Value of trust assets insufficient to meet the proper claims of successive trustees upon such assets in full. Trustees' claims ranking *pari passu.* Valuations of trust assets made in interlocutory proceedings (taken for the convenient administration of the trust whilst legal proceedings pending) held not to fix values to be attributed to such trust assets when making the final calculation of such trustees' respective entitlements.

[2023]GRC046

IN THE ROYAL COURT OF GUERNSEY **Civil Matter 1462**
ORDINARY DIVISION

Between:

(1) ITG LIMITED (formerly Investec Trust (Guernsey) Limited)
(2) BAYEUX LIMITED (formerly Bayeux Trustees Limited)

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)

Defendants

-and-

(1) FORT TRUSTEES LIMITED
(2) BALCHAN MANAGEMENT LIMITED

Intervening Parties/Current Trustees

Before:

HER HONOUR HAZEL ELEANOR MARSHALL QC
LIEUTENANT BAILIFF
Sitting alone

Hearing: 10th August 2023
Decision given

Approved judgment handed down 23rd August 2023

Advocate for the Plaintiffs: Advocate J M WESSELS
Advocate for the Intervening Parties/Current Trustees: Advocate N ROBISON
Advocate for the Fifth Defendant Advocate A DAVIDSON

JUDGMENT (approved)

The dispute

1. This is the latest disputed point arising in the matter of the proper distribution of assets comprised in the Tchenguiz Discretionary Trust ("TDT") as to which three sets of trustees of that Trust have competing claims. They are respectively the Plaintiffs ("**I&B**") as the Original Trustees, the Fifth Defendants ("**GTC**") as the Former Trustees, and the Intervening Parties ("**F&B**") as the Current Trustees.

2. The history of the lengthy litigation which produced the current situation is not relevant for present purposes, but can be found in several past judgments of this Court. I mention here only points material to the present dispute.

Background

3. The TDT is a vehicle for holding and managing many business and other assets of Mr Robert Tchenguiz and his family, and its assets are, or at least were, substantial. I&B were Trustees of the TDT during the period of some unfortunate events around 18 years ago, which led to substantial debt claims being made by the first four Defendant companies named in this action ("**the BVI Companies**") against I&B as Trustees of the TDT. The commencement of this litigation caused a fall out between I&B and Mr Tchenguiz resulting in I&B's being replaced as Trustees of the TDT by GTC. In the litigation, the debts claimed by the BVI Companies were disputed, with a fall-back position that if they were held to be valid, then claims were made on behalf of the TDT against I&B that they were personally liable to the TDT for such claims because of their breach of trust by gross negligence.

4. The judgment in the action at first instance in the action was given in December 2013. The debts were upheld and it was held that I&B were indeed personally liable. To protect the TDT assets, and in fact at the behest of the BVI Companies, the Court made an order transferring almost all the TDT assets into the control of Receivers, with powers of management but no power to distribute (and otherwise imposing restrictions on dealing with such assets as were not transferred). The Receivership management function incurred quite substantial fees and, together with the Receivers' costs and expenses, and those were ordered to be a first charge on the TDT assets.

5. Both aspects of the first instance judgment went to appeal, with GTC as the then Trustees conducting the litigation. In the Court of Appeal, two of the three debt claims of the BVI Companies were upheld, but that Court ruled that I&B were not personally liable for those debts, which were payable only out of the TDT assets. There was a further appeal to the Privy Council, immediately before which GTC themselves were removed as Trustees of the TDT and replaced by F&B, who have continued as Trustees ever since. The Privy Council finally gave judgment in April 2018, ("**the 2018 JCPC judgment"**) dismissing the appeals and thus confirming the position as fixed by the Court of Appeal.

6. Following the judgment of the Privy Council, the BVI Companies took steps, in September 2018, to enforce their judgments and obtain payment from the Receivers. This gave rise to various applications to the Court, as to how the assets of the TDT should be dealt with. This highlighted the point that there were three actual claimants with claims against the TDT assets in trust law, being the three sets of successive trustees. They would each themselves have direct claims for their own fees, costs and expenses, including reimbursement for any liabilities which they had themselves discharged on behalf of the Trust, but they would also advance, or could be called upon to advance, claims made by unpaid third party creditors/claimants who had dealt with them, and who therefore had the right to require the relevant Trustee to exercise that Trustee's lien over the trust assets to procure payment to such third party.

7. The liabilities incurred in respect of the BVI Companies' debts were about $270 Mn, and this was sufficiently great as to render the TDT "insolvent", in the sense that its assets would be insufficient to discharge all the liabilities imposed upon them, although it appeared possible, that without the BVI liabilities, the estate might not be insolvent. Directions were given to enable potential claims on the assets to be identified, by the Receivers calling for "proofs" of such claims to be submitted to them. This happened in January 2019, and the received claims were subsequently collated, analysed, and duplications removed.

8. A complication arose when, in March 2019, F&B took an assignment of the BVI Companies' debts to itself as Trustee of the TDT. This had the effect (it was later determined by the Court) of extinguishing those debts through creating unity in law of debtor and assignee. However, subsequently, Mr Tchenguiz and F&B as trustees of another Tchenguiz Trust (the TDAT) claimed beneficial entitlement to one third each of the value of such assigned debts, and that those liabilities had therefore been kept alive to that extent **("the RT claims**"). The validity of the RT Claims has yet to be determined.

9. With the claims on the assets of the TDT thus being advanced by or through three competing parties - I&B as original trustees, GTC as immediate former trustees and F&B as current trustees – and with the assets of the TDT being potentially insufficient to meet all such claims, the fundamental issue which then required determination was the relative priorities of those three parties ("**the Priorities Issue**"), and in particular whether the applicable principle was that of "first in time" (comparable to the principles applying to successive equitable charges) or *pari passu* (comparable to the principles applying to insolvent companies). On 9th December 2019 this court ruled that the applicable principle was "first in time", and this decision was upheld on appeal. However, there was a further appeal to the JCPC which ruled, eventually, in December 2022, ("**the 2022 JCPC judgment**") that the applicable principle was *pari passu*.

10. This has thus been a completely novel point, and it is therefore now for the parties and the court to work out how that principle falls to be applied in practice.

The Transfer Order

11. In early 2019, following the 2018 JCPC judgment, F&B, on behalf of the TDT sought what has become known as the Transfer Order, which was made on 3rd October 2019. Its object was to keep down or eliminate Receivership fees and costs, and at the same

time to seek to enable F&B to return to administering the TDT assets on behalf of the actual beneficiaries of the TDT, so far as might be possible, whilst the dispute as to the correct regime for distribution of the assets was authoritatively determined, which could (and in the event did) take several years. F&B therefore wanted the TDT assets re-transferred to them from the Receivers, but the Court would naturally only permit this if the interests of the other parties with claims on the assets were protected either to their, or the Court's, satisfaction.

12. The Court was of the view that if the financial interests of the competing parties could be protected, the transfer of TDT assets back to the trustees of the TDT (F&B) was desirable. With it then being unclear whether the applicable regime for distribution of the TDT assets would be "first in time" or *pari passu* (but against the background that the provisional decision was "first in time" with the possibility of this being overturned on appeal), the important point was to protect the potential rights of I&B and those claiming under or through it, to be paid in full as a first priority, and after them, GTC and those claiming under or through them, to be paid in full as second priority. If the eventual regime were *pari passu* their respective claims could only be less.

13. The various parties therefore proceeded to agree the mechanism for achieving this, which was ultimately contained in the Transfer Order of 3rd October 2019. In simple terms, this was as follows:

    (i) The amount of the claims being made by each relevant party or person was ascertained and listed with reference to each such person a schedule. Further allowances were added to account or any likely addition to such claim which might occur owing to further expenditure during the time whilst the correct scheme for distribution was being ascertained. Certain other sums for specific claims needing special consideration, allowance for the Receivers' own fees, and other minor matters were also made. Salient points are that:

        - The final sum to cover all these matters ("the Preserved Sum") was fixed at £41.5 Mn but subsequently reduced to £36.7 Mn.

        - The sum claimed by I&B totalled approximately £26 Mn, comprising mainly their legal costs incurred in the principal litigation, to which it claimed entitlement under its trustee indemnity having succeeded in the claims for breach of trust made against it. This sum, though, has subsequently increased beyond that predicted figure owing to the costs incurred by I&B in resisting objections to their claimed fees and costs, made by F&B, having exceeded expectations.

        - The claims of GTC totalled approximately £8 Mn, with about half relating to legal costs incurred in the principal litigation, and half to other claims, apparently related to Tchenguiz affairs. These claims have not yet been examined.

    (ii) The Receivers were directed to open bank accounts in the name of each relevant person (in fact, four individual claimants and one global account for remaining smaller amounts) and to execute a security interest agreement in favour of each such

person who wished to have this, relating to the relevant account, thereby creating Blocked Accounts, in the control of the Receivers for security.

(iii) The Receivers were to distribute the cash balances held by them within the TDT assets between such five Blocked Accounts *pro rata.*

(iv) Insofar as the cash balances were insufficient to pay the whole of the Preserved Sum into those accounts, F& B were to be permitted to obtain further lending, including by granting security over the leasehold of the residential property known as the Royal College of Organists, and/or the shares in Iver Resources Limited, (the company which held such lease) which were assets of the TDT, to make up the shortfall.

(v) Upon the Preserved Sum being fully paid up into the five Blocked Accounts, the Receivers were to transfer the assets of the TDT in their hands (other than the Blocked Accounts) to F&B as Trustees of the TDT.

14. The scheme was thus intended to provide that a sum equal to the whole of the claims being made by or through claimants who were entitled to assert priority over F&B on a "first in time" basis was secured and held available separately, pending determination as to such claimants' actual financial entitlement in the end. If the applicable regime were not first in time but *pari passu* then such claimant would be entitled only to a dividend upon its claim, which would inevitably be smaller.

15. Further provisions as to consequential and other matters were made in the Transfer Order, but two further provisions which are of note for present purposes were also made.

(i) By Clause 12 of the Order it was provided, *inter alia,* that F&B undertook to maintain "*all relevant financial information pertaining to the assets*" of the TDT until further order of the Court.

(ii) By Clause 13, it was provided that valuations of the assets of the TDT (many of which were real property held either directly or indirectly through shares in a holding company) should be made and agreed by common consent amongst the interested parties at the time of the Transfer. This was to be either by the Receivers' own valuations being accepted, or in the case of disagreement, by F&B obtaining alternative valuations which would then be agreed, (or any continuing objection being resolved by application to the court). By the remainder of Clause 12 (above) F&B undertook that if such valuations had not been obtained by the time of Transfer of the assets they would not dispose of or deal with such asset so as to diminish its value prior to such valuation being obtained.

16. The Transfer Order (3rd October 2019) took effect. With the first instance decision on the Priorities Issue (9th December 2019) going to appeal, progress towards the eventual distribution of the TDT assets was made by the court's giving directions with a view to ascertaining the quantum of I&B's claims, in the face of likely objections to these by F&B in particular, since that quantum would need to be determined whether the ultimate distribution scheme were "first in time" or *pari passu.* Steps were also taken

towards bringing about a determination as to the validity or otherwise of the RT Claims mentioned in [6] above.

Reviving the Asset Disclosure Request

17. The 2022 JCPC judgment settled the situation as regards the Priorities Issue. I&B's position, in the light of that judgment and the intervening events, was that they now did not have any priority over either GTC or F&B as regards indemnification for their claims out of the TDT assets, and it was possible that the Preserved Sum held in respect of their claims under the Transfer Order might not be sufficient to meet their actual claim in full. They therefore revived an Application previously made by them (the "**Asset Disclosure Request**"), which was made (I think) before the Transfer Order, and was overtaken by it. That application is, in effect, for an account from F&B in relation to the TDT assets in their hands.

18. This issue was brought before the Court as one of the issues now requiring directions to progress the matter, at a hearing convened on 23 June 2023.

19. Arguments at this hearing revealed, however, that there was a dispute between the parties (effectively, I&B and F&B) as to the effect of the Transfer Order on I&B's entitlement to be paid. I&B contended that their entitlement was to be paid out of all the assets of the TDT including, but not limited to, the Preserved Sum. It appeared, then, that F&B disputed this, and contended that the true meaning and effect of the Transfer Order was that I&B (and, by parity of reasoning, presumably, GTC also, although for simplicity I will not refer to that each time) were entitled to be paid only out of the Preserved Sum.

20. The way in which this dispute emerged was that, as one topic amongst the matters to be dealt with by directions in the course of the hearing on 23 June 2023, I&B requested information from F&B as to the value of the trust assets held by them, including the obtaining and/or giving of current valuations of the relevant assets. F&B objected to this, with those objections appearing to be twofold, namely, first, that the cost of obtaining such valuations was likely to be very great (a figure of £200,000 being suggested), with the further objection being made that I&B really did not have an interest in such valuations anyway, because of the effects of the Transfer Order. At the time it appeared that this was because F&B were in fact contending that I&B had no interest in the values of the remaining TDT assets because they had no interest any longer in those assets, but only in the Preserved Sum which (effectively) replaced them. It was this issue which was then adjourned to a hearing with full arguments, which took place before me on 10th August.

Construction of the Transfer Order - I&B's initial argument

21. At that hearing, Advocate Wessels, on behalf of I&B, made four points as to why I&B's apparent contention could not be right. The first was that it was inconsistent with the express terms of the Transfer Order, Paragraph 19 of which expressly provided that the terms of the order were

"*without prejudice to such indemnity as [I&B] and [GTC] may be entitled to pursuant to Article 26 (2) of the Trusts (Jersey) Law 1984 in respect of expenses and liabilities reasonably incurred*".,

Article 26 is the relevant general trustee indemnity provision applicable in this case because the TDT is governed by Jersey Law. It provides for such an indemnity "*out of the trust*". In addition, Advocate Wessels pointed out that, if it were correct that I&B (and GTC) would no longer have any interest in the remaining assets of the TDT on any basis after the Transfer Order had been effected, then the provisions for valuations of those assets were entirely otiose.

22. His second point was that it was inconsistent with the fact that the Court (myself) had commented, at the 2019 hearing, that if the Preserved Sum assets turned out not to be adequate at the end of the day, then "*there would still be recourse to the assets that had been released*", with which Advocate Robison, for F&B, had agreed.

23. His third point was that F&B's interpretation was inconsistent with several *dicta* of the Court in my judgment of 9th December 2019, which recorded the Court's understanding of the effect of the Transfer Order, indeed, recording the point above, (at [72]), and also in its express rejection there of arguments that subsequent dealings with the assets through the Receivership Order could somehow effect a "*new regime*" which affected, and in fact deprived, parties of their basic rights of indemnity [114].

24. His fourth point was that this contention was inconstant with F&B's recent position, recorded in a judgment of the Court of Appeal (on an appeal with regard to the making of an interim payment out of the preserved sum to I&B: see [2023] GCA 004) that the "Preserved Sum" amounts were no more than a secure cash amount which would be shared along with the other TDT assets among all those with claims to payment out of them.

F&B's response and its actual case

25. In response at the August hearing, Advocate Robison on behalf of F&B asserted that it was not F&B's position that I&B (and GTC) could not have recourse to any of the released assets to satisfy their entitlement if the Preserved Sums were insufficient; they accepted that they could do so. Advocate Wessels had misunderstood F&B's contention.

26. That contention was that whilst I&B could certainly have recourse to the other assets, they could do so only on the basis that the values of those assets were the values attributed and agreed with regard to those assets by the valuations which had been required to be made under the Transfer Order. It was not that I&B or GTC had no interest in such assets, but that their interest was confined to the extent of their accepted value as at the time of the Transfer Order (which was, of course, another way of demonstrating that they had no interest in having current valuations made, which was the reason why this point had come to the fore).

27. Advocate Robison's argument was that this was the necessary consequence and intention of the terms and effect of the Transfer Order in that its whole point was to give F&B freedom to run the TDT and manage its assets without limitation, ie without

having to have regard to the interests of I&B or GTC as creditors with claims on those assets; they were in effect being freed from the obligation to account in respect of such assets, once the valuations were agreed. It was also, for example, envisaged (and no secret was made of this) that in order to put up the Preserved Sum it was proposed that F&B would take out further loans on the security of the Royal College of Organists, a TDT asset, which would thereby immediately deplete the value of that asset in the hands of the TDT's creditors. The Order contemplated and approved F&B's being free to deal with the assets in whatever way it thought fit in the interests of the TDT beneficiaries. Having been given, in effect the "green light" to do so, it could not have been intended that they should subsequently be accountable to I&B for any decisions made, or acts undertaken, which I&B disliked or objected to, in hindsight. That would simply be unfair and contrary to the whole point of the Order.

28. Advocate Robison submitted that I&B's claimed position was unfair and illogical, in that they were (he claimed) taking the stance that if the released TDT assets had gone down in value, they would seek to rely on the valuations which had been made at the time of the Transfer Order as the basis for their entitlement, but if they had gone up, they would expect to gain the additional benefit of this.

29. He further submitted that this whole argument raised the fundamental question of: at what point in time is the value of the TDT assets to be calculated (or to be treated as having "crystallised") for the purpose of assessing the value of creditors' claims when ranked *pari passu?*

30. He submitted that the fact that the Receivership Order had been previously held (by me) <u>not</u> to create a new regime as to the parties' respective rights and was merely a mechanism for safe custody, was an argument that could not and did not apply to the Transfer Order, because that Order had actual dispositive effect. The Transfer Order did (he submitted) change the parties' rights because it was intended to, and did, enable the TDT trustees, in return for having secured the maximum entitlement of the other trustee creditors and provided valuations which would form the basis for any subsequent need to assess the value of the TDT assets for distribution purposes, to gain the right and liberty to do what they thought right with those assets in the interests of the TDT beneficiaries, without accountability to the any other creditors.

31. He pointed to the remark in my judgment of 9th December 2019 that the valuations had been obtained "*for future use if this were required in order to calculate a pari passu distribution*"[73], and submitted that this plainly referred to their future use in *pari passu* calculations, thus supporting his argument. If it were not intended that they should have such use, but that the value of the TDT assets should be determined at some future time, then such valuations would not have been necessary.

32. Finally, Advocate Robison threw down the challenge to Advocates Wessels and Davidson, that if they were submitting that they were entitled to have recourse to the value of the other TDT Assets at whatever their value at the relevant time, if they could not be fully paid their entitlement from the Preserved Sum, then they must presumably accept that that entitlement would take both the quantity of the Preserved Sum, and the additional expenses, etc, that had been incurred in achieving it, into account making the ultimate *pari passu* calculation of all three Trustee claimants entitlements.

33. Advocate Wessels in reply stated – and I have sympathy with this, as I was under the same impression, at least until Advocate Robison explained his skeleton argument to me – that the argument now made by Advocate Robison was not the argument he had expected to meet at this hearing. He nevertheless felt able to deal with it.

34. He first of all reminded the Court that the Transfer Order had been made at the request of F&B, and not of I&B or GTC. It was therefore a distortion to seek to imply that it had been entered into for the benefit of I&B, as Advocate Robison appeared to be doing. He pointed out that I&B had been in a very strongly protected position with the TDT assets being held by independent Receivers, and it was not right to suggest that the "Preserved Sum" scheme therefore gave them a greater advantage than before.

35. Still less was it right, or reasonable, to suggest that by gaining the supposed "advantage" of the Transfer Order and the Preserved Sum, there was an implicit requirement that they accepted the "rough with the smooth" and therefore accepted disadvantages which might be argued to flow from the Order. He pointed out that nothing in the Transfer Order could be construed as stipulating, or necessarily implying, that I&B (or any "non-RT" creditor) were giving up his or its underlying rights to be paid out in accordance with the law as to proper distribution of the TDT assets amongst creditors, in the circumstances of the case. The Transfer Order might have effected a re-arrangement of such assets, but it did not purport to vary the various rights which gave rise to calls on them, and the situation could not be construed as such.

36. Whilst Advocate Robison relied on the fact that the Transfer Order had been "agreed", that was correct only as to the terms of the Order. It certainly did not mean that the Order had embodied some kind of negotiated contractual or commercial agreement between the parties, as Advocate Robison then tried to suggest.

37. As to the "freedom" given to F&B, Advocate Wessels agreed that some freedom of action had been one of the purposes and supposed advantages of the proposed Transfer Order regime, but the freedom in question had been the freedom to act without having to make "Beddoes" or similar applications to the Court to effect any and every transaction, as had been the case previously, and had given rise to the very, very many laborious and intricate applications which subsequently become known in aggregate as "Guernsey 2". The "freedom" in question was not a freedom to act without regard to the obligation of trustees to administer the trust in the interests of those who were the true stakeholders. It was an administrative freedom and not a liberation from the basic principles of trustees' entitlements to indemnity out of the trust assets - whatever regime might be the appropriate distribution regime when such entitlements were in competition.

38. He emphasised that the effects of Advocate Robison's principle and argument as now refined were inconsistent with the principles of *pari passu* distribution, in that they would mean that one set of creditors would be paid on the basis of valuations of assets which were different to those which would operate to calculate the entitlements of another set of creditors. This would therefore inevitably result in a distribution which was not, in fact, *pari passu* in practice.

39. He submitted that the "purpose" for which the valuations had been obtained under the Transfer Order was not that of being used as the basis for any eventual actual calculation

of payments, but to ensure that information as to the value of the assets when they had been put back into the hands of F&B as the TDT Trustees was preserved, in case such information was needed for, or would have a bearing on, any matter requiring determination in the future.

40. He also emphasised that, as to the present situation, the need for valuations of the TDT assets sooner rather than later was essential in order to enable claiming parties to make sensible decisions as to pursuing their entitlements. Whilst one could assess or determine the monetary value of any claim made against the assets, and one could therefore aggregate these to arrive at the total value of the claims made against the assets, that merely gave one side of the calculation. One could assess the relative percentage values of the individual claimants claims against the assets as between themselves, but if the trust was insolvent and the assets were insufficient to meet the total claims in full, it was necessary to determine the aggregate value of the assets in the estate (ie the TDT assets as a whole) in order to determine what the percentage dividend was likely to be, and hence to assess the actual monetary value of any claim in itself.

41. As to Advocate Robison's challenge with regard to "*taking the rough with the smooth*" or "*accepting the yin and yang*" he declined to answer this in the absence of any information from F&B as the TDT Trustees having been forthcoming, which would enable a view to be taken on anything but a hypothetical basis. The necessary information was, he submitted the information in fact being sought in the Asset Disclosure Application.

Decision

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?".

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 - in particular as to any direction to obtain current valuations - on "proportionality" type grounds. They were apparently contending that it was excessive and disproportionate to do so because I&B (and GTC) had no further sufficient interest in the value of the released TDT assets, following the Transfer Order, to justify this.

44. This point is therefore a circumstance which would or might influence my ultimate decision on whether to order the kind of disclosure sought, either now or in any event, or how to tailor any such order as it might be appropriate to make. Advocate Wessels submitted (and I do not think Advocate Robison disputed) that I would still be at liberty to make such order as I considered appropriate in the circumstances, once determined. This point of construction is one of such circumstances, but it is sufficiently fundamental to progress in the laborious matter of determining the various entitlements to payment raised in this case, that a decision ought expediently to be made at this point.

45. I confess that I found it rather difficult to understand Advocate Robison's argument initially, but having now (I think) done so, I prefer Advocate Wessels' arguments on the true construction of the Transfer Order with regard to this particular point.

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.

49. I thus accept the points made by Advocate Wessels as to the true and correct construction of the Order itself. It was providing a solution to the problems created by the cumbersome, costly and freezing effects of the Receivership, (which was the driving factor) which everyone with an interest could subscribe to as sufficiently protecting his interest.

50. Advocate Robison's submission as to the effect of the Transfer Order can only arise as an argument of necessary implication. I see absolutely no grounds for this. I agree with Advocate Wessels that there was no reason why the Court should think it necessary to require I&B to give up the right which it had, to be paid whatever turned out to be

its entitlement, from the assets of the Trust as and when then available or as should be then available. It was intended - and indeed, to my mind the wording of the Order is quite clear - that if and insofar as the Preserved Sum might turn out not to be sufficient to satisfy any such proper claim as calculated, the creditor in question did retain his right of recourse to the further assets of the trust, comprising the released assets, at that time.

51. Moreover, I do not consider that this prospect is actually inconsistent with, or would or should affect, the underlying duty of F&B as the TDT trustees to administer the assets of the TDT with due regard to the possibility that I&B and/or GTC might subsequently, if the situation panned out that way, be entitled to recourse against the assets which they were administering, for payments owed to them

52. 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.

53. Of course, in assessing any claimed default by F&B which might subsequently be raised, I see no reason why the context and effect of the Transfer Order, and its obvious intentions, should not be prayed in aid by F&B, to whatever effect and for whatever the Court might think them worth at that time of any such dispute, but the extent to which that could apply, and its effect, would be a matter for debate and examination on the particular facts.

54. So my decision on the narrow, and the only, point which I am required to decide for present purposes is that the valuations made at the time of the Transfer Order are not binding figures upon which must be based any calculation of the *pari passu* entitlement of either I&B or GTC to payment out of the assets of the TDT. I hold for the avoidance of doubt (as it now seems to be agreed) that the effects of the Transfer Order do not deprive I&G, or GCT, or any other creditor, of their basic right to be paid their (proper and approved) claims against the assets of the TDT out of those assets general, on a *pari passu* basis with all other creditors so entitled. I consequently hold that the valuations obtained or agreed under Paragraphs 12 and 13 of the Order of 3rd October 2019 are not to be taken, as against any such creditor, as the notional value of the relevant asset to be used in any such *pari passu* calculation which falls to be made.

55. I stress, however, that this decision goes no further than this narrow point. Exactly how the proposition that the valuations do not represent binding valuations of the "released" TDT assets for the purpose of calculating any actual payment due to any creditor in respect of his or its claim under a *pari passu* distribution is to be worked out

in practice, in the whole context of the Transfer Order and the preservation of the Preserved Sum, is a matter for another day.

56. I think the above disposes of the matters which I am required to decide at this juncture.

Hazel Marshall KC
Lt Bailiff

23rd August 2023