context of a dispute as to the administration of a Trust.

[2024]GCA002

IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION
CASE NO. 575

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

15 January 2024

Before:

Jonathan Crow, CVO, KC
David Perry, KC
Sir Adrian Fulford, PC

Between:

FORT TRUSTEES LIMITED

Appellant/Intervening Party/Current Trustee

-and-

(1) ITG LIMITED (formerly Investec Trust (Guernsey) Limited)

(2) BAYEUX LIMITED (formerly Bayeux Trustees Limited)

Respondents/Plaintiffs

-and-

(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LTD
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) GENEVA TRUST COMPANY SA (formerly Rawlinson & Hunter Trustees SA)

Respondents/Defendants

Advocate for the Appellant/Intervening Party/Current Trustee: Advocate N ROBISON

Advocate for the Respondents/Plaintiffs: Advocate J M WESSELS

Advocate for the Respondent/Fifth Defendant: Advocate A DAVIDSON

Fulford JA

Introduction

1. This is the judgment of the court on an appeal by Fort Trustees Limited ("**Fort**"), the sole present trustee of the Tchenguiz Discretionary Trust ("**TDT**") (a Jersey trust), against an *ex tempore* decision of Her Honour Hazel Marshall KC, Lieutenant Bailiff, in the Royal Court on 10 August 2023 (which was followed by an approved written judgment handed down on 23 August 2023).

2. To summarise, this appeal turns on a narrow issue, namely the proper interpretation of a bespoke order made in the context of a dispute as to the administration of the TDT. Paragraphs 12 and 13 of a Transfer Order ("**TO**") made on 3 October 2019 by the Lieutenant Bailiff required the Joint Receivers (Helen Green and Kelvin Hudson) to serve valuations of the Receivership Assets on the Plaintiffs (ITG Limited and Bayeux Limited ("**I&B**")), the Fifth Defendant (Geneva Trust Company SA) and the then joint trustees, "**F&B"** (Fort and Balchan Management Limited ("**Balchan**")). The question of interpretation which is the subject of this appeal is whether **those** valuations are to be taken, vis-à-vis the creditors, as the notional value of any of the relevant assets when a *pari passu* distribution eventually falls to be made.

3. It is to be noted that the trustees of the TDT have changed over time. I&B were replaced as trustees by the Geneva Trust Company SA ("**GTC**") on 2 July 2010. GTC ceased acting as trustees in 2017, to be succeeded by F&B. Balchan retired from the joint trusteeship on 26 April 2023. This latter change in position from joint to sole trusteeship is immaterial for the purposes of the present appeal.

4. The administration of this trust has generated extensive litigation which, almost entirely, is irrelevant for the purposes of resolving the discrete issue which now arises. Accordingly, we have not attempted to describe the litigation background except to the extent that it impinges on the disposal of the appeal. It follows that the following historical section omits a significant number of events which have no bearing on our decision.

The Relevant History

5. The TDT is a vehicle for holding and managing a range of business and other assets of Mr Robert Tchenguiz and his family. Against the background of wider litigation, significant debt claims were made by the first four Defendant companies ("**the BVI Companies**") against I&B as the Trustees of the TDT. The judgment at first instance in this claim was handed down on 6 December 2013 by the then Lieutenant Bailiff, Sir John Chadwick, PC. The debts were upheld by the Lieutenant Bailiff and he found that I&B were personally liable.

6. To protect the assets of the TDT, the Royal Court made an order (dated 23 December 2013) transferring the majority of them into the control of the Joint Receivers, with powers of management but not distribution. The Royal Court otherwise imposed restrictions on dealing with those assets which had not been transferred.

7. In due course, two of the three debt claims by the BVI Companies were upheld by the Court of Appeal, but the latter ruled that I&B were not personally liable (these decisions were upheld by the Privy Council on 23 April 2018 in *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271).

8. The former and present Trustees (I&B, GTC and F&B) all advanced claims on the assets of the TDT and it became apparent that the trust's liabilities, when the BVI debts were taken into account, could result in the TDT's insolvency (*viz.* its assets were potentially insufficient to discharge its liabilities) (the "**Proofs Proceedings**"). By an application dated 25 September 2018 (the "**Priorities/Proofs of Debt"** application), the BVI Companies sought directions from the Royal Court in relation to their rights as regards securing their entitlement to damages. The BVI Companies sought, *inter alia*, to marshal the claims of all the creditors who purported to have a right to be indemnified from the TDT's assets.

9. Within the context of the Priorities/Proofs of Debt application, the **Priorities Issue** involved determining whether, when considering the relative priorities, the applicable principle was either that of "first in time" or that of *pari passu*. This issue was ultimately determined by the Privy Council, which held on 13 October 2022 (see *ITG Ltd and others (Respondents) v Fort Trustees Ltd and another (Appellants) (Guernsey)* [2022] UKPC 36) that the applicable principle was *pari passu* (thereby disagreeing with the Lieutenant Bailiff and the Court of Appeal who had determined it was "first in time").

10. In the meantime, following the 23 April 2018 decision by the Privy Council (see [7] above), on 3 October 2019 F&B obtained the TO (see [2] above). As already indicated, the proper interpretation of the TO – as it relates to the narrow issue on this appeal – now falls for our determination.

11. The broad purpose of the TO can be shortly described. F&B, on behalf of the TDT, wished to minimise the Receivership fees and costs whilst enabling F&B to return to administering the assets of the TDT on behalf of the actual beneficiaries of the TDT while the dispute as to the correct regime for the distribution of the assets was finally determined. To achieve this, F&B sought to have the assets of TDT transferred back to them from the Joint Receivers. The Royal Court was of the view that this was a desirable outcome, but one which was only to be permitted if the interests of the other parties with claims on the assets were protected.

12. This was achieved by the requirement that the Joint Receivers were to open "**blocked accounts**" containing sufficient funds to meet the claims that were being

made by each relevant party or person, as set out in a schedule, with allowance being made for further amounts that might accrue whilst the correct scheme for distribution was settled. Certain sums for specific claims and the fees of the Joint Receivers were given discrete consideration. This "**Preserved Sum**", created for the purpose of meeting or providing appropriately for the Third Party Claims (as defined below), was £41.5 million (which we were informed was later reduced to £36.7 million).

13. The TO includes the following recitals of relevance:

> (Recital (4))
> AND UPON the application dated 5 August 2019 (the "Transfer Application") by which the Intervening Parties ("F&B") sought inter alia a declaration from the Court as to the amount of money that would satisfy the claims made against the Receivership Assets lodged by all creditors apart from F&B, Mr Robert Tchenguiz and R20 Advisory Limited (the "Third Party Claims").
> …
> (Recital (7))
> AND UPON it appearing to the Court that subject to paragraph 4 of this Order, the amount of money required to be held for the purpose of meeting or providing appropriately for Third Party Claims (the "Preserved Sum") is £41,500,000 (Forty One Million and Five Hundred Thousand Pounds) as set out in the Schedule appended to this order.

14. Paragraphs 11 and 12 of the TO are as follows:

> "11. Subject to paragraph 12, within no longer than five (5) business days following receipt by the Joint Receivers of the full amount of the Preserved Sum into the Blocked Accounts, the Joint Receivers shall take all steps as are necessary to transfer the Receivership Assets (which for the avoidance of any doubt shall exclude the Blocked Accounts) to F&B, including but not limited to the transfer of shares and the resignation of directorships in respect of companies within the Receivership Assets.
>
> 12. And upon F&B undertaking that in the event the F&B Valuations (as defined below) have not been provided before the transfer of the assets, F&B shall not dispose or deal with the assets in any way that might diminish their value until the F&B Valuations are provided. And upon F&B further undertaking to maintain all relevant financial information pertaining to the assets until further order of this Court."

15. By paragraph 13, there are detailed provisions relating to the valuation of the Receivership Assets. The Joint Receivers were to serve the valuations of the Receivership Assets on or before Monday 7 October 2019. The parties, other than the Joint Receivers, were to indicate their agreement or disagreement with the valuations, and as regards the latter, their reasons for disagreeing. In such an event,

F&B were to obtain and serve a valuation of the Receivership Assets about which there was a dispute and a procedure was established for returning to court if the F&B valuations were challenged, in whole or in part.

16. By paragraph 19 it provides:

> "The terms of this Order are without prejudice to such indemnity as the Plaintiffs and the Fifth Defendant may be entitled to pursuant to Article 26 (2) of the Trusts (Jersey) Law 1984 in respect of expenses and liabilities reasonably incurred."

The Present Appeal

The Asset Disclosure Request

17. The event which triggered these discrete proceedings was a revival by I&B of an earlier **Asset Disclosure Request** by which they applied for an account from F&B in relation to the TDT assets held by the latter. This came before the Lieutenant Bailiff at a directions hearing on 30 June 2023. We note that at this stage, Fort argued that I&B were not entitled to have their claim satisfied out of the TDT assets, other than the Preserved Sum.

18. It is unnecessary to rehearse the various matters that arose in the context of this Application because, as set out above, it was accepted during the substantive hearing on 10 August 2023 that there was a single issue of substance requiring the Lieutenant Bailiff's decision described at [2] above. As the Lieutenant Bailiff set out in her written Decision of 23 August 2023:

> "42. I first make it clear that I am here deciding only the very narrow point which I agreed with Advocate Robison was to be formulated as being "Are the valuations binding for the purposes of a *pari passu* distribution?".

19. This, in turn, will determine whether I&B are entitled to seek an account from F&B of the assets they control. The Lieutenant Bailiff explained:

> 43. I am, however, deciding that point in the wider context of having been asked to make orders with regard to the disclosure of information from F&B to I&B and (by extension) GTC. This was on the basis that F&B were objecting to such disclosure orders".

20. Fort has not questioned in the Notice of Appeal or in the Written Case on Appeal this description by the Lieutenant Bailiff as to the limited nature of the issue under consideration.

The Decision of the Lieutenant Bailiff

21. The Lieutenant Bailiff, as described in [1] above, delivered an *ex tempore* judgment on 10 August 2023 and a written judgment dated 23 August 23 (Fort accepts that the latter was, in broad terms, substantially the same as the *ex tempore* judgment).

22. In the 23 August 2023 judgment, the Lieutenant Bailiff explained as follows:

> "46. In principle, I am quite satisfied that the Transfer Order itself, was not intended to and did not, make any difference to the principles of law which would govern the parties' ultimate positions and rights to be paid out of the assets of the TDT, and therefore their appropriate distribution, whether this should be payment in full, or only *pro tanto* in any case.
>
> 47. The purpose of the Transfer Order, in my estimation at the time and in my judgment now, was to enable the TDT trust assets to be administered during the inevitably "interim" stage at which the proceedings had arrived, in a way which was more beneficial, or apparently more beneficial, to the interests of, in particular, the beneficiaries of the TDT itself, represented by F&B, if that could be done without prejudicing the rights of those with prior claims on those assets. **It was not intended to fix the valuation of the various properties which comprised parts of the Trust Estate for the purpose of the calculation of any such subsequent entitlement.** The "future use" which I envisaged, and to which I referred in my 9th December 2019 judgment, was any use to which they might be helpful in settling any later disputes or disagreements about any such calculations as would have to be made in possible subsequent circumstances. It was intended as a "fail safe" mechanism to ensure that information as to their current value at the date of the Transfer Order was not lost.
> 48.The Transfer Order was thus not intended to change the basic rights of any relevant creditor of the trust to have recourse to the whole of the trust assets in principle; **it was intended to provide an interim regime to enable the TDT's affairs to be conducted to the best advantage of everyone concerned whilst the final rights of everyone with an interest were being determined.** If (as then was the prima facie position) certain creditors had priority as regards being paid in full, then provision needed to be made reasonably to preserve that priority, but on any basis, if the Preserved Sum turned out not to be adequate to meet any claimant's ultimate entitlement, that possible detriment was met by the recognition of principle that the claimant's residual rights against the remainder of the TDT's assets was recognised and preserved. The Transfer Order did not and does not, therefore, alter the basic rights of a claimant/creditor of the Trust to return to the trust property and require payments out of the trust assets, (pro rata with others entitled to such payment if that is the applicable scheme), until that person has been paid, in full, the sums which they were owed, insofar as such assets are available at any time" (our emphasis).

23. By way of necessary context, the 9 December 2019 Judgment to which the Lieutenant Bailiff referred was her decision on an application by the BVI Companies regarding competing claims to the proceeds of certain assets held by the Joint Receivers pursuant to the order of the Royal Court on 23 December 2013 (see [5] and [6] above). She then indicated when referring to the TO and the Preserved Sum:

"72. Advocate Robison accepted that the appropriate approach to fixing the sum to be set aside for future or contingent liabilities should be a reasonably generous one, on a "fail safe" basis (except where the court was satisfied that the possibility of any such claim was obviously speculative). He also indicated that this plan was not intended to confine the claims of relevant creditors to the fixed sum in the unlikely (he submitted) event that the estimate of any future or contingent claim might prove insufficient in practice. He accepted that such creditors would still have the right to pursue any outstanding claims against the assets returned to F&B. The effect of implementing this scheme would be that insofar as the claims of the "outside" claimants were ultimately upheld, their recoverability was secured in full, so that if "first in time" were the correct priority for such claims, they were entirely protected. They would not be disadvantaged because they could not be worse off if the ultimate priority decision were in favour of *pari passu*, as their recovery in such a case could only be lower.

"73. With the co-operation and agreement to various administrative directions designed to protect the position (such as for the Joint Receivers to enter into a formal security interest agreement with any relevant claimant who wanted the comfort of such an agreement, and directions for ensuring that the value of all the Assets was clearly recorded for **future use** if this were required in order to calculate a *pari passu* distribution), this scheme was implemented in the Order" (our emphasis).

The Grounds of Appeal

24. There are two Grounds of Appeal (as set out in the Notice of Appeal, dated 6 September 2023, and as developed in Fort's Written Case dated 11 October 2023):

    i) The Lieutenant Bailiff erred in finding that the TO did not alter the rights of the TDT trustees (former and present) including that the claimants or creditors there listed are entitled to return indefinitely from time to time to, and require payments out of, the trust property insofar as that property remains available until they have been paid, in full, the sums they are owed; and

    ii) The Lieutenant Bailiff erred in finding that valuations referred to in paragraph 12 of the TO were ordered to "protect and preserve" the assets for the benefit of creditors, such that Fort has (and continues to have) an obligation to "protect and preserve" the assets for the benefit of creditors, instead of for the beneficiaries of the TDT.

Fort's Submissions

25. Two matters are to be stressed at the outset. First, that Fort, in contrast to the position originally adopted, now accepts that the former trustees have recourse to the released assets in order to satisfy their entitlements, should the Preserved Sums prove to be insufficient. Put otherwise, they enjoy an equitable proprietary interest in the trust estate and can defray from the entirety of the trust estate any expenses reasonably incurred, albeit it is Fort's case, as set out above, that the former trustees

are bound by the valuations of the released assets as provided at the time of the TO. Second, although there are two grounds of appeal, it is undisputed that this appeal turns on the the proper interpretation of the TO as regards the future effect of the valuations provided at the time the Order was made.

26. In support of the Notice of Appeal, Advocate Robison advanced eight separate submissions, as follows:

    i) At paragraph 73 of the 9 December 2019 judgment, the Lieutenant Bailiff seemingly deliberately linked "future use" to the time when the Third Party Creditors sought to indemnify themselves from the trust estate;

    ii) The valuations were meant to leave F&B free to dispose of the TDT assets without reference to the Third Party Creditors;

    iii) The interests of the Third Party Creditors had been met by the restrictive covenant in the TO restricting F&B's ability to deal with the trust assets until the valuations had been agreed;

    iv) The TO was intended to limit the significant costs, *inter alia*, of the Joint Receivers;

    v) Because the TO gave F&B custody of the assets, enabling it to deal with them without reference to Third Party Creditors, the TO necessarily effected a substantive change in the duties, obligations and rights of the relevant parties;

    vi) The valuations, coupled with the trustees' power of disposal, substantively altered the rights of F&B who were no longer obliged to hold the assets of the TDT for the trust's creditors;

    vii) Fort does not have an obligation "to preserve the trust estate solely for the Third Party Creditors", as evidenced by the ability under the TO to raise finance using a TDT asset as security; and

    viii) Third Party Creditors have no interest in the state of the trust estate.

27. As part of his Written Case, Advocate Robison described the assets of the TDT as having been "frozen" by the valuations established under the TO vis-à-vis the benefit of the TDT's creditors. He argued that the Lieutenant Bailiff's 23 August 2023 decision that the valuations were not intended to fix the valuation of the various properties which comprised parts of the trust estate for the purpose of the calculation of any such subsequent entitlement was inconsistent with her December 2019 Judgment. Furthermore, he submits it was illogical: once valued, the assets could be dealt with absent any further consultation with those creditors whose interests are secured in the Blocked Accounts and, accordingly, there was no further need to value them. In support of this contention, it is highlighted that by clause

5.2(i) of the TDT settlement instrument, the trustee is allowed to appoint the "whole or part of the capital and income of the Trust Fund to or in any manner for the benefit of all or any one or more of the Beneficiaries" of the trust "at their discretion".

28. We note there was a somewhat different focus in Fort's oral submissions. Advocate Robison suggested that the TO had the effect of creating a *sui generis* regime which had "particular effects", resulting in a departure from what he described as the "ordinary" situation and operating outside of established legal principles. In seeking to make good the argument that the TO valuations are binding, Advocate Robison asked the Court to consider an extract from the oral submissions advanced during the application in September 2019 which led to the TO being issued on 3 October 2019 (see [2] above). He suggested that the TO should be construed in the light of what had been said by counsel and the Lieutenant Bailiff at that stage. In advancing this contention, he distinguished the present facts from those in *SDI Retail Services Ltd v The Rangers Football Club Limited* [2021] EWCA Civ 790. That case involved an injunction granted in the English Commercial Court, restraining Rangers from performing, or assisting two other parties from performing, a Technical Kit Supplier agreement. This was a mandatory "undoing" injunction which required Rangers not only not to perform the agreement but actively to repudiate it. When considering whether to place any weight on the submissions of the advocates, the majority of the Court of Appeal were of the view that an analysis of the transcript of the argument before the judge should be treated with considerable caution when the transcript does not contain the judge's reasons for making the relevant order (the judge in that case set out his reasons in his "formal" judgments). Per Philips LJ at [66]:

> "As explained by Lord Sumption in *Sans Souci* (*Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6), the reasons given by the court for making an order are "an overt and authoritative statement of the circumstances which it regarded as relevant" and are admissible if (and only if) there is an ambiguity. Engaging in an excavation and analysis of the parties' submissions to discover their motives for seeking particular orders seems to me to be a difficult and dubious exercise, with parallels to admitting evidence of negotiations in constructing a contract. As far as I am aware, such an approach finds no support (even if not expressly forbidden) in the authorities."

29. And per Baker LJ at [81]:

> "Like Phillips LJ, I am cautious about the extent to which it is appropriate to consider submissions made in argument before an order is made as relevant to the interpretation of the order. The starting point must be the terms of the order and the judgment in which the court explains its reasons for making it. I do not see any ambiguity in the terms of the order and the interpretation I put on those terms is reinforced by the Judge's ex tempore judgment delivered after considering the submissions."

30. Underhill LJ (VP), who referred in his judgment to the submissions leading to the order (albeit they were not essential to his reasoning), observed at [94]:

> "I have also considered carefully the concerns […] about the legitimacy of referring to the submissions which led to the making of the order […]. I agree that it is not generally desirable to have to do this kind of forensic excavation: a well-drafted order should speak for itself. But I cannot think that it is objectionable in principle in a case where, as here, there is real doubt about the intended effect of the order. The relevant intention is of course that of the Court, rather than, as in the contractual context, that of the parties. The submissions made to the Court may shed light on that intention, or on the overall purpose of the order, to the extent that they establish the relevant factual background and what the issues were understood to be."

31. In essence, the suggested distinction on which Advocate Robison relies is that *SDI* concerned a "prohibitive" injunction which had to be "exact" in its terms, whereas in the instant case the TO was the result of a collaborative approach involving the advocates and the judge.

32. Advocate Robison suggests that there could have been no doubt as to the intentions of Fort in applying for the TO, as reflected in paragraphs 10 and 13 of their Skeleton Argument (as Intervening Parties) submitted in relation to the 5 August 2019 Application. It was to reduce the level of costs and to return such Receivership Assets as no longer required in order to meet Third Party Claims so they could be administered for the benefit of the beneficiaries, including by way of distributions.

33. During the hearing on 18 September 2019, Advocate Robison suggested that on the basis of a possible *pari passu* distribution, the valuations would enable the parties to "know the limit, the roof" (page 43 C). Following submissions, the Lieutenant Bailiff set out what she understood she had to decide, namely whether the assets could be returned to the trustees, to be administered for the benefit of the trust beneficiaries without prejudicing those who have extant claims. Using the analogy of a winding-up process, the judge indicated that a substitute for selling the assets was to have them valued. She noted that a "notional sale, a synthetic realisation of the assets on the basis of the valuations" was considered an acceptable course by Advocate Wessels (page 48 D – p.49C), who had referred to the valuation as providing "an element of futurity", "an element of future gazing in a present valuation", "a valuation now that looks to the future as to what something might be worth" (page 49 E – G). On this basis, Advocate Robison argues that it was clear that these valuations were binding for future purposes.

The Respondents' Submissions

34. Advocate Wessels on behalf of I&B argued that the TO indicates the opposite of the contentions of Fort; he relies on the decision of the Lieutenant Bailiff as to how the TO operates in this regard; and he suggests that the effect of Fort's case is to "cut across" established principles of trust law regarding a trustee's right of indemnity, and that express wording would be needed to achieve such an outcome. Advocate

Wessel's central submission is that the TO did not effect a substantive change to the parties' rights. It simply devised a mechanism to enable part of the TDT assets to be transferred to F&B, to be administered for the benefit of all parties with an interest in those assets but without the costs of the Joint Receivers. The TO did not fix the former trustees' interest in the TDT assets transferred to F&B by reference to the agreed valuations. He suggests that the TO did not contain any such provision. Put broadly, Advocate Wessels submits that over the course of a number days during which submissions were advanced, there was no suggestion that the parties were creating a *sui generis* scheme and instead the TO was a practical arrangement, framed to deal effectively with a potentially insolvent trust.

35. Advocate Wessels argues, additionally, that in the event of the TDT's insolvency, the beneficiaries no longer have any economic interest in the trust assets and the trustees should primarily administer those assets in the interests of the creditors, rather than the beneficiaries. We note, however, that whether there is sufficient liquidity in the Receivership Assets is neither entirely clear nor agreed.

36. Advocate Davidson supported the submissions of Advocate Wessels.

Discussion

37. In our judgment, the TO does not contain any ambiguity as regards whether the valuations are to be taken, vis-à-vis the creditors, as the notional value of any of the relevant assets when a *pari passu* distribution eventually falls to be made. There are no provisions within the TO which suggest that the valuations, once provided, were in any sense "frozen" for these purposes, and this includes, as analysed briefly below, in Recitals (4) and (7) and paragraphs 11, 12, 13 (f) and 19 (see [13] above), provisions on which Advocate Robison placed particular reliance.

38. Recital (4) sets out that F&B sought a declaration from the Court "as to the amount of money that would satisfy the claims made against the Receivership Assets" and Recital (7) identifies that £41.5 million was required as the Preserved Sum. These two provisions do not support the suggested long-term binding effect of the Agreed Valuations or, more widely, the basis for a future distribution.

39. Paragraph 11 merely sets out the obligation to transfer the TDT assets, apart from the Preserved Sum, to F&B.

40. By paragraph 12, F&B undertakes not to "dispose or deal with the assets in any way that might diminish their value", a provision which was necessary for the limited, yet important, purpose of maintaining the status quo pending receipt of the Agreed Valuations so that their value as at the date of transfer could be readily identified. The undertaking does not suggest, still less substantiate, the implication that F&B could ignore the interests of the creditors after the Agreed Valuations had been obtained when disposing or dealing with the TDT assets. Furthermore, this paragraph does not directly or impliedly provide for the suggested long-term binding effect of the Agreed Valuations or, more widely, the basis for a future distribution.

41. Neither paragraph 13 (f) which rehearses that F&B paid the costs of the Agreed Valuations nor paragraph 14 which refers to the prohibition on disposing of any part of the Preserved Sum enhance Fort's argument that the TO "froze" the valuations as regards the former trustees.

42. Paragraph 19 expressly stipulates that the terms of the TO are without prejudice to the previous trustees' right of indemnity out of the TDT assets, including those assets transferred to F&B pursuant to the TO. We agree with Advocate Wessels that this provision substantially undermines Fort's case, given it is expressed without qualification.

43. Fort's central contention concerning the valuations, therefore, is dependent on a construction of the TO which is without any material support that is to be found in its terms. As Lord Sumption observed in *Sans Souci* at [13]:

> "the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties."

44. Not only does Fort, in our view, gain no assistance from the language used in the TO for the interpretation that is advanced, but if the parties had intended to "freeze" the valuations, thereby limiting the substantive rights of the former trustees, the Court would have expected this to have been expressed in clear terms. Instead, paragraph 19 provides, to the contrary, that the terms of the TO are without prejudice to the previous trustees' right of indemnity out of the TDT assets, which would include the assets transferred to F&B in accordance with the TO.

45. Given the lack of ambiguity in the TO, we are confident that the present dispute as to interpretation does not come within the restricted circumstances in which it would be appropriate to engage in a "forensic excavation" of the parties' submissions and the *en passant* observations by the Lieutenant Bailiff during the hearing. The terms of the TO "speak" for themselves (to use Underhill LJ's description (see [31] above)). Furthermore, the Lieutenant Bailiff has explained in clear and unequivocal language her approach (see [22] and [23] above). On the issue of "futurity" of the valuations, in the judgment of 23 August 2023 at [52] she stated:

> "As regards the purpose of having the valuations obtained, I can say quite categorically, because it was in my mind (although I think the Order in fact also reflects this) that the purpose of obtaining current agreed valuations of relevant assets at the date of the Transfer Order was to preserve information rather than let it disappear, when one did not know, but could easily imagine, that there might come a time in the future when accurate information as to the value of an asset, or all assets, at the time of the Transfer Order was relevant. This was against the background that the reason for the assets being placed under the control of Receivers was to protect and preserve

them from what might happen to them (without necessarily implying any malpractice), to the arguable detriment of creditors owed sums out of them, in the hands of F&B. The valuations would provide evidence and a benchmark which would be of use if dispute were to arise subsequently as to any steps taken by F&B with regard to such assets."

46. In this context, we agree with Advocate Wessels that there are a number of potential scenarios when it would be necessary to have recourse to this information in the future, for reasons wholly unconnected with Fort's contentions. For instance, even if the asset under consideration was realised for the same value as that in the Agreed Valuations, it could potentially be argued that this was the result of some actionable failure to secure additional value. Similarly, liability may arise if the asset was realised for a lesser sum on account of the way it had been administered. Finally, if the asset was realised for a greater sum, that would be available to creditors up to the full satisfaction of their claims.

47. Even if the submissions of counsel and the observations of the Lieutenant Bailiff during the course of the hearing on 18 September 2019 are technically admissible, the extracts relied on by Advocate Robison do not provide material assistance on the issue of interpretation. First, it needs to be recalled that the Court was being asked to approve a transfer from the Joint Receivers to F&B in order to assist in reducing the ongoing administrative costs, whilst appropriately reflecting the interests of the beneficiaries and the Third Party Creditors. This was not a straightforward undertaking, and it required careful explication and consideration. As is frequently the case, the submissions of counsel and the apparent reaction of the judge evolved as the arguments progressed. On occasion, isolated remarks either by Advocate Wessels or the Lieutenant Bailiff could be said to be supportive of Advocate Robison's submissions. For instance, late in the discussion of this subject, the Lieutenant Bailiff attempted a summary of an aspect of Advocate Wessel's submissions (transcript, page 45):

> "In other words, your point, Mr Wessels, that what we are doing is by analogy with an insolvency, even though in fact the trust is not really being entirely wound up at this point, is that you are accepting that in this sort of analogous area that we are in, the appropriate way to deal with it, to bring finality, is that you do work out what the amount of the value of the trust is against which all the current claims out of which it would have to be satisfied, so that you can do your arithmetic accordingly and make sure everybody gets the right amount of money on the basis of that calculation. That is the purpose of the valuations.

To which, Advocate Wessels responded simply:

> "This Application has been proposed on the footing that it will take out some costs, the Joint Receivers' costs of managing the assets that will no longer need to be managed."

48. A little later, the Lieutenant Bailiff asked Advocate Wessels (transcript, page 46):

> "how far I was therefore going to have to decide that one could operate on the basis that valuations were good enough because they would sufficiently fix any potential entitlements of parties for later, even if the transferred distribution of assets were made as Advocate Robison is asking."

To which Advocate Wessels replied:

> "I think we accept there has to be a valuation. I think it is more about ... I think we have put it as a sort of when are they going to get done? On what basis? By whom? Who is going to pay for them? What happens if we disagree about them? I think those are the questions we have raised."

49. Along with the other examples given at [34] above, these exchanges are paradigmatic of what occurred during the discussion between the bench and the Bar on this issue, in the context of establishing the mechanics of the proposed TO. Questions were raised by the Lieutenant Bailiff which were, on occasion, only partially answered; possible eventualities were suggested which were, in part, left unresolved; and the Lieutenant Bailiff generally explored with counsel the implications of their respective submissions. Placing isolated passages from this process under a microscope provides an extremely unsatisfactory basis for interpreting the terms of the resulting draft order, which was later approved and as regards the valuations, explained by the judge. The ebb and flow of submissions and the evolution of the judge's views on the merits of an application have little, if any, value when trying to understand how the final order of the court is to be interpreted, particularly when no seemingly definitive statements had been made and when the relevant terms of the resulting order are unambiguous. We emphasise two additional matters in this regard: first, we have only an extract of the submissions on the proposed TO; and second, irrespective of any future considerations, these valuations were essential in order to ensure, at the time the TO was made, that the Preserved Sum was sufficient to protect the claims of the Third Party Creditors.

50. The judgments of the Lieutenant Bailiff, explaining her reasons for making the relevant provisions of the TO, are clear and consistent. As she set out in her judgment of 9 December 2019 (see [23] above]:

> "114. […] Indeed, it had been accepted or admitted in the course of the Transfer Application that parties claiming through proofs submitted in the Receivership would not lose their rights if they were not fully paid through the Receivership, but could continue to follow any Assets released to F&B and enforce their rights accordingly. This had been one of the points which had been used to persuade the court to allow the scheme proposed by the Transfer Application, at all. No other legal event which could have the necessary effect had been identified by Advocate Robison."

Put otherwise, the TO had not been meant to limit the rights of Third Party Creditors as regards the assets released to F&B.

51. At paragraph 73 of the 9 December 2019 judgment (see [26] above), the judge indicated that the value of all the assets was recorded for future use if this were required in order to calculate a *pari passu* distribution. As she explained at [47] of her judgment of 23 August 2023, she had not thereby intended to fix the valuation of the various properties which comprised parts of the trust estate for the purpose of the calculation of any such subsequent entitlement but instead she had been referring to their potential use in settling any disputes or disagreements that may arise in later circumstances. As she described it, this was intended as a "fail safe" mechanism to ensure that information as to their current value at the date of the Transfer Order was not lost. There is no credible basis for challenging this explanation by the Lieutenant Bailiff.

52. For the reasons given in this judgment, the Lieutenant Bailiff was correct to determine that the valuations provided under the TO are **not** to be taken, vis-à-vis the creditors, as the notional value of any of the relevant assets when a *pari passu* distribution eventually falls to be made. It follows that the appeal is dismissed.