Easter Term
[2018] UKPC 7
Privy Council Appeals:
Nos 0016, 0017, 0018, 0035, 0080, 0081, 0083 of 2016
and No 0003 of 2017

JUDGMENT

(1) Investec Trust (Guernsey) Ltd (2) Bayeux Trustees Ltd (Respondents) *v* (1) Glenalla Properties Ltd (2) Thorson Investments Ltd (3) Eliza Ltd (4) Oscatello Investment Ltd (5) Rawlinson & Hunter Trustees SA (Appellants) (Guernsey)

From the Court of Appeal of Guernsey

before

Lord Mance
Lord Sumption
Lord Carnwath
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

23 April 2018

Heard on 27, 28, 29 and 30 November 2017

Former Trustees

Simon Taube QC
Jeremy Wessels
James Brightwell
Thomas Fletcher

(Instructed by Macfarlanes LLP)

Current Trustees
Guernsey 1 appeals
Lord Goldsmith QC
Charles Hollander QC
Ian Swan
Kathryn Purkis
Nick Robison
John Robb
Georgina Petrova
(Instructed by Debevoise & Plimpton LLP)

Current Trustees
Guernsey 3 appeal
Charles Hollander QC
Nick Robison
John Robb
(Instructed by Debevoise & Plimpton LLP)

The BVI Companies
Ewan McQuater QC
John Greenfield
Daniel Warents
Matthew Watson
(Instructed by Harcus Sinclair LLP)

Former Trustees:
(1) Investec Trust (Guernsey) Ltd
and
(2) Bayeux Trustees Ltd

Rawlinson & Hunter Trustees SA (acting in person)

Current Trustees:
(1) Fort Trustees Ltd
and
(2) Balchan Management Ltd

The BVI Companies:
(1) Glenalla Properties Ltd,
(2) Thorson Investments Ltd,
(3) Eliza Ltd and
(4) Oscatello Investment Ltd

Table of Contents

The factual background....2
The Court Proceedings....13
The meaning of article 32 of the TJL....17
The characterisation of the issue under the private international law of Guernsey: does article 32 of the TJL apply? 23
Analysis....25
Article 26 of the TJL and the liability of trustees of a Jersey trust for breach of trust 34
The appeals against the Court of Appeal's refusal of interlocutory applications and the application for retrial, and the human rights challenges 39
Oscatello's claim in restitution 44
The appeals in relation to costs....51
The second litigation....53
Factual background....53
The appeal on the second litigation 56
The Somerfield claim....56
The investment claims 58
Conclusions....65
Lord Mance:....65
Lord Briggs:....83

LORD HODGE: (with whom Lord Mance, Lord Sumption, Lord Carnwath and Lord Briggs agree)

1. This advice, to which each member of the panel of the Board has contributed, is the unanimous view of the Board on all matters except those on which members of the Board have produced separate judgments. On those matters it is the majority judgment of the Board. The advice concerns eight appeals from the Court of Appeal of Guernsey ("the Court of Appeal"). One of the appeals raises two points of general public importance about the interpretation of articles 26 and 32 of the Trusts (Jersey) Law 1984 (as amended) ("the TJL") and about the relevant rules of private international law of Guernsey. The other appeals do not raise points of general public importance but are appeals as of right under section 16 of the Court of Appeal (Guernsey) Law 1961 ("the 1961 Law"). That section provides that no appeal in civil matters shall lie from the Court of Appeal without the special leave of the Board or the leave of the Court of Appeal "except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling".

2. The Court of Appeal refused many of the applications which were made in this case to appeal to the Board, relying on its earlier decisions in *Pirito v Curth* 2005-06 GLR 34 and *Emerald Bay Worldwide Ltd v Barclays Wealth Directors (Guernsey) Ltd* (unreported) 9 January 2014, Court of Appeal of Guernsey Judgment 02/2014 by applying a test of whether the appeal raised arguable questions of law of general public importance. The Board granted permission to appeal on those matters because it considers that the test which the Court of Appeal of Guernsey sought to apply is not consistent with the terms of section 16 of the 1961 Law. The Board has set out its reasoning for that view in its advice in *A v R* [2018] UKPC 4, which was handed down on 5 March 2018. This set of appeals and the appeal in *A v R* have demonstrated that there is a question for the States of Guernsey whether to amend its legislation, as its sister jurisdiction of Jersey did in 2008 (see article 14 of the Court of Appeal (Jersey) Law 1961 (as substituted by article 7 of the Court of Appeal (Amendment No 8) (Jersey) Law 2008)), to facilitate the introduction of such a test. The Board urges the States of Guernsey to address this matter without undue delay.

The factual background

3. The disputes which are the subject of these appeals concern the administration of the Tchenguiz Discretionary Trust ("the TDT") in the period between March 2007 and October 2008. The TDT came into existence in the following way. In October 1988 the Tchenguiz Family Trust ("the TFT") was

established as a discretionary trust governed by the law of the British Virgin Islands ("the BVI"). By the time of the matters in issue the trustee of the TFT was Investec Trust (Guernsey) Ltd ("Investec"). The beneficiaries of the TFT included the sons of Victor Tchenguiz, Robert and Vincent. In March 2007 a decision was made to separate the assets of the trust which were held notionally for Mr Robert Tchenguiz from those so held for Mr Vincent Tchenguiz. On 26 March 2007 Investec as trustee of the TFT exercised powers of appointment to establish the TDT, which is a discretionary trust governed by the law of Jersey. The beneficiaries of the TDT are Mr Robert Tchenguiz, his children and remoter issue, and any person or charity that is added to the class of beneficiaries. The initial trust fund of the TDT was £5,000. At the outset, Investec was the sole trustee of the TDT but Bayeux Trustees Ltd ("Bayeux") was appointed as a co-trustee on 21 August 2007 in the context of the transfer of substantial assets from the TFT to the TDT, which the Board discusses below. In its discussion of the acts of the trustees of the TDT the Board refers to Investec and Bayeux as "I&B".

4. The TDT, which was signed on 26 March 2007, provides in clause 3.1 that it is established under and governed by the laws of Jersey and the courts of Jersey are the forum for the administration of the trust. Clause 9.1 provides that no trustee is liable for any loss to the trust fund or its income unless the loss shall arise by reason of the trustee's own fraud, wilful misconduct or gross negligence. Clause 10.4 provides that a trustee on ceasing to be trustee has the right to withhold such assets as it in good faith considers necessary in respect of any liability which is properly chargeable against the trust fund.

5. From about October 2004, a company, R20 Ltd ("R20"), acted as investment adviser to the trustees of the TFT in relation to the assets notionally allocated to Mr Robert Tchenguiz. R20's chairman was Mr Robert Tchenguiz. Following the transfer of assets from the TFT to the TDT in August 2007, R20 acted as investment adviser to the TDT. The assets of the TFT which were notionally allocated to Mr Robert Tchenguiz comprised companies which held investments in public equity, private equity and real estate. Those companies, which were transferred to the TDT in August 2007, held many of their investments in public equity through contracts for differences and other margin contracts.

6. The holding of investments in this form, at a time when the banking market deteriorated in the second half of 2007 as the financial crisis developed, exposed the TFT and later the TDT to margin calls, which if not met, would have caused the trusts to lose those investments. As a result of the margin calls, the TFT urgently needed to obtain funding to support those investments.

7. In the narrative which follows, the Board focuses on three events: (i) the loan agreement which Investec as trustee of the TFT and three subsidiary companies of Investec in the TFT entered into with the Icelandic bank, Kaupthing Bank hf ("Kaupthing") on 20 August 2007, (ii) the transfer of assets and related liabilities from Investec as trustee of the TFT to I&B as trustees of the TDT on 24 August 2007, and (iii) the re-financing of the TDT by a restructuring of the TDT's corporate assets in a framework agreement ("the Framework Agreement") and an overdraft loan agreement ("the Overdraft Loan Agreement"), both dated 19 December 2007.

8. *The 20 August 2007 loan agreement*: In order to obtain the needed funding to meet the margin calls Investec as trustee of the TFT and three subsidiaries entered into the loan agreement with Kaupthing which gave them a short-term loan facility of up to £100m. The loan agreement was governed by the laws of England and Wales. By clause 11.1 of the agreement each borrower undertook joint and several liability for the performance of the borrowers' obligations. Repayment of the loan was secured by the pledge of the shares of specified subsidiary companies and also by a personal guarantee to be given by Mr Robert Tchenguiz, which he provided at about the same time.

9. *The transfer of assets and liabilities on 24 August 2007*: The assets, which on 24 August 2007 were appointed to be held by I&B subject to the trusts declared in the TDT trust instrument, comprised shares in 30 companies registered in the BVI and also loans owed to the TFT by 34 companies. It was also necessary to transfer from Investec as trustee of the TFT to I&B as trustees of the TDT the liabilities which were associated with the transferred assets. Those liabilities included not only the debt incurred to Kaupthing under the 20 August 2007 loan agreement but also debts owed by Investec as trustee of the TFT to subsidiary companies within the TFT structure, the shares of which were being transferred to I&B as trustees of the TDT.

10. I&B as trustees of the TDT assumed the liabilities of Investec to Kaupthing under the 20 August 2007 loan agreement by a deed of novation dated 24 August 2007. On the same date I&B as trustees of the TDT entered into deeds of novation under which I&B as trustees of the TDT assumed the liabilities of Investec as trustee of the TFT to some of the companies which were being transferred from the TFT to the TDT. Those liabilities had arisen through the practice of Investec as trustee of the TFT and its subsidiaries to account for flows of funds between companies in the TFT as loans, apparently for tax reasons. A company with available funds would transfer funds to a company in need of funds by passing those funds to its immediate parent company, which in turn would pass the funds to its parent company and so on until the funds reached Investec or an intervening common parent company. Investec or the common parent company would then pass the funds to its direct subsidiary and the funds

would pass through intervening subsidiary companies until they reached the intended transferee company. Each transfer was recorded as a loan or as a loan repayment, where there was a pre-existing balance. Frequently, the transactions were recorded after the event by book entries and resolutions of the trustees and of the boards of the relevant companies and not by any written loan contracts.

11. Among Investec's liabilities which were transferred to I&B as trustees of the TDT by deeds of novation were a sum of €78,825,988.98 owed to Glenalla Properties Ltd ("Glenalla") and a sum of £80,541,936 owed to Thorson Investments Ltd ("Thorson"), which were both companies incorporated in the BVI. The deeds of novation recited that the Glenalla loan and the Thorson loan were unsecured, interest-free and repayable on demand. As will become clear, the allegation that I&B acted in breach of trust in failing to transfer their liability for the two loans into the corporate structure created in December 2007 as part of the re-financing of the TDT is one of the principal claims in these proceedings.

12. *Events leading to the re-financing of the TDT*: In about August 2007 the effects of the financial crisis in the banking market resulted in increasing margin calls on companies within the TDT. Those calls continued after the 20 August 2007 loan agreement. After a bid to take over Sainsbury's plc failed, Kaupthing's loan facility was increased to £122.5m by 22 November 2007, and Mr Robert Tchenguiz extended his personal guarantee to cover that sum. The facility was fully drawn down by that date. Faced with continued margin calls and the exhaustion of the Kaupthing loan facility, R20, on Kaupthing's suggestion, in November 2007 considered a reorganisation of the assets within the TDT and the injection of further funds into the TDT. It was only on 28 November 2007 that I&B learned of the proposed reorganisation when Mr Aaron Brown of R20 telephoned Mrs Lydia Bleasdale, who was the employee of I&B working on trust management with day to day responsibility for the TDT, including liaison with R20. Mr Brown informed Mrs Bleasdale of the proposal which was at an early stage of discussion and stated that R20 would provide a formal recommendation in due course. I&B resolved in principle to accept R20's recommendation on 29 November 2007, but had to chase R20 for a formal recommendation letter. I&B requested R20 to ascertain the net asset value of the TDT and discussed that valuation at a meeting on 3 December 2007. On 5 December 2007 Mr Brown sent Mrs Bleasdale the first draft of the document that became the Framework Agreement, which had been prepared on the instructions of R20 by Kirkland & Ellis International LLP ("Kirkland & Ellis"), who were the solicitors of Investec as trustee of the TFT and who then acted for I&B as trustees of the TDT. It was R20's practice, in its role as I&B's investment adviser, to liaise directly with I&B's professional advisers, such as Kirkland & Ellis. This practice was reflected in the terms of engagement between Kirkland & Ellis and I&B.

13. The re-financing arrangement was developed as a matter of urgency. Mrs Bleasdale described the period as "frantic". On 10 December Mr Brown of R20 sent a draft asset and liability spreadsheet which had been prepared by Kaupthing. On the same day Kirkland & Ellis sent an email to Mrs Bleasdale inviting her to look at an attached email and structure paper. In the attached email chain there was an email from Kirkland & Ellis to Lovells in which Kirkland & Ellis stated that, as far as they were aware, they were not asking for any amendments to any loans which were in place. I&B only received R20's formal recommendation on 11 December at a time when the completion date was scheduled for 14 December. I&B formally resolved to approve the arrangement on 12 December 2007. Mrs Bleasdale emailed Mr Brown on 14 December 2007 to express concerns about unanswered questions and the state of the draft framework agreement. He responded: "Right. Keep in mind that Kaupthing could sell everything right now if they liked". On 17 December Mrs Bleasdale expressed concern to Mr Brown that I&B needed time to read and understand the documents that they were being asked to sign. Among the subjects which I&B discussed with R20 was a statement of the assets and liabilities of the companies within the TDT which were affected by the proposed reorganisation. Kaupthing and R20 produced the statement, which it was proposed that I&B would warrant. I&B made it clear to R20 and Kirkland & Ellis in emails of 14 and 17 December that they were not comfortable about warranting balance sheets of the companies within the TDT as such balance sheets could not be produced in the time available. Mrs Bleasdale was aware of the existence of loans between I&B and Silverville Ltd ("Silverville" a BVI company owned by Investec) on the one hand and several companies which were to be included in the proposed new corporate structure and that those loans were not included in the statement to be warranted. Mrs Bleasdale explained that she was not happy about I&B giving a warranty as to all of the companies' assets and liabilities. But she explained that she was ultimately comfortable about I&B giving the warranty in relation to what she then understood to be a list of securities in a spreadsheet which R20 and Kaupthing had produced. She did not notice in a draft of the Framework Agreement that I&B's warranty was that the assets and liabilities spreadsheet showed a summary of all of the assets and liabilities of the companies in the new structure. Mr Clifford, Investec's managing director, who signed the Framework Agreement on behalf of I&B, thought that the problem had been satisfactorily dealt with by 19 December 2007 because he understood that by then Mrs Bleasdale was happy with the warranty. The Board refers to the warranty in para 24 below.

14. *The re-financing in December 2007*: The refinancing of the TDT was achieved on 19 December 2007 by a number of interconnected agreements. Because of the dispute as to whether Oscatello Investment Ltd ("Oscatello") has a restitutionary claim against I&B and the assets of the TDT, it will be necessary to examine some of the provisions of the Framework Agreement, by which the companies within the TDT were restructured, in some detail in the discussion of

that claim in paras 133-151 below. At this stage it is sufficient to summarise the elements of the re-financing.

15. First, the Framework Agreement dated 19 December 2007 was an agreement between I&B as trustees of the TDT, Kaupthing, Isis Investments Ltd ("Isis") which was a company incorporated in the Isle of Man and a subsidiary of Kaupthing, New Ortland II Equities Ltd ("New Ortland"), which was a BVI company and an investment vehicle of Lydur and Agust Gudmundsson, Eliza Ltd ("Eliza") which was also a BVI company owned by I&B as trustees of the TDT, Oscatello which was until then an off-the-shelf BVI company owned by Eliza, and Silverville. The purpose of the Framework Agreement was to transfer the shares of 11 BVI companies, including Glenalla and Thorson, into the ownership of Oscatello and to give charges over the shares in those companies to Kaupthing as security for further lending which Kaupthing would make to Oscatello. That lending would be used to discharge current debt including the liabilities incurred under the 20 August 2007 loan agreement.

16. Secondly, Kaupthing and Oscatello entered into the Overdraft Loan Agreement also on 19 December 2007. Kaupthing made available to Oscatello a loan facility of up to £371m for the stated purpose of re-financing current debts which were listed in a schedule to the Overdraft Loan Agreement, to meet potential margin calls on Oscatello's subsidiaries and to pay interest on the loan. Among the loans listed in that schedule was a loan of £39,366,791 from Kaupthing to I&B as trustees of the TDT under the 20 August 2007 loan agreement. That loan was recorded on a loan account number 5962. The repayment by Oscatello of that loan is the subject matter of the restitution claim.

17. Thirdly, and again on 19 December 2007, Isis and New Ortland, in accordance with their obligations under the Framework Agreement, each entered into a profit participation loan agreement with Eliza to make profit participation loans in the total sum of £150m to Eliza. These loans provided the additional investment which Kaupthing had demanded in order to support the positions which the companies in the TDT had built up.

18. Fourthly, on the same date Oscatello granted Kaupthing a charge over its shares in the 11 BVI companies, which were its subsidiaries, in security of its obligations under the Overdraft Loan Agreement.

19. The resulting corporate structure ("the Oscatello structure") was that I&B as trustees of the TDT (either directly or through their subsidiary, Silverville) owned Eliza, which owned Oscatello, which in turn owned the 11 BVI companies, the shares of which were charged to Kaupthing. The effect of the re-

financing was that Oscatello became Kaupthing's debtor and Mr Robert Tchenguiz was released from his personal guarantee for the liabilities of the borrowers under the 20 August 2007 Loan Agreement.

20. It is sufficient in this part of the judgment to summarise the structure of the Framework Agreement as the background to the disputes. The Framework Agreement, after reciting that the parties wished to set out the terms on which they would invest in the Oscatello structure, stated that their agreement was "in consideration of the mutual promises and undertakings herein". Clause 1 defined the terms used in the Framework Agreement. Clause 2 stated the parties' agreement that either I&B as trustees of the TDT or a subsidiary would invest in Eliza by way of contributing the shares of the 11 BVI companies specified in Schedule 1 and that Isis and New Ortland would each lend £75m to Eliza under the terms of a profit participation loan agreement ("the PP loans").

21. The method by which this was achieved in clause 3 was, in summary, that I&B as trustees of the TDT and Silverville contracted to transfer their shares in the 11 BVI companies to Oscatello, which undertook to issue shares in itself to I&B and Silverville. Then I&B and Silverville undertook to transfer their shares in Oscatello to Eliza in return for shares in Eliza, thereby creating the Oscatello structure. All of these steps were subject to completion and to be effected on the completion date, which in the event was 19 December 2007.

22. Schedule 2 set out the obligations of the parties on completion. Kaupthing was obliged, among other things, to procure the formal release of the guarantee by Mr Robert Tchenguiz and to deliver to Oscatello duly executed counterparts of the Overdraft Loan Agreement and the Oscatello Share Charge (paras 1.3 and 1.4). Oscatello was obliged among other things to deliver to Kaupthing duly executed counterparts of those documents (para 3).

23. Clause 5 of the Framework Agreement concerned governance. It provided (so far as relevant) undertakings by each of I&B as trustees of the TDT, Eliza and Oscatello to Silverville and New Ortland, to apply the PP loans and the equity injection in advancing and operating the Overdraft Loan Agreement and to observe the provisions of the Framework Agreement and the Overdraft Loan Agreement.

24. In clause 8.1(A) of the Framework Agreement, I&B warranted to each of Kaupthing and New Ortland that the asset and liability statements which had been provided to Kaupthing contained "a true and correct list of all the assets and liabilities" as at 30 November 2007 (which was the benchmark date) of the 11 BVI companies which were transferred to Oscatello. This warranty was not

correct because the list omitted the liabilities which existed between I&B and Silverville on the one hand and those companies on the other. I&B had signed a letter of warranty on 18 December 2007 confirming that a spreadsheet "correctly and completely reflects the assets and liabilities" of the 11 BVI companies as at 30 November 2007.

25. *Events after 19 December 2007*: On 20 December 2007 Isis and New Ortland advanced £150m as loans to Eliza in accordance with the Framework Agreement and Eliza transferred that sum to Oscatello as an interest-free loan. On 21 December 2007 Oscatello used that sum together with other funds, including funds from the Kaupthing facility, to make payments amounting to £293,984,107.10. Those payments included five payments to Kaupthing in repayment of loans, including the loan which was stated to be £39,366,791 and was recorded in loan account 5962, which I&B as trustees of the TDT had formerly owed to Kaupthing.

26. Mrs Bleasdale raised the issue of the existence of loans between I&B and companies within the Oscatello structure with Kirkland & Ellis on 21 December 2007, when she emailed to ask whether the loans should be assigned to Oscatello, a matter which she saw as "an internal tidy up point". In her evidence she explained that she had intended that the loans would be transferred from I&B to the companies which had received the shares which were transferred into the Oscatello structure. She also explained in her evidence that she understood that this was an administrative matter for the TDT but that, having created the Oscatello structure, the movement of liabilities between companies would require the consent of Kaupthing. Her intention in raising the matter was to follow the established practice in the administration of the TFT, and later the TDT, that when shareholdings were moved from one company to another, the transferor's associated inter-company loans also were transferred to the transferee. The transfers of the loans would achieve what she understood to be the aim of "ring-fencing" assets and liabilities within the Oscatello structure, so that Kaupthing could have recourse only against assets within that structure.

27. Between 16 and 29 January 2008, Mrs Bleasdale again raised the issue of these loans with Kirkland & Ellis, informing them that the loans amounted to £152m. The correspondence proceeded on the basis that the approximate aggregate value of the loans were those owed by the companies to I&B and Silverville, whereas the figure of £152m was what was then believed to be the net figure of the sums due by the companies after deduction of sums owed by I&B to Glenalla and Thorson. Kirkland & Ellis wrote about the matter to Kaupthing's solicitors, Linklaters LLP, on 29 January. Linklaters never responded. Mrs Bleasdale did not pursue the matter because she did not see it as a priority at that time.

28. If the matter had been pursued shortly before the 19 December 2007 re-financing or afterwards, it is not clear whether, and if so when, the transfer to Oscatello of I&B's liabilities to Glenalla and Thorson could have been achieved.

29. Mr Robert Tchenguiz and R20 had a close working relationship with Kaupthing. They collaborated in identifying business opportunities which would benefit both Kaupthing and the Tchenguiz trusts. Mr Robert Tchenguiz maintained regular contact with Kaupthing's chief executive, Hreidar Mar Sigurdsson. The TDT was a significant part of Kaupthing's business, and Kaupthing continued to provide finance to the companies within the TDT. In his evidence at trial, Mr Robert Tchenguiz expressed confidence that, if R20 had been alerted to the outstanding liabilities of I&B as trustees of the TDT for the loans from Glenalla and Thorson either in the lead up to the Framework Agreement or afterwards, Kaupthing would have consented to the transfer of those liabilities into the Oscatello structure, because Kaupthing expected to have recourse for the repayment of its advances only against assets within the Oscatello structure. He opined that the matter would have been resolved with Kaupthing without difficulty and in a matter of days. Mr Aaron Brown also expressed confidence that Kaupthing would have consented.

30. But there was no reliable evidence to support the optimism of Mr Tchenguiz and Mr Brown. Because of the continuing adverse market conditions, Oscatello was in default under the new financing arrangements from the outset. By 10 January 2008 Kaupthing had requested further security as a condition of further funding and I&B and R20 were discussing the possibility of providing that security in order to avoid the loss of both their relationship with Kaupthing and the assets in the Oscatello structure. No witness from Kaupthing was called to give evidence as to its willingness to allow the value of Oscatello to be altered by the transfer to it of the loan liabilities owed to Thorson and Glenalla, or as to the terms upon which its agreement would be given.

31. The evidence led at the trial also did not demonstrate the practicability of such a transfer once the solvency of several of the companies which were transferred into the Oscatello structure was in question. Expert evidence was led at the trial from Hugh Matthew-Jones of PKF (UK) LLP and Martin Dougall of KPMG LLP. The experts agreed that on 19 December 2007 only three of the 11 BVI companies, namely Glenalla, Seacourt Ltd ("Seacourt") and Brigetta Investments Ltd ("Brigetta"), had net assets and that the solvency of the 11 BVI companies, and thus Oscatello's net assets, deteriorated sharply between 19 December 2007 and 8 January 2008. Their major disagreement was on the valuation of interests which Seacourt and Brigetta held in Somerfield plc ("Somerfield") which caused them to differ on whether Oscatello itself was insolvent or had any net assets by 8 January 2008. In the context of insolvency or threatened insolvency, the directors of Glenalla and Thorson would have had

to be satisfied that it was in the interests of those companies to substitute Oscatello as their debtor in place of I&B as trustees of the TDT, thereby eschewing recourse against the other assets of the TDT.

32. Further, if all of the loans due by companies in the Oscatello structure to I&B as trustees of the TDT and to Silverville were repaid and I&B had repaid the loans to Glenalla and Thorson, there would have been a net outflow of funds from the companies in the Oscatello structure of about £191m. Seven of the companies in the Oscatello structure which owed sums to I&B or to Silverville had net liabilities and may not have been in a position to repay them.

33. It may be that Kaupthing would at some stage have been prepared to accept the transfer of I&B's liabilities to Oscatello, as it is arguable that in the negotiation of the Framework Agreement Kaupthing was looking for an equity investment from the TDT of £264m and no recourse to assets outside of the Oscatello structure. But Mr Robert Tchenguiz accepted on cross-examination that the value of the share portfolio on which the £264m figure was based had fallen significantly between 30 November and 19 December 2007, and further, on the expert evidence, by 21 December 2007 the value of the 11 BVI companies in the Oscatello structure had fallen far below their value at the benchmark date of 30 November 2007. Absent detailed evidence from Kaupthing, it cannot be concluded that Kaupthing would readily have agreed to the transfer of I&B's liabilities to Oscatello.

34. As a result of continued margin calls on the companies within the Oscatello structure, the loan facility under the Overdraft Loan Agreement was increased on 10 January 2008 from £371m to £401m. In April 2008 further security was given to Kaupthing from outside of the Oscatello structure, when Adrianne Properties Ltd, a company within the TDT portfolio, gave security over the shares it owned in Welcome Break Group Ltd. The possibility of giving this security had been discussed with Kaupthing as early as 10 January 2008. In addition, the trustee of the TFT gave securities over shares in certain companies in the TFT portfolio which held freehold interests giving rise to an income from ground rents. Between 17 March and 30 May 2008 the facility under the Overdraft Loan Agreement was increased incrementally to £600m. Statements of assets and liabilities of the companies within the Oscatello structure as at 30 June 2008 showed negative values of £252m or of £405m depending on the presentation of the value of certain assets.

35. In July 2008 Mr Louw Rabie, an accountant employed by Investec made a series of book entries in the ledgers of the companies within the Oscatello structure. Those entries purported to show that I&B's liability to repay the loans from Glenalla and Thorson had been replaced by a liability on the part of

Oscatello. Mrs Bleasdale's evidence was that those entries did not reflect anything that had actually happened as there were no trustee or company board resolutions to support them. Mr Rabie reflected those entries in draft balance sheets as at 31 August 2008, which were intended to show the financial position of companies within the Oscatello structure, including Glenalla, Thorson and Oscatello itself. On 3 October 2008 at meetings of the boards of directors of Thorson, Glenalla and Oscatello, the directors resolved to convert shareholder debt into equity in order to remove the negative equity which appeared in the draft balance sheets of Thorson and Oscatello. Mr Rabie made further accounting entries in October 2008. But Lieutenant Bailiff Chadwick ("the Lt Bailiff") in his judgment after trial, which the Board discusses below, held that neither the July 2008 book entries nor those in October 2008 effected or reflected the novation or assignment of I&B's liability as trustees of the TDT for the loans by Glenalla and Thorson. Those findings are not now challenged.

36. *The continued financial crisis and the formal insolvencies within the Oscatello structure*: In October 2008 Kaupthing was in serious financial difficulty and was subjected to a process equivalent to nationalisation. It exercised its security rights over the shareholdings in the Oscatello structure, selling certain assets of companies within the structure. On 10 December 2008 Kaupthing appointed receivers over the shares of Glenalla and Thorson and those companies were placed in liquidation on 18 August 2009. On 16 February 2010 Oscatello also was placed in liquidation. On 22 February 2010 a winding up order was made in the BVI in relation to Eliza. On 22 April 2010 the joint liquidators of Glenalla, Thorson, Oscatello and Eliza wrote to I&B demanding the payment of sums said to be due by them as trustees of the TDT.

37. *The replacement of the trustees*: On 2 July 2010 I&B were replaced as trustees of the TDT by Rawlinson & Hunter Trustees SA ("R&H"), a company incorporated in Switzerland. Since 3 October 2017 Fort Trustees Ltd and Balchan Management Ltd ("the current trustees") have replaced R&H or trustees of the TDT.

38. *The investigation by the Serious Fraud Office*: In 2009 the Serious Fraud Office ("the SFO") announced that it was commencing an investigation into suspected criminal offences committed in connection with the collapse of Kaupthing. In pursuance of that investigation, on 9 March 2011 searches under warrant were carried out at the homes and business premises of Mr Robert Tchenguiz and Mr Vincent Tchenguiz and both men were arrested. The SFO sent a letter of request to Her Majesty's Procureur of the Bailiwick of Guernsey on 26 August 2011, in which the SFO requested the Procureur's assistance in providing material and interviews from I&B in relation to the matters under investigation, which included alleged insolvency in the Oscatello structure and an alleged misrepresentation to Kaupthing by a failure to disclose intercompany

lending at the time of the Framework Agreement. As a result, there was a meeting of officials of the SFO, the responsible Guernsey Crown Advocate and employees of I&B on 8 February 2012. Neither I&B nor their employees were formal subjects of the investigation.

39. Mr Robert Tchenguiz and others challenged the lawfulness of the search warrants by judicial review and in a judgment dated 31 July 2012 the Divisional Court ruled that the SFO had not obtained the warrants lawfully. The proceedings were transferred to the Queen's Bench Division for determination of civil damages claims against the SFO ("the SFO damages proceedings"). As a result of disclosure in the SFO damages proceedings, documents relating to the letter of request and the meeting on 8 February 2012 were made available to the parties to those proceedings, which after April 2014 included R&H. The SFO damages proceedings were settled in July 2014.

The Court Proceedings

40. Because of the wide range of challenges advanced in these appeals, it is necessary to set out in more detail than would be usual the proceedings in the Guernsey courts. In this section the Board addresses the proceedings commenced in March 2010. In paras 160-191 below the Board considers the subsequent proceedings which R&H as trustees of the TDT commenced on 25 June 2013.

41. On 12 March 2010 I&B commenced proceedings in the Royal Court seeking (i) the determination of the questions whether they had incurred liability to Glenalla, Thorson, Oscatello or Eliza ("the BVI companies") and, if so, on what terms, and (ii) declarations against the BVI companies that (a) pursuant to article 32(1)(a) of the TJL I&B had no personal liability in respect of any moneys said to be due and that any claims of the BVI companies extended only to the trust property of the TDT and (b) I&B were liable only as trustees so that the BVI companies could enforce obligations against them only to the extent that they held assets of the TDT. Later I&B were allowed to amend their application to claim an indemnity against the assets of the TDT and to join R&H as a fifth defendant.

42. The BVI companies defended the proceedings and counterclaimed to seek a declaration that moneys were due to Glenalla, Thorson and Oscatello under the loan agreements and for judgments against I&B for the sums due, or alternatively for an account of all sums due to them. At the start of the trial the BVI companies were allowed to amend their pleadings to introduce (i) an alternative counterclaim that I&B were liable to Oscatello in restitution and (ii) a declaration

that Glenalla, Thorson and Oscatello were entitled to have the sums claimed paid out of the assets of the TDT.

43. R&H also lodged a defence and counterclaim and also a third party claim against the BVI companies in which they sought declarations against I&B and the BVI companies that (i) the BVI companies had no claims against the TDT and (ii) in any event I&B had no right of indemnity against the TDT assets in respect of any sums due to the BVI companies because such liabilities had not been "reasonably incurred" for the purposes of article 26(2) of the TJL. R&H also claimed that I&B were liable for breach of trust because of their gross negligence.

44. R&H responded to requests for further information from I&B and the BVI companies. On 25 May 2012 R&H sought a further affidavit from the BVI companies that they had complied with their disclosure obligations. The Lt Bailiff heard the application on the third day of the trial and later refused it.

45. The trial took place over 12 days between 11 and 29 June 2012. Unfortunately, the Lt Bailiff took over 17 months to complete and hand down his judgment, which he delivered on 6 December 2013. In the interim, R&H made three unsuccessful applications (i) on 31 October 2012, for leave to adduce further evidence, (ii) on 19 August 2013, for specific disclosure from the BVI companies, and (iii) on 14 October 2013, for leave to adduce further evidence and to recall one of I&B's witnesses for further examination. The Court of Appeal dismissed appeals against the dismissal of applications (ii) and (iii) in a judgment dated 28 November 2013.

46. In his judgment dated 6 December 2013 the Lt Bailiff held that (i) I&B as trustees of the TDT were bound by the loans which Glenalla and Thorson had made to Investec as trustee of the TFT as a result of the novation in August 2007, (ii) the book entries of July and October 2008 had not assigned those debts, (iii) Oscatello had not lent I&B £39,386,354.80 when it repaid I&B's debt on 19 December 2007 but had a claim in restitution against I&B because it had repaid their loan at their request, (iv) I&B could not rely on article 32 of the TJL or the terms of the deeds of novation to exclude their personal liability for the loans from Glenalla and Thorson, (v) similarly I&B were personally liable to pay Oscatello in restitution.

47. The Lt Bailiff also held that I&B had not acted unreasonably in incurring the liabilities to Glenalla and Thorson in August 2007 or the liability in restitution to Oscatello on 19 December 2007. He construed article 26(2) of the TJL, which the Board discusses in paras 103-116 below, as being concerned with

the initial incurring of a liability and rejected R&H's submission that the article would have excluded I&B's indemnity from the TDT assets if it were found that they had failed to extinguish those liabilities after they had been incurred. The remedy for such a failure would be a claim for breach of trust, which, under the TDT trust deed, required the beneficiaries to establish wilful default or gross negligence on I&B's part. While I&B might have recognised sooner than they did that there was a future problem if assets of the TDT outside the Oscatello structure remained exposed to claims from Kaupthing, they had not been guilty of gross negligence in failing to deal with the problem before entering into the Framework Agreement, because by December 2007 there was an urgent need to have that agreement in place and it would not have been reasonable to hold it up to deal with the future problem. Similarly the Lt Bailiff held that R&H had failed to establish that I&B had been grossly negligent in failing to deal with the problem of the Glenalla and Thorson loans after 19 December 2007 because (a) it had not been shown that Kaupthing would have consented to a reduction in the value of its security, and (b) unscrambling the loans between the companies within the Oscatello structure and I&B would have involved many parties in a complex and lengthy process which would have become increasingly more difficult as market conditions deteriorated. The Lt Bailiff therefore held that I&B were personally liable to pay Glenalla, Thorson and Oscatello but were entitled to use the TDT assets to satisfy those liabilities.

48. The Court of Appeal of Guernsey (James W McNeill QC, John V Martin QC and Robert L Martin QC) issued eight judgments in the course of the appeals from the Lt Bailiff's judgment.

49. The first judgment dated 27 June 2014 addressed the nature of the liability of I&B as trustees of the TDT. The court held that the Guernsey courts should recognise as a matter of private international law that article 32 of the TJL applied to the liability of the trustees. The court rejected the submission of the BVI companies that I&B's liability for the Glenalla and Thorson loans was governed by the proper law of the transaction. Instead, the court characterised the issue as one of I&B's status as trustees which was governed by the laws of Jersey. The court also held that, as a matter of construction of the loan documents, I&B did not incur personal liability to Glenalla and Thorson.

50. In the second judgment dated 29 October 2014 the court held that where article 32(1) of the TJL applies to a transaction, the trustee has no personal liability in respect of a claim arising out of the transaction, if the counterparty knew that it was transacting with a trustee. The trustee which was party to the transaction is entitled to settle the creditor's claim out of trust assets and, when the trust assets are exhausted, is entitled to be discharged of the liability. To achieve this, a former trustee has an equitable lien over trust assets transferred to a subsequent trustee and the subsequent trustee has to make the trust assets

available in order to satisfy the third party creditor's claim. The ability of the trustee to satisfy the liability out of trust property does not depend upon whether or not there exists at the time an allegation of breach of trust against the trustee.

51. In the third judgment dated 17 February 2015 the court addressed R&H's application for leave to amend their notice of appeal to expand their grounds of appeal, to adduce further evidence, for specific disclosure from the BVI companies and for specific disclosure and interrogatories on the part of I&B. The court refused each of the applications. R&H applied to amend the notice of appeal in order to allege that the trial was unfair because R&H had not had access to witnesses from Kaupthing because of the continuing SFO investigation at that time. But the court held that there had not been a material change of circumstances as R&H were aware of those circumstances at the time of the trial. In relation to the allegation of a failure of the BVI companies to make proper disclosure, the court held that R&H could have used documents in the public domain to make the allegations they now sought to make. Having refused leave to amend the notice of appeal, the court refused the other applications which related to those refused grounds of appeal.

52. On 10 August 2015 the court issued its fourth judgment, which dealt principally with (a) the allegation of procedural irregularity because of the Lt Bailiff's delay in issuing his judgment which, it was asserted, had given rise to the risk that he had forgotten material evidence which bore on I&B's entitlement to an indemnity from the trust assets and (b) the claim by Oscatello. R&H argued that the court should order a retrial because the Lt Bailiff had failed to deal adequately with their allegations both of breach of trust and that I&B had unreasonably incurred the liabilities to Glenalla and Thorson. The court recognised that the delay in producing the judgment was unreasonable but held that the test was whether the judgment was unsafe as a result of that delay. The court stated that it had to examine the judge's findings of fact with particular care. The court went on to examine R&H's pleaded case to ascertain the issues which were before the Lt Bailiff and to exclude issues which R&H sought to raise which were not part of the trial. The court rejected the allegation of breach of trust against I&B for incurring the liability of the TDT for the Glenalla and Thorson loans in the novation deeds in August 2007. The court stated that there was not a sufficient basis for it to disturb the Lt Bailiff's conclusion that there was no serious or flagrant degree of negligence in I&B's failure to recognise the future exposure of the assets of the TDT to claims from Kaupthing in the lead up to the Framework Agreement in December 2007 because of the urgent need to have the agreement in place and the unacceptable impact of any delay. In relation to the allegation that I&B failed to transfer to Oscatello their obligations as trustees of the TDT under the loans from Glenalla and Thorson after 19 December 2007, the court recognised that the Lt Bailiff had expressed his determination "in somewhat telegraphic terms", but held that he had been

entitled to reach the view which he did having regard to the complexity of the objective and the uncertainty of the financial world at the time.

53. In relation to Oscatello's claim against I&B, the court held that the Lt Bailiff was entitled to hold that there was no contract between the parties to support the allegation that there was a loan. But, reversing the Lt Bailiff's judgment, it also held that Oscatello had no claim in restitution because its payment of I&B's debt arose out of the arrangements in the Framework Agreement and it had no reasonable expectation that it would be entitled to immediate recoupment from I&B.

54. In the fifth judgment dated 22 December 2015, the court addressed the form of order which it was to pronounce and granted a stay of execution over the house which Mr Robert Tchenguiz and his family occupied. It granted leave to appeal to the Board only on the application and construction of article 32 of the TJL. In this judgment and in further judgments dated 24 February 2016 and 19 July 2016 the court refused applications for leave to appeal by applying a test whether the appeal raised arguable questions of law of general public importance. For the reasons discussed in para 2 above, the Board has not been able to apply such a test in the face of current legislation.

55. Finally on 19 April 2016 the Court of Appeal dealt with the questions of the costs of the litigation. The Board addresses the residual issues now in dispute in paras 153-159 below.

The meaning of article 32 of the TJL

56. The question at issue is whether the liability of I&B as former trustees of the TDT is limited to the trust assets by article 32 of the TJL. If the answer to that question is yes, then it becomes necessary to decide whether a creditor whose debt was incurred by a trustee in that capacity has direct recourse to the trust assets to satisfy his debt, regardless of the state of the account between the trustee and the beneficiaries (as the Court of Appeal held), or is limited to claiming through the trustees by way of subrogation. In the latter case, the creditor's claim would be limited to the amount that the trustees could claim by way of indemnity, having regard to the state of their account with the beneficiaries. The current trustees assert that I&B have no right of indemnity because the relevant liabilities were unreasonably incurred and/or because they were guilty of gross negligence.

57. Before addressing article 32, some preliminary observations need to be made. The TDT is a discretionary trust established under the law of Jersey. In

their modern form, trusts are a creation of equity judges in England. There are of course concepts in other legal systems, notably in Roman law and in the civil law of France, which have some features in common with an English law trust. But they do not have the elaboration and detailed prescription which the existence of a large and coherent body of case law has given to the English trust law. The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes. These general remarks apply equally to the trust law of Guernsey.

58. The TJL is the principal indigenous source of Jersey trust law. It is not a complete code of the law of trusts. But it gives statutory effect to some principles already well established in England and significantly modifies other principles. English trust law therefore serves as the background against which the provisions of the TJL fall to be construed.

59. For this reason, it is necessary to start by setting out some well-established principles of English trust law which are relevant to the present issue:

(i) A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.

(ii) English law does not look further than the legal person (natural or corporate) having the relevant rights and liabilities. As Purchas LJ observed in dealing with the legal personality of a temple under Indian law in *Bumper Development Corpn Ltd v Comr of Police of the Metropolis* [1991] 1 WLR 1362, 1371:

> "The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones."

(iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate. As Lord Penzance put it in *Muir v City of Glasgow Bank* (1879) 4 App Cas 337, 368, where debts are incurred by a trustee for the benefit of the beneficiaries, the trustee

> "could not avoid liability on these debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted."

(iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity which Lord Penzance regarded as insufficient: see *Lumsden v Buchanan* (1865) 3 M (HL) 89. There must be words negativing the personal liability which is an ordinary incident of trusteeship. In *Gordon v Campbell* (1842) 1 Bell App 428 and *Muir v City of Glasgow Bank* itself, it was held that the words "as trustee only" were enough.

(v) A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate: *In re Blundell* (1888) 40 Ch D 370, 376. To secure his right of indemnity, the trustee has an equitable lien on the trust assets: *Lewin on Trusts*, 19th ed (2017), para 21-043. Because an equitable lien does not depend on possession, it normally survives after he has ceased to be a trustee: *In re Johnson* (1880) 15 Ch D 548, 552.

(vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity: *In re Johnson* (1880) 15 Ch D 548.

(vii) Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default or gross negligence. More generally a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity. As has frequently been observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can in principle protect his position, for example by taking a fixed charge over the trust assets, or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary.

It appears to the Board that all of these principles must be regarded as having been part of the law of Jersey before the enactment of the TJL or its statutory predecessors.

60. Article 32 of the TJL provides:

"**32. Trustee's liability to third parties**

(1) Where a trustee is a party to any transaction or matter affecting the trust -

(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;

(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).

(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust."

61. The Board considers that the effect of article 32(1) is to abrogate the rule of English law that the law looks no further than the legal entity which has assumed the liability. It deals with the status of the trustee against whom the claim is made, introducing a legal distinction between his two capacities, personal and fiduciary. It provides that he may be treated as incurring liabilities not personally but "as trustee", and therefore without recourse to his personal estate. The reasons are as follows:

(i) The object of the provision is to limit the exposure of the trustee in respect of liabilities incurred by him as such. Since the law already allowed him to do so contractually, it is reasonable to suppose that the draftsman intended something more than that. This is consistent with the fact that subsection (1) is not limited to contractual or even transactional liabilities. The opening words of the subsection ("Where a trustee is party to any transaction or matter affecting the trust") indicates that it is confined to liabilities arising from some pre-existing relationship to which the trustee can be said to be a "party", and which has arisen in a manner affecting the trust. But that would extend to certain claims for unjust enrichment (for example claims arising from the frustration of a contract or a total failure of consideration), or tort (for example, claims for negligent misrepresentation).

(ii) Subsection (1) might be read literally as conferring a kind of claim *in rem* against the assets themselves. But the phrase "shall be against the trustee as trustee and shall extend only to the trust property" must be read as a whole. The limitation of the trustee's liability is achieved by treating him as having two legally distinct capacities and two legally distinct estates. Only his capacity as trustee is relevant and only the trust estate is engaged. The words limiting the "claim" to the trust property do not serve to introduce a monetary cap on the trustee's liability, as all parties now appear to accept. It would be unworkable in practice, in particular where there were multiple third party claims against the trustees of a single trust. Nor are they concerned merely with controlling the execution of judgments. They serve to describe the character of the claim. It is a claim against the trustee in that capacity only. The limitation to trust assets follows on from that.

(iii) That view of the matter is reinforced by the contrast between subsection (1)(a), which deals with a claim against the trustee as such, and subsection (1)(b), which deals with a claim against the trustee personally.

Before article 32 was enacted the trustee could incur liabilities in only one capacity, namely his personal one. The effect of the article is to create two.

(iv) It is fair to say that it is unusual for a statutory provision about the status of a person against whom a claim is made to depend on the knowledge of the claimant. But there is no conceptual difficulty about this. Irrespective of the knowledge of the claimant, the trustee has two capacities. The knowledge of the claimant does not determine his status. It only determines in which of his two distinct pre-existing capacities he is to be taken to have acted. The concept is familiar in other common law jurisdictions, and notably the United States, which the draftsman of article 32 is likely to have had in mind. In these jurisdictions, the unsatisfactory features of the English rule have led to the enactment of broadly similar statutory provisions to limit the liability of a trustee incurred in that capacity. The *American Law Institute, Restatement of the Law, Trusts* 3d (2011), Chapter 21, pp 94-95 observes of the principle underlying these enactments that it

> "recognizes modern reality rather than traditional concepts. Technically, the trust is still not generally recognized as a legal 'entity', but … in practice trustees act on behalf of their trusts and are sued as trust representatives. Indeed, in this Chapter and elsewhere in this country, the trust is *treated* as an entity to such an extent that it is no longer inappropriate to refer to claims against or liabilities of a 'trust' (as in the title and content of this Chapter) and to the liability or debt of a beneficiary to a 'trust' (as in Chapter 20), or to refer to and treat trusts, in law and in practice, as if they were entities in numerous other contexts."

62. This is, however, the only relevant respect in which the pre-existing law is altered by article 32. There is nothing in that article which modifies the rule that a creditor can access the trust assets only by way of the trustee's right of indemnity and subject to the limits on that right imposed by the trust deed or the general law. On the contrary, the continued subsistence of the rule is acknowledged by section 54(4) of the TJL. This provides:

> "Where a trustee becomes insolvent or upon distraint, execution or any similar process of law being made, taken or used against any of the trustee's property, the trustee's creditors shall have no right or claim against the trust property except to the extent that the trustee himself or

> herself has a claim against the trust or has a beneficial interest in the trust."

That subsection might have been expressly limited in its effect to a situation where article 32(1)(b), rather than (1)(a) applied, since in an article 32(1)(a) situation the solvency or otherwise of the trustee would be irrelevant, and there could be no distraint or execution upon his personal assets for his liability as trustee. But it was not. It assumes that the creditor's right to go against the trust fund continues to depend upon subrogation. In this regard the Jersey legislature has not gone as far as the legal initiatives in the United States in the personification of a trust by creating a direct right of action against the trust in return for relieving the trustee of personal liability. Instead it has relieved the trustee of personal liability by providing that a person when acting as a trustee acts in a separate capacity.

63. The creation of a new direct means of recourse by creditors against the trust fund, without the protection to the beneficiaries formerly accorded by the inherited English law, as described above, would be a radical departure which should not lightly be inferred or implied in the absence of clear words. The Jersey legislature plainly intended by article 32 to improve the position of trustees by insulating their personal assets from liabilities to third parties expressly incurred as trustees, and must have appreciated that this would have to be at the expense either of creditors or beneficiaries, or both. On the reasonably safe assumption that the legislature intended thereby to promote rather than damage the trusts industry in Jersey, and that its future prosperity would depend upon foreign settlors continuing to choose Jersey as the place for the establishment of their trusts, it seems very unlikely that a deliberate choice would have been made to improve the position of trustees at their beneficiaries' expense. By contrast with beneficiaries, creditors other than tax authorities are usually voluntary, and can choose upon what terms as to security and personal guarantees they are prepared to lend or give credit to trustees. Against that background the Board finds it impossible to discern from the terms of article 32 any intended change in the only method (of subrogation to the trustee's indemnity) whereby the pre-existing law enabled creditors to have recourse to the assets of the trust for the enforcement of liabilities incurred by the trustees.

The characterisation of the issue under the private international law of Guernsey: does article 32 of the TJL apply?

64. Whether, and if so in what respects article 32 of the TJL falls to be applied in Guernsey depends on the private international law ("PIL") of Guernsey. It is common ground that the principles of Guernsey's PIL are the same as English PIL on this point, except where it has been modified by a Guernsey statute. In

this case the relevant statute is the Trusts (Guernsey) Law 2007 ("TGL"), which the Board discusses below.

65. All counsel treated as a starting point the following well-known three stage test set out by Mance LJ in *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825, para 26, namely:

(i) characterisation of the relevant issue;

(ii) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and,

(iii) identification of the system of law which is tied by that connecting factor to that issue.

66. This must be subject to the TGL in so far as it lays down a rule of PIL. It is also a process which must not be carried out mechanistically, but rather with regard to the objective of identifying the most appropriate law to govern the issue, in a spirit of comity. The particular notions of the domestic law, either of the *lex fori,* or of any other system of domestic law available for choice, should not be allowed to dominate the analysis.

67. There are three provisions in the TGL which appear to lay down rules of PIL. They are sections 3, 42(4) and 65. The TGL is in part a compressed summary of English trust law and in part a variation of it. Almost all of the TGL is concerned with the domestic trust law of Guernsey.

68. Section 3, headed Proper law of trust, is part of Part I of the TGL, headed Preliminary. It provides, subject to irrelevant exceptions, that the proper law of a trust is either that chosen by the settlor or, in default, the law with which the trust has its closest connection at the time of its creation.

69. Section 42 is mainly concerned with the limits upon the liability of a trustee to third parties, and makes substantially the same provision, amending the former common law, as does article 32 of the TJL. It is within Part II of the TGL, which contains provisions which only apply to Guernsey trusts, that is, trusts which have the law of Guernsey as their proper law: see section 3(2). Section 42(4) provides:

> "This section applies to a transaction notwithstanding the lex causae of the transaction, unless the terms of the transaction expressly provide to the contrary."

This plainly creates a default rule of PIL in relation to issues about the liability of trustees to third parties, subject only to express provision to the contrary in the transaction creating the liability. But it only applies to Guernsey trusts.

70. Part III of the TGL applies only to foreign trusts, that is, trusts of which the proper law is not the law of Guernsey: see section 80. The TDT is of course a foreign trust, which has the law of Jersey as its proper law. The only section within Part III is section 65, which provides in subsection (1):

> "Subject to subsection (2), a foreign trust is governed by, and shall be interpreted in accordance with, its proper law."

The exceptions in subsection (2) are of no present relevance.

Analysis

71. The Board has examined four analyses of the three stage *Raiffeisen* test. One leads to the conclusion that the applicable law is the proper law of the loan contracts, so that article 32 of the TJL does not apply. The other three all lead to the conclusion that Jersey law is applicable, so that article 32 is determinative of the relevant issues.

72. Mr McQuater QC for the BVI companies espoused what he called the discharge rule. He submitted that the question whether I&B could limit their liability for the loans was a question of discharge governed, in accordance with well-settled PIL in Guernsey as much as in England, by the proper law of the underlying loan contract which, so the Lt Bailiff held (and there is no appeal) is not Jersey law.

73. The burden of supporting the applicability of Jersey law was undertaken before the Board by Mr Taube QC for I&B. The following three strands emerge from the Board's consideration of his submissions. The first, which may be called the status rule, is that the common law (in England and Guernsey) should now recognise, by analogy with cases about the liability of officers of a company or other entity with separate legal personality, that questions as to the capacity in which trustees act, and the liability consequences which flow from that

capacity, should be governed by the proper law of the trust of which they are trustees. What article 32 of the TJL does is (i) provide for a trustee to act in one or other of two legally distinct capacities, and (ii) determine (by reference to the counterparty's knowledge) which is the relevant capacity in any particular case.

74. The second, which would apply to the PIL of Guernsey (but not necessarily elsewhere), is that the TGL sufficiently declares that the proper law of the trust determines the nature and extent of the trustees' liabilities to third parties, this being an aspect of the governance of the trust within the meaning in its context of section 65.

75. The third, which is closely aligned with the second, and which would also apply in Guernsey although not necessarily elsewhere, is that in a jurisdiction in which, under its domestic law, the liability of trustees to "knowing" creditors is limited to the assets of the trust, there is a sufficient analogy with other limits on the classes of assets upon which creditors can enforce, to make it appropriate to recognise the substantially identical proper law of the trust, so as to make article 32 applicable.

76. In applying the *Raiffeisen* approach, the first stage is to identify the relevant issue. Here, there are two related issues. The first contest between the parties is between, on the one hand, the BVI companies' claim that I&B's liability is unlimited, in the sense that both their personal assets and their trust assets are available for enforcement, and I&B's claim that their liability extends only to the assets of the TDT, ie that their personal assets are immune. The second contest is as to the mechanism for (and limitations upon) the effective recovery by the creditors against the assets of the trust, specifically whether, as the current trustees submitted, it is limited to subrogation to the trustees' right to an indemnity.

77. One must then select the conflict of laws rule which lays down the connecting factor for those issues and identify the governing system of law.

78. *The proper law of the contracts*: The general rule is that the proper law of an obligation determines not only its discharge but its extent. This may turn on the interpretation of the contract in accordance with its proper law, or on overriding rules of that law. Thus in *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society* [1938] AC 224, the Privy Council held that payments due to a creditor in Victoria under a loan agreement governed by New Zealand law were unaffected by a Victoria statute reducing the rate of interest below the one agreed. And in *Keiner v Keiner* [1952] 1 All ER 643, a debt governed by the law of New Jersey had to be paid

in full, and not after deduction of UK income tax as required by a UK statute. In *In re Helbert Wagg & Co Ltd* [1956] 1 Ch 323, German legislation provided that debts payable in a non-German currency were to be discharged by a payment in Reichsmarks into a special account with the German central bank at a designated rate of exchange, in return for non-interest-bearing promissory notes payable to the creditor but expendable only in Germany. The effect was to reduce the value of payments due under a loan agreement, but because the agreement was governed by German law effect was given to the legislation. In that case, the German legislation came after the contract was made, but the result would have been the same if it had always been in force. Upjohn J, at p 340, expressed the principle as being that "the power of legislation to affect a contract by modifying or annulling some term thereof is a question of discharge of the contract which, in general, is governed by the proper law." It follows that if a trustee enters into a contract "as trustee only" (the formula held to be effective to limit his liability contractually in *Gordon v Campbell* and *Muir v City of Glasgow Bank*) effect would be given to it in accordance with its proper law. But a statutory rule of some other law which imposed a contractual term to the same effect would be irrelevant.

79. These principles are well established, but the Board considers them to be of little relevance to the present issue. I&B's case (based on article 32 of the TJL) does not purport to determine the substance of the obligation assumed by a trustee. The amount of the debt, the currency in which, the place at which and date upon which it is to be paid, are all unaffected, as would be any relevant contractual provision for interest or security. Nor does it purport to determine what kind of performance will serve to discharge the obligation, or for the discharge of the trustee upon the happening of a subsequent event. All it does is to limit the class of assets to which the creditor may have recourse for enforcement of the debt, by reference to the capacity in which, from the outset, the trustee is deemed to be acting.

80. The sheet anchor of the BVI companies' case for the application of the discharge rule was the decision of the House of Lords in *Adams v National Bank of Greece SA* [1961] AC 255. In that case, a Greek bank had guaranteed an issue of bonds. Greek legislation subsequently effected a merger between the guarantor bank and another bank, and provided that the merged entity should be the universal successor to the rights and liabilities of both. In *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, the House of Lords had decided that the English courts would recognise that succession and give effect to it notwithstanding that the relevant liabilities were governed by English and not Greek law. The Greek legislature responded by retrospectively amending the merger legislation so as to exclude liabilities under the guarantee from the succession. The House refused to give effect to the amendment. It is clear from the reasoning of every member of the Appellate Committee except for Lord Denning, who decided the matter on a different basis, that the exclusion would

have been effective if it had been part of the original legislation. But whereas the original legislation was what constituted the merged bank and determined its status and attributes, this was not true of the amendment. The succession to the liabilities of the guarantor bank having occurred under the original legislation, the amendment had to be regarded as an abrogation (ie discharge) of an existing liability, which could be recognised in England only if it was effected under its proper law: see, in particular, pp 274-275 (Viscount Simonds), 279-280, 282-283 (Lord Reid).

81. Nor did the other authorities cited by Mr McQuater provide him with the necessary assistance. Of those cited in oral argument, in *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, the Court of Appeal rejected an attempt by the defendant to rely upon an alleged discharge from an LME contract made in England by virtue of a French form of corporate bankruptcy. While there is a trenchant statement of what may be called the discharge rule by Lord Esher MR (at p 405), this was clearly a case of alleged discharge by reason of an event subsequent to the making of the contract.

82. The decision in the *Gibbs* case was applied by the Board in *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349, on appeal from the Supreme Court of Victoria. In that case the requisite majority of the creditors of the defendant company made a scheme of arrangement for compromise of its debts sanctioned by the High Court in England under the Joint Stock Companies Arrangement Act 1870 (33 & 34 Vict, c 104), an act which did not apply to the Colonies. A non-consenting creditor sued for her full debt (contracted in Victoria under Victorian law). The company pleaded the arrangement but failed. Again, the effect of the scheme of arrangement was to bring about an alleged discharge (or variation) of her debt after it had been incurred.

83. *The status strand*: The first strand in the contrary argument is based upon the status of trustees, or the capacity in which they contract or engage with third parties in connection with the trust. The editors of *Dicey, Morris and Collins on the Conflict of Laws*, 15th ed (2012), express the opinion at para [30-010] that the substantive law of the country under which an entity was formed "will determine the legal nature of the entity so created, eg whether the entity is a corporation or partnership and, if the latter, the legal incidents which attach to it." Authority for this proposition is sparse, but in principle, the Board is satisfied that it is correct and applicable not only to partnerships but to any entity. This is because the law of an entity's creation is the only law which is apt to determine its status. In *National Bank of Greece and Athens SA v Metliss* [1958] AC 509, the House of Lords rejected the suggestion that the status of an entity meant nothing more than its existence, powers and internal constitutional arrangements. It extended to its attributes. "I believe," said Viscount Simonds, at p 525:

> "that justice will be done if your Lordships think it right not only to recognize the fact that the new company exists by the law of its being but to recognize also what it is by the same law … If, for reasons of comity, we recognize the new company as a juristic entity, neither the Greek Government, the creator, nor the new company, its creature, can complain that we too clothe it with all the attributes with which it has been invested."

Cf, Lord Tucker at p 529.

84. By the same token, the questions of status which the common law refers to the law of the entity's creation include what it means to say, if the entity (such as a traditional partnership or unincorporated association) does not have separate legal personality, that it has assumed an obligation. Whose liability is thereby engaged? Thus, where a contract governed by a foreign proper law is made with an English partnership, English law and not the proper law of the contract will determine whose liabilities are thereby engaged. All the partners will be jointly and severally liable. That result might be reached by applying ordinary principles of the law of agency and giving effect to the mutual agency of partners.

85. But it may also be viewed as a question of status. This can be seen when one looks at the converse position where the law of a partnership's formation determines not only whose liability is engaged but what are the limits of that liability. *Johnson Mathey & Wallace Ltd v Alloush* (1984) 135 NLJ 1012, Court of Appeal (Civil Division) Transcript No 234 of 1984 concerned a Jordanian partnership. Under Jordanian law the partnership was a distinct legal personality but each partner was jointly and severally liable for its debts subject to a proviso that the creditor should first have exhausted his remedies against the partnership. The Court of Appeal accepted that it was "for Jordanian law to determine the personal liability of members or officers of a Jordanian company acting as such." But for the fact that limitation was held to be procedural, they would have applied it. Sir John Donaldson MR observed that

> "it is open to the proper law of a company to limit the liability of its members and officers by adopting either a substantive law route or a procedural law route. The choice is that of the relevant legislature. If it chooses to adopt the substantive law route, that law will have extra-territorial effect, at any rate so far as England is concerned."

86. In *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants VOF* [1998] CLC 1574, the Court of Appeal dealt with a species of Dutch partnership with no exact analogue in English law. According to the findings of the trial judge, it was not a partnership in the English sense, nor did it have a separate legal personality, but it had sufficient legal existence to be sued in its own name. It was an association whose function was essentially representative of the partners as a whole. Under Dutch law, the partners were not parties to contracts made in its name, but were jointly and severally liable on those contracts by statute. The Court of Appeal held that the partners' liability was purely statutory and enforceable as such, although, not being parties to the contract, they could not rely on a purely contractual time limit for claims.

87. In *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465 the Court of Appeal had to deal with the name and capacity in which a Swiss partnership could be sued in England. A Swiss partnership is a separate legal entity for certain purposes, including the incurring of contractual obligations such as the one in issue. The liability of its partners is purely derivative. The Court held that the partnership itself could be sued in the name of the four individual partners, notwithstanding that they were not personally liable directly on the contract, provided that the title of the action made it clear that they were sued only in their capacities as partners and not in their personal capacities.

88. In all of these cases, the English courts were seeking to grapple with the conceptual problem of a foreign representative entity capable of suing or being sued in England, but which under the foreign law created liability for its members only in a particular capacity. In the Board's opinion, the time has come to recognise that as a general rule the common law will recognise and give effect to limitations of liability which arise under an entity's constitutive law by reason of the particular status or capacity in which its members or officers assume an obligation.

89. The Board would not confine this rule to entities which have separate legal personality but would apply it to partnerships, including firms registered under the Limited Partnerships Act 1907 or similar foreign legislation, associations of persons without legal personality and also a Jersey or Guernsey trust. The editors of *Lewin on Trusts* (19th ed, para 1-001) cite, as a useful starting point in the absence of any single really satisfactory common law definition of a trust, that used in the Convention on the Law Applicable to Trusts and on Their Recognition 1985, of which this is an extract

> "… the term 'trust' refers to the legal relationship created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the

> benefit of a beneficiary or for a specified purpose." (Article 2)

Many other attempted definitions also speak of the trust in terms of relationship. Other definitions, such as that by Mayo J. in *In re Scott, Decd* [1948] SASR 193, 196, speak more in terms of a trust being:

> "[a] … duty or … aggregate accumulation of obligations that rest upon a person described as a trustee."

90. Both the TGL and the TJL avoid this choice between relationship and duty. Rather they speak (at section 1 and article 2 respectively) of the circumstances in which a trust exists, namely (citing from the TGL):

> "A trust exists if a person (a **'trustee')** holds or has vested in him, or is deemed to hold or have vested in him, property which does not form or which has ceased to form part of his own estate -
>
> > (a) for the benefit of another person (a **'beneficiary'**), whether or not yet ascertained or in existence, and/or
> >
> > (b) for any purpose, other than a purpose for the benefit only of the trustee."

91. Whether one speaks of relationship (a term akin to "relation" in partnership law: section 1 of the Partnership Act 1890 (53 & 54 Vict, c 39)), or of a special capacity arising out of the specific obligations and duties of a trust, article 32 of the TJL and section 42 of the TGL are creating a special status when the trustee transacts openly as a trustee, to which the general rule can apply.

92. The Board recognises that there are two more limited ways, which arise out of the PIL of Guernsey, of reaching the same conclusion that the proper law of the trust provides the connecting factor in this case.

93. *Strand 2 - section 65 of the TGL*: The key provision, as recognised by both the Lt Bailiff and the Court of Appeal, is section 65, although they differed in its interpretation. The difficulty arises from its extreme brevity, and the uncertainty about what is intended to be comprised within the phrase "governed

by" in subsection (1). The Lt Bailiff's view was that section 65 was only about the enforcement of the trusts of a foreign trust, not about the enforcement by third parties of their rights against the trustees. The Court of Appeal disagreed, but did not regard section 65 as, on its own, determinative of the PIL question in favour of the applicability of Jersey law, as the proper law of the trust. Rather they adopted their own analysis of the status principle, by analogy with cases on companies and partnerships.

94. The Board takes a simpler view. Part II of the TGL makes provision for a wide variety of matters affecting Guernsey trusts, ranging from validity to failure, lapse and determination, and including breach of trust (sections 39 to 44) and the power for the court to relieve trustees from personal liability for breach of trust (section 55). The personal liability of trustees to third parties is included among those matters, at section 42, (albeit probably not within section 55). By contrast section 65(1) simply provides that, for foreign trusts, governance and interpretation is regulated by their proper law.

95. On this analysis the subject matter of what section 65(1) describes as "governed by … and interpreted in accordance with" the proper law of a foreign trust is all the types of matter dealt with in relation to Guernsey trusts by Part II. The quoted phrase is just short-hand for that subject matter. The phrase includes, either within governance or interpretation, every item within Part II and, necessarily therefore, the liability of trustees to third parties, to the extent that it is within the regulatory scope of section 42. That does not mean that every aspect of the contractual relationship between a trustee and a third party is subjected to the proper law of the trust. Much, even most, of it will be governed by the proper law of the contract. Nor, of course, does section 42 provide itself the answer to an issue about the extent of the trustee's personal liability, in relation to a foreign trust. But if the same issue arises in relation to the personal liability of a trustee of a foreign trust, then it is to the proper law of that trust that section 65 directs the Guernsey court, and this Board, on appeal.

96. Nor does section 42(4) thereby apply. Even though it is a mandatory PIL provision applicable to Guernsey trusts, it has no application of its own to a foreign trust. Section 65 provides the requisite direction.

97. *Strand 3 - kindred trust regimes*: The third strand in the analysis which leads to the conclusion that the issues under this heading are governed by Jersey law begins with the appreciation that, in Guernsey, like Jersey and many states in the USA, but unlike England and Scotland, the default position of trustees who deal openly with third parties in matters affecting their trust (ie deal expressly as trustees), is that they do not thereby incur a liability which extends to their personal assets.

98. The common law, in England, Scotland and Guernsey, has always recognised that persons who happen to be trustees do not, when dealing with their own personal affairs, incur liability which can be enforced against assets which they hold on trust. Nor do dealings affecting trust A give rise to liabilities enforceable against assets which they hold as trustee for trust B. But in England and Scotland the default position is that all the liabilities which they incur, regardless whether affecting a trust or not, are nonetheless fully enforceable against their personal assets.

99. In Guernsey by contrast the default position is more symmetrical. Trustees expose their personal assets to liability for personal transactions, and their trust assets (albeit indirectly) to liability for trust transactions. It would be surprising if the immunity of a person's trust assets from exposure to personal transactions depended upon the proper law of the contract which created the relevant liability. The reason for the immunity may be said to be because the defendant does not beneficially own the trust assets. But the distinction between legal and beneficial ownership is a basic aspect of the law of trusts.

100. Suppose for example that a person, who happened to be the trustee of a trust recognised by the common law, made a contract pursuant to a foreign law which did not recognise trusts, for some personal purpose, and thereby incurred a personal liability. It would be extraordinary if the creditor could sue him in the courts of a common law country and claim to be able to enforce judgment against all assets vested in that person at law, but held by him as trustee. The court would either apply its own domestic law, or the proper law of the relevant trust, in concluding that the trust assets were immune.

101. But why, in a common law jurisdiction, in which the default position is that the trustee who, as trustee, when making a contract affecting the trust does not expose his personal assets to liability, should the courts override that immunity by reference to the proper law of the contract, any more than in the converse situation just described? The substantial symmetry between those two default positions in jurisdictions like Guernsey, Jersey and states within the USA therefore provides a real basis for treating the proper law of the relevant trust as the applicable law in preference to the proper law of the relevant contract not merely for insulating trust assets from exposure to personal transactions but also, by analogy, for insulating personal assets from exposure to trust transactions.

102. For the reasons set out in each of the three strands the Board concludes that the issues set out in para 76 above, which concern the extent of the liability of I&B as trustees of a Jersey trust, are governed by the proper law of that trust. The Board is not persuaded that the suggested difficulties for a third party who deals with a Jersey trust are such as to render inappropriate the choice of the

proper law of the trust. When a third party chooses to contract with a foreign trustee or a foreign partnership, it is only prudent to enquire how and to what extent it will be able to enforce its claims against the counterparty and, if necessary, to stipulate for additional means of enforcement, such as the taking of security.

Article 26 of the TJL and the liability of trustees of a Jersey trust for breach of trust

103. The Board's conclusion that Jersey law (including article 32) is the applicable law, that it limits I&B's liabilities to the BVI Companies but (in disagreement with the Court of Appeal) that it creates no new means of recourse by creditors against the trust fund, makes it necessary now to deal with issues about the meaning and effect of article 26, which (as amended by article 5 of the Trusts (Amendment No 5) (Jersey) Law 2012) provides as follows:

> "26. Remuneration and expenses of trustee
>
> (1) Unless authorized by -
>
> (a) the terms of the trust;
>
> (b) the consent in writing of all the beneficiaries; or
>
> (c) any order of the court,
>
> a trustee shall not be entitled to remuneration for his or her services.
>
> (1A) Despite paragraph (1), where the terms of a trust are silent as to his or her remuneration, a professional trustee shall be entitled to reasonable remuneration for services that the professional trustee provides after this paragraph comes into force.
>
> (2) a trustee may reimburse himself of herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust."

The present case is only concerned with subsection (2) but, as will appear, its meaning is best ascertained from reading it in context.

104. A principal objective of R&H and now the current trustees in this litigation has been to seek to protect the interests of the beneficiaries of the TDT by asserting claims against I&B capable of being used as obstacles to the enforcement by way of subrogation by the BVI Companies of I&B's right of indemnity conferred by article 26(2). They did so in the following ways:

(i) By asserting that the continued existence of the BVI loan liabilities was attributable to gross negligence by I&B;

(ii) By alleging other breaches of trust by I&B, capable of being brought into account as a defence to enforcement of their indemnity, in the "Guernsey 3" litigation (which the Board discusses in paras 160–191 below);

(iii) By claiming that the BVI loans were originally unreasonably incurred by I&B;

(iv) By claiming in the alternative to (i) and (iii) that the BVI loans should be treated as unreasonably incurred by reason of I&B's unreasonable failure to get them discharged, at no cost to the TDT, either as part of the restructuring enshrined in the Framework Agreement, or thereafter.

105. Those endeavours have thus far failed. As to (i), the Lt Bailiff rejected all the claims of gross negligence, and he was upheld in that regard by the Court of Appeal. The Board will dismiss the current trustees' appeal on that issue, and the related application for a retrial: see paras 124-132 below. As to (ii), the Guernsey 3 claim was in part struck out by the Royal Court, and as to the residue by the Court of Appeal. Again, the Board will dismiss the current trustees' appeal: see paras 160-191 below. All attempts to erect a gross negligence barrier to the enforcement of I&B's indemnity are now at an end. As to (iii), this claim was dismissed by the Lt Bailiff and by the Court of Appeal and has not been pursued before the Board. I&B inherited the BVI loans in August 2007. It is now settled that, at that stage, they were reasonably incurred.

106. The case advanced under (iv) has thus far received the following treatment. It was common ground before the Lt Bailiff that article 26 was part of the applicable law. But he held that to treat a liability originally reasonably

incurred but thereafter unreasonably allowed to continue as falling outside the indemnity conferred by article 26(2) would involve a misinterpretation of the statute. He said (at para 220):

> "It seeks to import into article 26(2) of the Trusts (Jersey) Law words of limitation which the legislature has not thought fit to include. I am not persuaded that the right conferred by that article is to be cut down by reading it as if the phrase 'liabilities reasonably incurred' was qualified by the words 'and reasonably permitted to subsist'. If a person interested in the trust - the present trustee or a beneficiary - contends that a trustee has acted unreasonably in permitting liabilities reasonably incurred to persist (when, for example, there was an opportunity to extinguish those liabilities), the remedy is to claim damages for breach of trust or equitable compensation. But, in a case such as the present, the question, then, is not whether the former trustees acted unreasonably in failing to extinguish the liabilities; but whether they were guilty of wilful default or gross negligence: clause 9.1 of the declaration of trust. Reading into article 26(2) of the Trusts (Jersey) Law words of limitation which the legislature has not thought fit to include would have the effect of depriving trustees, in this context, of the protection against liability for breach of trust (absent wilful default or gross negligence) which is afforded by provisions commonly included in trust instruments for the protection of professional trustees."

The Lt Bailiff therefore found it unnecessary to decide whether I&B had acted unreasonably in allowing the BVI loans to subsist in or after December 2007, although the current trustees say that there are indications in his judgment that, had it mattered, he would have found that they had acted unreasonably in that respect.

107. The Court of Appeal also found it unnecessary to decide that factual question, because they took the view (with which the Board has disagreed) that article 32 created a new direct means of recourse to creditors against the assets of the TDT which did not depend on the state of account between I&B and the beneficiaries.

108. Before the Board there have therefore been two issues debated. The first is whether the Lt Bailiff was correct in his interpretation of article 26(2). The

second, which arises only if he was not, is whether in fact I&B did unreasonably allow the BVI loans to continue as liabilities of theirs, in or after December 2007.

109. The burden of challenging the Lt Bailiff's decision on the interpretation of article 26(2) was undertaken by the current trustees. Lord Goldsmith submitted that the question whether a liability had been reasonably incurred had to be determined at the point in time when the trustees (or creditors by way of subrogation) sought to rely upon it. That required a look-back at all the facts relevant to the existence of that liability. It would be unrealistic and unworkable then to draw a distinction between the original incurring of the liability and the circumstances in which it was allowed to continue, when addressing the question whether, at that point in time, the existence of the liability was attributable to unreasonable conduct on the part of the trustees. An example of the suggested unreality of the distinction was provided in the comparison between a rent liability continued by renewing a lease, and one continued by failing to exercise a break clause.

110. In support of his argument Lord Goldsmith relied on three cases which showed, he submitted, that the court will look forward in time beyond the date upon which a liability is originally incurred, in dealing with its consequences. They are *In re Exhall Coal Co Ltd* (1866) 35 Beav 449; *Stott v Milne* (1884) 25 Ch D 710; and *Conway v Fenton* (1888) 40 Ch D 512. Those cases were not about liabilities originally reasonably incurred, where there had been a subsequent missed opportunity to have them discharged. Rather they were about liabilities which might, viewed strictly when incurred, have been unauthorised, but which were nonetheless allowed to the trustees under their indemnity because of the benefit which they had brought to the trust fund. They do not therefore assist with the present issue.

111. Attractively though these submissions were made, the Board has not been persuaded by them. The starting point is to recognise that, although the statutory indemnity in article 26(2) is broad enough to cover a multi-million pound borrowing liability reasonably incurred by trustees to a wholly owned trading company, as part of a tax-efficient way of moving money round a group of such companies, such a liability is far removed from the typical liabilities for which article 26(2) was designed. Borrowing by trustees on this vast scale to support a highly geared derivatives business is probably a very unusual activity for trustees, in Guernsey or anywhere else. Article 26 is about trustees' remuneration and expenses. Remuneration is dependent upon having the prescribed authority (unless, now, the trustee provides professional services). Expenses and liabilities incurred are within the indemnity, provided only that they were reasonably incurred. The express contemplation of subsection (2) is that they may be paid straight out of the trust fund, or reimbursed if the trustee first pays out of his own pocket.

112. Secondly, where a liability is originally reasonably incurred, unreasonable conduct by the trustees which leaves it in place rather than discharged will always be a breach of trust. But the measure of the loss thereby caused to the beneficiaries will by no means usually be equivalent to the amount of the liability. Generally speaking, liabilities are not discharged without any cost to the person liable. The discharge usually has to be paid for. The relevant breach of trust typically occasioned by the unreasonable failure to discharge the liability will consist of not applying some lesser amount of the trust funds to get rid of the liability cheaply, rather than free. Where a future liability could reasonably have been discharged early, consideration would also have to be given to adjustment of the beneficiaries' loss by reference to the time value of money. All these complexities may readily be factored into the assessment of liability for breach of trust, but it will be a rare case in which a fair outcome will be achieved by a conclusion that, as at the relevant date, the entire liability was just not reasonably incurred, because it could have been got rid of earlier.

113. Thirdly, as the Lt Bailiff noted, fairness to the trustees (and to creditors relying on their indemnity by way of subrogation) may frequently require regard to be had to the agreed limitations upon the trustees' liability for breach of trust, set out in exoneration clauses in the trust deed. Again, the blunt weapon of treating the liability which has been continued by breach of trust as not being reasonably incurred will not easily respond to that analysis.

114. Finally, the interpretation adopted by the Lt Bailiff accords better with the ordinary meaning of the word "incurred" than does the broader interpretation contended for by the current trustees. As with any legal definition, there will be difficult cases which appear to straddle the relevant line, and cases with the same economic consequences which lie on either side of it (as in the example of a break clause and a renewal of a lease). But the adoption of the wider meaning which includes the unreasonable failure to discharge a liability will itself be an even more certain recipe for uncertainty. Article 26(2) was intended to afford trustees a simple means of paying for expenses and liabilities out of the trust fund, or refunding themselves for expenses paid out of personal assets, in both cases without having to go to court for directions. If their ability to do so is put in doubt wherever a review of their conduct after originally incurring the liability gives rise to a claim for breach of trust, the beneficial effect of the statutory indemnity will be much reduced. The availability of an independent remedy for breach of trust in every such case means that there is no need to give "incurred" in article 26(2) a wider meaning than its ordinary meaning.

115. That conclusion on the question of interpretation makes it unnecessary for the Board to embark upon the factual question about the reasonableness or otherwise of I&B's attitude to the continued existence of the BVI loans in and after December 2007. It suffices to say that the complexities of the discharge of

those liabilities and the deteriorating financial circumstances of the TDT after November 2007, and the absence of compelling contradicting evidence, point away from a conclusion that it is more likely than not that I&B could have discharged the liabilities in time to avoid the claims which the TDT now faces. The claim therefore would face the issues of causation, which the Board discusses below when considering the application for a re-trial (paras 124-132).

116. Nor is it necessary or appropriate for the Board to seek to resolve the difficult question whether, if the alternative interpretation was correct, the trustee exoneration clause in the TDT would have been applicable to nullify its effect, a point on which the Board invited and received interesting written submissions. The BVI loans were liabilities reasonably incurred at the outset, sufficient to engage the indemnity in article 26(2), and that is the end of the matter.

The appeals against the Court of Appeal's refusal of interlocutory applications and the application for retrial, and the human rights challenges

117. In this part of the judgment, the Board addresses the challenges by the current trustees to the Court of Appeal's judgments of 17 February 2015 and 10 August 2015, which the Board has summarised in paras 51 and 52 above.

118. In relation to the former judgment, the current trustees seek to overturn the Court of Appeal's refusal to allow R&H to expand its grounds of appeal in order (a) to mount a detailed challenge to the Lt Bailiff's findings that the Glenalla and Thorson loans had not been novated in either July or October 2008 and (b) to seek to establish that Kaupthing would have consented to the transfer of the liability for the Glenalla and Thorson loans from I&B to Oscatello after 19 December 2007. The current trustees assert that the fact that there had been contact between the SFO and I&B's employees (para 38 above), if known at the time of the trial, would have enabled R&H to mount an argument that I&B had deliberately suppressed evidence of the novation of those loans in order to protect themselves from allegations of criminal wrongdoing by not leading the evidence of those employees most closely involved in the making of the book entries. The current trustees also argue that the Court of Appeal should have allowed R&H to adduce further evidence from Mr Robert Tchenguiz and also evidence from Mr Gunnarsson, an employee of Kaupthing who had not been prepared to give evidence during the currency of the SFO investigation, which would have supported the conclusion that Kaupthing would have consented to the transfer of liability for the Glenalla and Thorson loans to Oscatello. Thirdly, the current trustees submit that the Court of Appeal erred in refusing to allow R&H to rely on the judgment of Eder J dated 11 December 2014 concerning documents disclosed by Kaupthing in the SFO proceedings in England in support of their contention that the liquidators of the BVI companies had failed to make

proper disclosure of contemporaneous documents of Kaupthing. The current trustees argue that the failings of the Court of Appeal in determining these applications should be remedied by the ordering of a retrial.

119. In relation to the judgment of 17 February 2015, the Board observes that the Court of Appeal was exercising its discretion on a matter of case management. The central issue was whether R&H should be allowed to expand their notice of appeal. The applications to adduce fresh evidence were in substance dependent upon the success of the application to amend the notice of appeal. The Board is not persuaded that the court went outside the proper bounds of its discretion in coming to the decisions which it made. The Board reaches this view for the following six reasons.

120. First, there is the matter of timing. The applications were made in January 2015, about one year after R&H had lodged its notice of appeal and less than one month before the start of the already postponed third hearing of the appeal. That delay was not explained by the English proceedings concerning the SFO before Eder J, who had refused R&H's application to allow the use of 57 documents in the Guernsey appeal and had held both that much of the information in those documents was in the public domain and that the documents would have been of limited utility. Secondly, the Court of Appeal was entitled to conclude that it would have been unfair on the other parties to the appeal to allow those applications so close to the resumed appeal hearing. Although this was not articulated in the judgment of 17 February 2015, the Court of Appeal in its judgment of 19 April 2016 on costs disclosed how the applications had disrupted the preparations of the other parties for the imminent appeal hearing.

121. Thirdly, the Court of Appeal was fully entitled to hold that there had been no material change of circumstances since the trial. R&H was aware at the time of the trial both of the effect of the SFO investigation on their access to witnesses from Kaupthing and of the possibility of cross-examining witnesses from I&B about their involvement in the events which the SFO was investigating. Indeed, R&H had argued that they had not sought to obtain evidence from Kaupthing to avoid the risk that the SFO might view such an attempt as a basis for suspecting that Mr Robert Tchenguiz was in a collusive relationship with Kaupthing. Further evidence of the nature of the SFO investigation is not in the Board's view a material change of circumstances. Fourthly, the Board observes that the allegedly new evidence about the book entries of July and October 2008 would have been designed to support an attempt to set up the validity of those entries in support of the transfer of liability for the Glenalla and Thorson loans from I&B to Oscatello by novation. But in the absence of any documentary or other evidence that the needed company resolutions had been passed to support those book entries in accordance with I&B's established practice and in face of the apparent insolvency of many of the BVI companies by the time of those entries,

it is difficult to see what the evidence could have established. This part of the application appears to have been a speculative attempt to undermine the credibility of I&B's employees which was being pursued in the absence of any evidence to support the existence of the authorisations which were needed to support the alleged novation.

122. Fifthly, the evidence seeking to challenge the completeness of the disclosure by the liquidators of the BVI companies was addressing a challenge which had already been addressed, both by the Lt Bailiff and also in the SFO proceedings in England to which both Mr Tchenguiz and R&H were parties. It thus involved the renewal of a failed challenge. Sixthly, even if it had been established that Kaupthing would have consented to the transfer of I&B's obligations under the Glenalla and Thorson loans to Oscatello on or after 19 December 2007, that would not have been sufficient to establish the case of gross negligence against I&B, because, as discussed below, R&H had not demonstrated the practicability of such a transfer in the financial circumstances of the companies after 19 December 2007.

123. In the Board's view, even if the Court of Appeal had erred in its exercise of discretion, the fourth and sixth reasons above would have militated against awarding a re-trial as a remedy.

124. The Board now turns to the current trustees' challenge to the Court of Appeal's refusal to order a retrial in its judgment of 10 August 2015. In short, the current trustees submit that the Court of Appeal failed to deal with R&H's challenge to the Lt Bailiff's finding that I&B had not been grossly negligent in failing to deal with the Glenalla and Thorson loans, either at the time of the Framework Agreement or subsequently before the collapse of Kaupthing. The challenge to the finding of no negligence in relation to the novation of the loans in August 2007 is no longer advanced. The current trustees contend that the Lt Bailiff did not deal with this important part of R&H's case and, having allowed 18 months to pass before issuing his judgment, had misremembered, misunderstood or failed to deal with the evidence.

125. Because of this challenge and also in view of the arguments at the appeal hearing as to the scope of article 26 of the TJL, the Board invited the parties to submit lists of the relevant evidence which the Board should consider. The Board has considered that evidence and its findings in paras 3-39 above are the result of that consideration.

126. It is true that the Lt Bailiff dealt with this issue very briefly in his judgment between paras 247 and 252. In particular the Board accepts McNeill

JA's comment that the Lt Bailiff's determination of the case against I&B in the period after 19 December 2007 had been expressed "in somewhat telegraphic terms" in para 251 of his judgment. The Lt Bailiff did not make many findings of primary fact to support his conclusions. Nonetheless, having considered the relevant evidence, the Board is satisfied that his conclusions are a fair and balanced reflection of the evidence which was led before him, and that his delay in producing his judgment does not support the view that his conclusions are unsafe.

127. First, in relation to the period before 19 December 2007, no criticism is now made of I&B in relation to the Glenalla and Thorson loans at any time before R20 informed them of their intention to restructure the finances of the TDT in what later became the Framework Agreement. The complaint is that I&B should have acted more promptly to achieve the "ring-fencing" of the TDT's liability to Kaupthing to the assets which were placed in the Oscatello structure. But under the TDT trust deed, any such failure would give rise to liability for breach of trust only if it amounted to gross negligence (para 4 above).

128. The Lt Bailiff held that by December 2007 there was an urgent need to have the Framework Agreement in place. He stated (para 247) "it would have been unreasonable, and unacceptable to the other parties involved, for [I&B] to hold up the execution of that agreement while they sought to deal with the loans problem". In the light of the Board's findings in paras 12 and 13 above, the Board is satisfied that there is an ample basis in the evidence for those conclusions. I&B did not know of the proposed restructuring until 28 November, by which time it had become critically important to retain Kaupthing's support, in order to achieve a re-financing of the loans and obtain further funds to meet the continuing margin calls. While I&B might have drawn attention to the need to address their continuing liability for the Glenalla and Thorson loans, their failure to do so in the lead in to the Framework Agreement has not been shown to have led to any loss. It has not been demonstrated that the liability could have been novated in the limited time available before 19 December. In any event, any failure to do so in the circumstances did not amount to gross negligence.

129. I&B's failure actively to pursue the resolution of the problem of the Glenalla and Thorson loans after 19 December 2007 was a serious failing, but the problem for the current trustees is that it has not been demonstrated that that failing caused any loss to the TDT. The Lt Bailiff (para 250) was not persuaded that I&B could have transferred the liability for those loans into the Oscatello structure without the consent of Kaupthing and also of all the parties to the Framework Agreement. R&H led no evidence as to how this was to be achieved. The general statements of confidence expressed by Mr Tchenguiz and Mr Brown had not been substantiated. The Lt Bailiff concluded (in para 251):

> "the process [for extinguishing I&B's liability for the loans] would have been complex and lengthy. It would have become increasingly more difficult as time went by; given the deteriorating market conditions throughout 2008. It may be said that [I&B] should have done more than they did, following entry into the framework agreement, to achieve that objective; but I am not satisfied that the failure of [I&B] to achieve the objective, before the collapse of Kaupthing in October 2008, can be described as amounting to a serious and flagrant degree of negligence."

130. The Board agrees with his assessment. In paras 25-36 above, the Board has summarised the facts on which the Lt Bailiff had to make his judgment. In particular the Board is persuaded that R&H failed to show on a balance of probabilities that any failing by I&B in this regard caused loss to the TDT. The continuing falls in the value of the companies within the Oscatello structure, in the days leading up to and immediately after the execution of the Framework Agreement, would have made it very difficult for I&B to transfer their liabilities into the Oscatello structure. The directors of Glenalla, Thorson, Oscatello and Eliza would have had to act in accordance with their fiduciary duties to each of those companies in the context of an actual or potential insolvency. Kaupthing would have had to consider its own interests in a context in which a significant proportion of the £264m of assets which were supposed to be within the Oscatello structure had disappeared (paras 31-33 above). Within about three weeks of the Framework Agreement, Kaupthing was requesting further security for its continued support (para 30 above). Eventually, in early April 2008 further security had to be provided from assets of the TDT outside the Oscatello structure and also from the TFT (para 34 above).

131. Against this background, the Board is satisfied that the Lt Bailiff did not err in concluding that R&H had not established that they as trustees of the TDT had suffered loss caused by gross negligence. The Court of Appeal was fully entitled to reach the view (in para 112 of its judgment) that given the difficulties which the financial circumstances created, the Lt Bailiff was entitled to express the views which he did.

132. In conclusion, notwithstanding the delay in the issuing of the Lt Bailiff's judgment, the Board is satisfied that R&H received a fair trial of their case. The fact that one of the assets of a company within the TDT, against which the BVI companies may seek recourse, is the family home of Mr Robert Tchenguiz has led R&H to assert that his right to respect for family and personal life, under article 8 of the European Convention on Human Rights, requires the judgment to be justified by a proportionality exercise under article 8(2). The current trustees cite *R (JL) v Secretary of State for Defence* [2013] PTSR 1014 and

Manchester City Council v Pinnock (Secretary of State for Communities and Local Government (Nos 1 and 2) intervening) [2011] 2 AC 104 in support. This is untenable. The current proceedings are not part of any legal process to dispossess Mr Tchenguiz of his leasehold interest in his family home. The proceedings are concerned with establishing the rights of private parties, namely, so far as relevant, whether Glenalla and Thorson can enforce their contractual rights against the assets of the TDT and whether Oscatello has a claim in restitution which it can enforce in like manner. Whether or not the enforcement of any such claims will result in an action for possession of Mr Robert Tchenguiz's home is unknown and may depend on what he does in response to a judgment against the current trustees. Further, the Board observes that there is nothing in the latest judgment of the UK Supreme Court in this field, *McDonald v McDonald* [2017] AC 273, which suggests that Mr Robert Tchenguiz's article 8 rights are relevant to the questions in this appeal or to the manner in which appellate courts address those questions. In the Board's view the human rights challenge is wholly without merit. The application for a retrial should therefore fail. And the Board will humbly advise Her Majesty to that effect.

Oscatello's claim in restitution

133. The issue under this head relates to a payment of £39,386,354.80 made on 21 December 2007 by Oscatello to Kaupthing in discharge of a liability owed up to that point by I&B to Kaupthing. In the courts below, one analysis of this transaction was that it involved Oscatello in the making of a loan to I&B by use of which the latter discharged their liability to Kaupthing. Both courts below rejected that analysis, principally on the basis that its only basis consisted in book entries made by Mrs Bleasdale in circumstances where she had no authority on behalf of any of the parties involved to agree any such loan.

134. The suggestion of a loan has not been pursued before the Board. Instead, Oscatello has advanced as an alternative analysis that it is entitled to recover in restitution on the basis that its discharge of I&B's debt took place at the request or with the consent of I&B, and/or was freely accepted by I&B in circumstances making it unjust that the latter should retain the benefit thereof without indemnifying Oscatello.

135. The Lt Bailiff accepted Oscatello's case on this basis. The Court of Appeal reached the opposite conclusion, and rejected Oscatello's claim in restitution. Oscatello now appeals to the Board.

136. It is necessary to put the payment made by Oscatello in discharge of I&B's debt to Kaupthing into context. The context, which the Board has set out

in paras 8-12 above, was, in summary, (a) the 20 August 2007 loan facility of up to £100m, (b) Mr Robert Tchenguiz's personal guarantee of indebtedness under the facility, (c) the transfer of assets from the TFT to the TDT on 24 August 2007 (d) on the same date the replacement of Investec by I&B by deed of novation as debtors under the 20 August 2007 loan facility, with Mr Tchenguiz's personal guarantee remaining in place, and (e) the extension of this loan facility to £122.5m by 22 November 2007.

137. Thereafter, as discussed above, it was decided that there should be a new loan facility and refinancing, and the Framework Agreement was entered into on 19 December 2007 for that purpose. Under the Framework Agreement, various shareholdings previously held by the TDT were transferred to Oscatello, which was in turn an indirect subsidiary, through Eliza of the TDT. On the same date, Oscatello entered into the Overdraft Loan Agreement with Kaupthing, where underKaupthing agreed to make available to Oscatello financing of up to £371m (clause 2.1), on the security of the Share Charge over the shareholdings transferred to Oscatello by the TDT. Under clause 2.2, the express purpose of the loan was "to refinance current debt as listed in Schedule 1, to meet potential margin calls in the Borrowers subsidiaries trading accounts and the payment of interest in accordance with article 3".

138. Schedule 1, entitled "Current debt in the structure that will be refinanced", lists five borrowers and the sums owed by them to Kaupthing at 19 December 2007. The relevant borrowings all arose under the loan facility dated 20 August 2007, and one underlying purpose of their refinancing was to eliminate Mr Tchenguiz's exposure as a personal guarantor of such indebtedness. All five borrowings were duly discharged by Oscatello, using moneys drawn down under the Overdraft Loan Agreement (which is referred to in the documentation as "the Iceland Loan"). Four of the listed borrowers were companies which were under the Framework Agreement to become subsidiaries of Oscatello, namely Limebrook Ltd, Thorson, Daniella Properties Ltd and Violet Capital Group Ltd. These four companies were listed as owing amounts ranging from some £4.8m to £63.8m, making in total around £107m. The consequences of the discharge of their borrowings were, as between each of them and Oscatello, regulated by formal loan documentation, as recorded in para 126 of the Lt Bailiff's judgment. No claim has in fact been made by Oscatello against any of the four companies under such loan agreements or otherwise, because, the Board was told, they are all insolvent. I&B's position is different. Their indebtedness (by mistake somewhat under-stated in Schedule 2) was duly discharged by Oscatello by payment of the £39,386,354.80 to which the restitution claim relates. It is now accepted that no loan agreement was at any point agreed to cover the consequences of such discharge.

139. It is necessary in these circumstances to examine the terms of the Framework Agreement and Overdraft Loan Agreement more closely. As stated in para 15 above, the parties to the former were I&B, Kaupthing and its subsidiary Isis, New Ortland (the vehicle of the outside investors), Eliza (a 100% subsidiary of the TDT), Oscatello and Silverville. The recitals to the Agreement recorded inter alia that (A) the parties wished to set out the terms on which they would invest in a new corporate structure to hold certain interests currently owned within the TDT, that (B) "subject to the terms and conditions of this Agreement" they had agreed that to facilitate the transaction, TDT would make an equity investment in each of Eliza and Oscatello and each of Isis and New Ortland would enter into a profit participation loan with Eliza, and that (C) TDT and Silverville would transfer their shareholdings in various companies ("the companies' Shares") to Oscatello and would also transfer their shares in Oscatello ("the Oscatello Shares") to Eliza "in consideration for shares to be issued in Eliza in each case subject to the terms and conditions of this Agreement".

140. The terms following the recitals were prefaced by the statement "IN CONSIDERATION OF THE MUTUAL PROMISES AND UNDERTAKINGS HEREIN THE PARTIES AGREE AS FOLLOWS: …" Clause 4.1 provided for completion to take place in accordance with Schedule 2 and clause 4.2 provided that

> "At completion the Parties shall do those things required of them in Schedule 2 …"

The "Completion Obligations" in Schedule 2 included the delivery by Kaupthing to Oscatello and by Oscatello to Kaupthing of "duly executed counterparts of the Iceland Loan and the Oscatello Share Charge". In the latter case, the TDT also undertook to procure such delivery by Oscatello.

141. Clause 3.1 of the Agreement provided that "On and subject to the terms of this Agreement and subject to clause 4.1" the TDT and Silverville should transfer the companies' Shares to Oscatello and the Oscatello Shares to Eliza, and further

> "(D) procure that Oscatello promptly grants the Oscatello Share Charge in favour of Kaupthing as security for all of Oscatello's obligations under the Iceland Loan."

Clause 3.2 provided that

"The consideration payable by each of Oscatello and Eliza for the Shares and the Oscatello Shares respectively is as follows:

(A) By Oscatello:

(i) to TDT: the issue of 169,672,450 £0.01 shares in the capital of Oscatello; and

(ii) to Silverville: the issue of 94,786,000 £0.01 shares in the capital of Oscatello,

With £0.01 credited as paying up the par value and £0.99 credited as premium on the issue of each share, and together with the single no-par share currently held by TDT in Oscatello, being the "Oscatello Shares", and

(B) By Eliza:

(i) to TDT: the issue of 169,672,450 £0.01 shares in the capital of Eliza; and

(ii) to Silverville: the issue of 94,786,000 £0.01 shares in the capital of Eliza,

With £0.01 credited as paying up the par value and £0.99 credited as premium on the issue of each share."

142. Clause 5 headed "Governance" contained undertakings by "Each of TDT (in respect of itself and Eliza and Oscatello) and Eliza and Oscatello" to Silverville, Isis and New Ortland "(B) to procure that the Business shall be properly managed in all material respects in accordance with the Transaction Documents … [and] (C) to observe the provisions of the Transaction Documents …". The Transaction Documents include by definition in clause 1 the Iceland Loan.

143. I&B's borrowing from Kaupthing was discharged on 21 December 2007 by in effect instructing Kaupthing to debit Oscatello with corresponding borrowing under the Overdraft Loan Agreement, and to credit I&B with

repayment accordingly. Mr Robert Tchenguiz's personal guarantee was discharged at the same time. Early in 2008, Mrs Bleasdale, who was a signatory of the Framework Agreement for I&B, summarised her understanding of the correct treatment of the repayment, by indicating that book entries should be made showing Oscatello as having made a loan to I&B, which the latter had used to repay Kaupthing. While it is no longer suggested that the loan analysis is sustainable, or that Mrs Bleasdale had authority to bind any of the parties to any loans, the Lt Bailiff nevertheless attached significance to her evident belief that Oscatello did not, by discharging I&B's borrowing, intend to confer a gratuitous benefit on I&B (judgment para 128). In the Board's opinion, Mrs Bleasdale's view about the consequences of performance of the Framework Agreement and Overdraft Loan Agreement is not an admissible aid to their interpretation or to understanding their legal effect.

144. The question whether Oscatello's use of moneys borrowed under the Overdraft Loan Agreement to discharge I&B's prior indebtedness to Kaupthing gave rise to a right of restitution against I&B must be answered by reference to the terms of the Framework Agreement and Iceland Loan in the light of the general principles governing restitution. The parties accept the four-part approach outlined by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227 and recently endorsed in *Investment Trust Companies v Revenue and Customs Comrs* [2017] 2 WLR 1200, para 24. This involves asking

(i) Has the defendant benefited in the sense of being enriched?

(ii) Was the enrichment at the claimant's expense?

(iii) Was the enrichment unjust?

(iv) Are there any defences?

145. Since I&B and Oscatello are separate legal entities, the answers to the first two questions are on the face of it in the affirmative. In economic terms, however, the matter can be seen differently. Since I&B were (through their shareholdings in Silverville and Eliza) 100% owners of Oscatello, I&B would be no better or worse off, whether the discharge of their indebtedness was effected by Oscatello with or without recourse to I&B. If with recourse, I&B would bear the loss directly. If without recourse, they would bear it through the diminution in value of their subsidiary, Oscatello.

146. The focus of the submissions has however been on the third criterion for a restitution claim, the need for an unjust factor. The point made in the preceding paragraph is capable of feeding into this, but the rival submissions have concentrated on (a) whether I&B should be treated as having requested or consented to or freely accepted the discharge by Oscatello of their debt, or (b) whether, on the contrary, the Framework Agreement and Overdraft Loan Agreement should be treated as regulating the position contractually in a manner leaving no scope for the law of restitution. Both parties accept that the existence of an agreed contractual regime legislating for the situation which has arisen will render "the imposition by the law of a remedy in restitution both unnecessary and inappropriate": *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161, 164, per Lord Goff of Chieveley. In that case, charter hire, payable by the charterers 15 days in advance, had been assigned to a third party. The appeal related to hire duly paid in advance for a 15 day period, throughout the whole of which the vessel proved in fact to be off hire, and after the end of which she continued off hire until the charter was justifiably terminated by the charterers on account of the owners' repudiation. The owners were in these circumstances under an express obligation (and, even in the absence of an express obligation would have been under an implied obligation) to repay the charter hire overpaid, but were not worth powder and shot. The charterers claimed, unsuccessfully, to recover the overpaid hire from the third party assignee to whom it had been paid. Lord Goff said that, even between the charterers and owners, the existence of a contractual scheme governing the payment and repayment of hire meant that restitution had no role to play. As between the charterers and the third party, the third party was an assignee who had bought the right to receive the advance hire and there was nothing in the assignment that even contemplated, still less imposed, on the assignee an additional obligation to repay overpaid hire so received.

147. In the present case, the Framework Agreement and Overdraft Loan Agreement constitute an agreed contractual regime, which contemplates the discharge by Oscatello of I&B's indebtedness to Kaupthing, but is silent as to any right of indemnity on the part of Oscatello against I&B. The question is what inference is to be drawn from that silence. Does it leave place for the application of the general principle identified by the Lt Bailiff, that if A pay B's debt to C, at the request or with the consent of B, an obligation arises on B to repay A? Or is the inference that the parties intended the Framework Agreement and Overdraft Loan Agreement to reflect and finalise their positions inter se without further adjustment, as the Court of Appeal concluded?

148. On this question, Oscatello submits, firstly, that the Framework Agreement is careful to define the consideration which Oscatello received and gave, in terms which mean that Oscatello cannot be regarded as having taken on the burden of discharging I&B's indebtedness as a quid pro quo for the receipt from I&B of the companies' Shares: see clauses 3.1 and 3.2. Secondly, it submits

that, although the Framework Agreement, and the Overdraft Loan Agreement to which it cross-refers contemplated and foresaw the discharge of I&B's indebtedness by use of the Iceland Loan, nothing in these documents regulated, or limited the ordinary consequences of, such discharge. Thirdly, it submits that there is no other basis for treating Oscatello as having, voluntarily and at its own cost, discharged I&B's indebtedness to Kaupthing, without any corresponding right to repayment by I&B.

149. In response, I&B point out that clauses 3.1 and 3.2 were designed to identify the companies' Shares and Oscatello Shares which the TDT and Silverville were to transfer to Oscatello and Eliza, and the numbers, par value and premium of the shares which Oscatello and Eliza were to give in return, the latter being matters of importance for company law and tax reasons, but that there is no inference that this was the limit of the parties' mutual commitments. It is clear from the introductory words of the Framework Agreement ("IN CONSIDERATION OF THE MUTUAL PROMISES AND UNDERTAKINGS HEREIN …") and other provisions such as clauses 4.2 and 5.1 that TDT and Oscatello undertook further responsibilities. These included Oscatello executing and observing (and the TDT by clause 5 undertaking to procure that Oscatello observed) the terms of the Overdraft Loan Agreement, which in turn meant discharging the I&B's indebtedness to Kaupthing.

150. In the case of the four other companies whose borrowings were discharged out of the Iceland Loan, formal loan documents were arranged to regulate the position. In the case of I&B, no such loan arrangement was made. The overall aim of the Framework Agreement was that Oscatello should stand in the shoes of I&B in relation to borrowings from Kaupthing, receiving sufficient assets from I&B to provide appropriate security to Kaupthing to enable this to occur. It would be understandable in this situation if Oscatello not only replaced I&B as the effective borrower from Kaupthing, but did so on a non-recourse basis. As I&B point out, it would not affect I&B if they bore the cost through a diminution in the value of their 100% subsidiary, Oscatello, rather than by having to indemnify Oscatello. The former would appear more consistent with a general aim that Oscatello take over the companies' Shares with concomitant responsibility for borrowings from Kaupthing. Viewing the arrangements made as a whole, Oscatello's undertaking of responsibility for discharging I&B's indebtedness can be seen to have been an element of an overall package of mutual commitments, leaving no necessity or place for restitution to play a role.

151. The Board is, like the Court of Appeal, unpersuaded that there is any scope for the operation of a principle of restitution in the present case, essentially for the reasons which I&B have advanced. The interrelated Framework Agreement and Overdraft Loan Agreement operate coherently and

understandably without any basis for regarding them as involving a tacit understanding that I&B would repay Oscatello. They and the discharge which Oscatello arranged do not involve or give rise to any unjust factor, which could ground a claim in restitution. The fact that I&B thereafter had and retained the benefit of the discharge cannot in these circumstances constitute any sort of free acceptance that would be capable of giving rise to such a right. It was simply the result of the mutual arrangements made by the Framework Agreement and Overdraft Loan Agreement.

152. For these reasons, the Board will humbly advise Her Majesty that Oscatello's appeal against the judgment of the Court of Appeal in this respect should be dismissed.

The appeals in relation to costs

153. The parties have managed to settle some of their disagreements concerning costs. The parties have agreed that, contrary to the Court of Appeal's order of 19 April 2016, section 42 of the TGL, which applies only to Guernsey trusts, does not apply to costs orders made in these proceedings. The Board agrees. Further, the current trustees and R&H have conceded that article 32(1)(a) of the TJL does not apply to costs orders which I&B obtained from the Court of Appeal against R&H in the order of 19 April 2016. Again, the Board agrees. R&H's costs appeal falls to be determined accordingly.

154. There remain two costs issues for determination by the Board. First, there is the question of whether article 32 of the TJL can apply to costs orders made in favour of the BVI companies, and, secondly, whether the costs order made against R&H for the interlocutory applications requires to be set aside or varied. The Board deals with each in turn.

155. In the Board's view, article 32(1)(a) cannot apply to costs orders made in the Guernsey proceedings. This is because there is a separate regime for costs governing Jersey trusts in the TJL. Article 53 of the TJL, which is located among the provisions of general application in Part 4 of the TJL, provides:

> "The court may order the costs and expenses of and incidental to an application to the court under this Law to be raised and paid out of the trust property or to be borne and paid in such manner and by such persons as it thinks fit."

Article 51(1) of the TJL provides that a trustee may apply to the court for direction concerning the manner in which the trustee may or should act "in connection with any matter concerning the trust". Article 53 empowers the Jersey courts to make costs orders in relation to such applications and confers a wide discretion on the courts which, in the Board's view, is inconsistent with reading the phrase "any transaction or matter affecting the trust" in article 32 as covering the award of costs.

156. As article 32 of the TJL would not govern the award of costs in an application to the Jersey courts, it cannot be a provision governing the status of Jersey trustees which the Guernsey courts would have to apply under section 65(1) of the TGL when making an award of costs against such trustees. It follows therefore that the appeal by the BVI companies against the costs judgment of 19 April 2016 should be allowed to the extent of holding that neither article 32 of the TJL nor section 42 of the TGL applies to limit the liability of I&B and R&H for the orders for costs under paras 1(a)-(d) and 2(e) and (g) of the order of 19 April 2016.

157. There remains the ground of appeal raised by R&H, namely whether the Court of Appeal erred in its discretion in its costs order of 19 April 2016 in making R&H personally liable on the indemnity basis for the costs of I&B and the BVI companies in relation to the interlocutory applications which the Court of Appeal refused on 17 February 2015 and which the Board have discussed in para 51 above. In its order of 19 April 2016 the Court of Appeal declared that R&H's liability was personal and did not extend to the trust property of the TDT.

158. The Court of Appeal in paras 113-125 and 143 of its judgment dated 19 April 2016 discussed the costs relating to the interlocutory applications in the context of submissions on behalf of I&B and the BVI companies that R&H had behaved in a manifestly unreasonable manner or abusively in bringing forward those applications shortly before the commencement of the further and already-delayed hearing of the appeal on 16 February 2015. The applications, which involved large volumes of papers, disrupted the preparations of the other parties for the continued appeal hearing. R&H in several respects were seeking relief which had already been sought and refused. The matters raised in the proposed amendments to the notice of appeal, including the existence and implications of the SFO investigation, could have been raised before the Lt Bailiff at the trial. There was no need to rely on documentation disclosed in the English proceedings and thus await the permission of the English courts to use the documentation, which permission had not been obtained. There was no excuse for the delay, which followed a pattern manifested by R&H's repeated applications to the Lt Bailiff before he issued his judgment (see para 45 above). The Court of Appeal concluded (para 143):

> "when one looks at the interlocutory applications … we consider, essentially for the reasoning of the other parties, … that the behaviour of [R&H] cannot be justified by reference to surrounding circumstances and can only properly be characterised as a determined attempt to derail the appeal process."

159. R&H attack this finding on the basis first, that they had participated in the litigation with the benefit of two *Beddoe* orders (*In re Beddoe, Downes v Cottam* [1893] 1 Ch 547) and that the applications arose within the four corners of the litigation. But that is no answer to the charge of unreasonable behaviour in the conduct of the litigation. Secondly, R&H challenge the finding by the Court of Appeal of a collateral purpose behind the applications. While it is correct, as R&H assert, that the Court of Appeal in its judgment of 17 February 2015 did not state that they had delayed making the applications in order to disrupt the appeal, the court in that judgment referred to the pre-existing delay in holding the continued appeal hearing and stated robustly that R&H's contentions that they could not have formulated their full grounds of appeal earlier "do not withstand scrutiny" for the reasons which they set out. Thirdly, R&H assert that they had no conceivable independent reason to want to disrupt the appeal. But it was open to the court, which had dealt with their several applications, to infer from the history of the earlier applications in the litigation, and from the absence of any justification for the timing of the interlocutory applications on the eve of the continued appeal hearing, that there was an attempt to postpone that hearing. R&H have therefore advanced no sufficient argument to persuade the Board to interfere with the Court of Appeal's exercise of its discretion.

The second litigation

Factual background

160. On 23 June 2013 R&H raised fresh proceedings in Guernsey (which the parties have referred to as "Guernsey 3") against I&B in which they alleged that I&B had acted in breach of trust in (i) accepting the recommendations of R20 as to investments without proper inquiry after August 2007, (ii) accepting the novation of the Kaupthing loan in August 2007 without excluding recourse against the trustees of the TDT, (iii) failing to diversify the portfolio of the TDT, which was concentrated on medium to long term investments, and to hedge against a downturn in the market, (iv) failing to keep adequate books and records of the TDT and to keep them separate from other records and confidential, (v) failing to monitor Kaupthing's financial position in 2008 and (vi) mishandling the litigation commenced by I&B.

161. In the same proceedings R&H claimed that I&B had acted in breach of trust in their handling of a litigation concerning the proceeds of the sale of shares in Somerfield, the former owner of a supermarket chain. The background to this claim was as follows. The TFT had invested £141m in Somerfield through a subsidiary, Tazamia Ltd ("Tazamia"), ownership of which was transferred to the TDT in August 2007. Tazamia was one of the 11 BVI companies which became part of the Oscatello structure and its shares had been given in security to Kaupthing. When Co-operative Ventures Ltd purchased the shares of Somerfield in 2008, Tazamia received £127m for its stake. After the collapse of Kaupthing in October 2008, I&B as trustees of the TDT and R20 sought to protect those proceeds from enforcement by Kaupthing by transactions in November 2008, but in December 2008 Kaupthing commenced proceedings in the BVI to set aside those transactions. I&B counterclaimed seeking a declaration that they were entitled to retain those proceeds. They relied on an oral agreement, said to have been reached in Scott's restaurant in London on 7 April 2008 between Mr Robert Tchengiuz and Mr Brown of R20 on behalf of the TDT and Mr Sigurdsson of Kaupthing, that Kaupthing and Isis would waive the requirements of the Framework Agreement to allow the TDT to receive the proceeds directly from Tazamia ("the Scott's Agreement").

162. In February 2009, Isis brought proceedings in the High Court in England against I&B, Oscatello and Kaupthing for breaches of the Framework Agreement ("the English proceedings"). In those proceedings, Kaupthing alleged that the November 2008 transactions were a fraudulent attempt to undermine its security. I&B counterclaimed relying on the Scott's Agreement for their entitlement to retain the proceeds for the TDT. Eventually, the English proceedings were settled on 14 June 2010 by the withdrawal of each side's claims and no award of costs, and the transactions to ring-fence the Somerfield proceeds from Kaupthing were unwound. As a result, the Somerfield proceeds were applied in accordance with the Framework Agreement and so were not made available to I&B as trustees of the TDT.

163. In the Guernsey 3 proceedings, R&H criticised I&B for their mishandling of the English proceedings and for an alleged conflict of interest which, it was said, caused them to enter into the disadvantageous settlement agreement in June 2010. I&B applied to strike out the cause (i) as an abuse of process as the majority of the claims relating to the TDT's investments could and should have been raised in the proceedings raised in Guernsey in March 2010 ("Guernsey 1") and (ii) because there were no reasonable grounds for bringing the other claims relating to the TDT investments or the claims relating to the Somerfield litigation, or, alternatively, for summary judgment against such claims.

164. In a judgment dated 11 November 2015, Deputy Bailiff McMahon held that the new proceedings overlapped with R&H's claims in the earlier

proceedings which I&B had initiated and that the new claims, which the Board has summarised in para 160 above, could have been pursued in the earlier proceedings. But because I&B had not established that R&H should have raised those claims in the earlier proceedings, the new proceedings were not an abuse of process and would not be struck out. He required that the case concerning the maintenance of the TDT records be re-pleaded and entered summary judgment against the case concerning the handling of the prior proceedings.

165. The Deputy Bailiff also entered summary judgment against the claims relating to the Somerfield litigation. In his judgment, he reviewed the legal advice which I&B had received from their solicitors and from Stephen Auld QC, which (a) expressed grave doubts as to whether the Scott's Agreement, about which I&B and senior figures in Kaupthing were thought to have been unaware at the time, was legally binding, and (b) questioned the prospect of recovery even if I&B were successful in setting up the Scott's Agreement because an unsecured claim for the Somerfield proceeds could be undermined in the insolvency of the BVI companies. After an unsuccessful mediation, Mr Auld advised that I&B did not have better than a 30% chance in setting up the terms of the Scott's Agreement for which they argued, and that, even if they succeeded in that, the realistic prospects of ever receiving any money were less than 10%. When Mr Auld later saw a witness statement from Mr Sigurdsson, he reduced his estimate of establishing the Scott's Agreement to no higher than 20%. Mr Auld advised I&B urgently to take steps to settle the case and warned that otherwise that they would probably lose at trial and be ordered to pay costs on an indemnity basis, which were estimated at £5m. Failing settlement, he advised I&B to discontinue their counterclaim in order to avoid an indemnity costs order after trial. The Deputy Bailiff held that I&B were entitled to act on the advice of their legal advisers in settling the Somerfield litigation on the terms which they did. The outcome was reasonable in the circumstances and R&H had no real prospect of succeeding in a claim that I&B had been grossly negligent in their conduct of the Somerfield litigation.

166. Both parties appealed that judgment to the Court of Appeal (James W McNeill QC, Clare Montgomery QC and Jonathan Crow QC), which upheld the Deputy Bailiff's decision to enter summary judgment against the claim relating to the Somerfield litigation. As discussed below, the court held that this claim was properly characterised as a claim for the loss of a chance. The court dismissed the appeal principally because in light of the legal advice which I&B had received, the chance of obtaining a better settlement was fanciful.

167. In relation to the claims about the mismanagement of the TDT which the Board has summarised in para 160 above, the Court of Appeal disagreed with the Deputy Bailiff for the reasons which the Board discusses in paras 180-183 below.

The appeal on the second litigation

168. In addressing the Guernsey 3 proceedings, the Board deals first with the Somerfield claim, on which the courts below were agreed.

The Somerfield claim

169. The claim is for alleged misconduct by I&B in respect of their decision to settle proceedings arising out of the sale of the former supermarket chain, Somerfield. The background facts have been summarised above (see also para 18 of the judgment of the Deputy Bailiff). It is alleged in short that the proceedings could and should have been settled on better terms, and that the failure to do so was attributable to the mixed motives of I&B, or to their misconduct of the proceedings, or both.

170. The major difficulty facing that claim, as found by both the courts below, was that the decision to settle had been made in the light of strong advice by leading counsel, Stephen Auld QC (summarised in para 20 of the Deputy Bailiff's judgment) that the prospects of success were minimal. The central conclusion of the Court of Appeal was expressed thus (paras 144-147):

> "144. Upon the basis of the advice given to the defendants by their legal team, the chance of achieving a better final result than was attained in the settlement was fanciful. There is no contradictor to the April 2010 statement and advice by leading counsel, whose view was that the chance of succeeding on a critical matter was no more than 30% and that the realistic prospects of ever receiving any money were less than 10%. As he explained, indeed, the defendants had always considered that they would not be successful at trial. After the failed mediation, the advice in June 2010 was, unsurprisingly, that continuing with the counterclaim in both England and in the BVI could well expose the defendants to an order for indemnity costs.
>
> 145. Applying the legal test which we have outlined above, at para 100, to the situation which the Somerfield proceedings had reached, we are satisfied that the only proper conclusion is that the prospects of success for them were fanciful. The percentages identified are clearly of a level at which only the most committed or foolhardy litigant proceeds, at his or her own potential detriment, to a full

> blown expensive trial with the prospect of a damaging award of costs. It would be a rare position in which to see a trustee.
>
> 146. Upon the most generous consideration of the position of the plaintiff, although it has put forward, both before this court and below, numerous indications that other matters might be pursued, there has been no real indication that there is a serious likelihood of a point of substance being found which would have altered the prospects for the defendants of achieving any settlement based upon actual evaluation as opposed to nuisance value.
>
> 147. This is not a case, for example, where there is a suggestion of failure to carry out a critical step, or a suggestion of loss of a critical piece of evidence or of a failure in diligence: all that has been done is to suggest, in effect, that certain matters earlier identified by the defendants' leading counsel, might be worthy of exploration. But there is not even an arguably firm suggestion that any one of those matters has a clear prospect of leading to different prospects of success which, upon that hypothesis, were lost to the defendants as trustees."

Although the court regarded that analysis as determinative of the appeal, it went on to consider and dismiss ten separate matters of complaint which had been raised by R&H (paras 149-161). In particular, it noted that, apart from the evidential difficulties facing the claim, the insolvency of Oscatello provided a further obstacle to any practical benefit emerging (para 152).

171. Before the Board, Mr Hollander QC, for R&H, criticises the Court of Appeal for dismissing out of hand what is said to be a relatively substantial body of evidence to suggest that I&B were acting in their own interests rather than those of their beneficiaries. These are set out under no less than 12 points. They include, for example, the allegations of fraud made against the trustees in those proceedings, which it is said gave them a powerful personal motive for wanting to settle; lack of notice to the beneficiaries of the settlement negotiations; legal advice received by the trustees of potential conflict of interest, and failure to take steps to deal with it; failure to seek the blessing of the Royal Court for the settlement; and finally information which might have emerged from disclosure by the Serious Fraud Office. All these are said to amount to "significant circumstantial evidence" that I&B were motivated by considerations other than the perceived legal merits of the claim. Similarly a number of points are put

forward to challenge the view that alleged misconduct by I&B could have made no difference to the merits of the claim. It was not sufficient simply to rely on the advice of leading counsel, which could not be determinative; or to dismiss the possibility of further supportive material emerging.

172. Against that, Mr Taube QC for I&B, asks the Board to support the concurrent view of the courts below. Not least he notes the emphatic terms of Mr Auld's final advice, that there was "no realistic possibility" of the claim succeeding at trial in relation to the Scott's Agreement, that the probable result would be an adverse order for indemnity costs, and that, in his view, continuation of the proceedings would not be a proper use of trust moneys.

173. Without disrespect to the detail of these submissions, the Board's conclusions can be shortly stated. It should be noted that there is no disagreement over the legal principles applied by the courts below. (They were taken as conveniently summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at para 15.) The appeal therefore depends on showing that both courts below erred in some way in their application of those tests to the evidence in the case, or in the evaluation of that evidence. The Board had already indicated (by the Registrar's letter dated 12 April 2017) that it regarded the prospects of success of this appeal as very poor and that it would dispose of this appeal by reference to written submissions only. Consideration of the extensive written submissions made in support of the appeal has not changed that view.

174. The Board is content to adopt the reasoning of the Court of Appeal, so clearly summarised in the paragraphs quoted above. Nothing which has been put forward in the current submissions, by way of criticism of I&B's motives or conduct, has thrown any doubt on the correctness of leading counsel's advice or of the decision which followed, still less to support a case of gross negligence against those who took it. The courts were entitled to take the view that the present proceedings were doomed to failure.

The investment claims

175. This part of the appeal raises more substantial issues in view of the difference between the Deputy Bailiff and the Court of Appeal. Again, however, there was no difference as to the legal principles to be applied, taken from the leading case of *Johnson v Gore Wood & Co* [2002] 2 AC 1, and authorities following it. They were summarised by the Court of Appeal at para 10 of its judgment in terms which have not been criticised. The Court of Appeal also reminded itself (para 17) of the restraint appropriate for an appellate court before interfering with the judge's evaluation of the many factors at play in such cases

(citing Thomas LJ in *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748, para 16). Indeed the principal submission of the appellants is that the Deputy Bailiff reached the right conclusion for the right reasons, and that there was no proper basis for the Court of Appeal to overturn that reasoning. It is necessary therefore to consider first the main steps in the Deputy Bailiff's reasoning.

176. First, he accepted that there was sufficient overlap between the two sets of proceedings for it to have been possible for the Guernsey 3 claims to have been made in the previous proceedings. However, he thought the degree of overlap relatively limited: in his words:

> "Guernsey 1 was fundamentally about the loans, whereas the existence of those loans is now part of the canvas on which the allegations the plaintiff wishes to pursue are to be painted." (para 91)

Thus the claims *could* have been brought in Guernsey 1, but that did not mean that they *should* have been.

177. Secondly, he discounted R&H's case that funding difficulties had forced them to postpone review of the extensive trust documents delivered to them in December 2011 and January 2012; he found that funding could have been made available if necessary. He also considered that R&H should have been "more forthcoming with the defendants and the court" and "at least raised the possibility" of bringing some or all of the claims into Guernsey 1 (para 98). Taking account of the relative flexibility of case-management procedures in a small jurisdiction such as Guernsey, "the proper process" would have been for the issue to be addressed before the trial in Guernsey 1:

> "It would then have been the function of the Court to hear the representations of all the parties convened in Guernsey 1 on the different options and decide how to deal with the whole case justly. It should not have been the unilateral choice of the plaintiff as to how to conduct its claims." (para 101)

He rejected the submission for R&H that it should make any difference that it had been brought into Guernsey 1 as a defendant, and was raising matters by way of counterclaim. The rules did not justify drawing a distinction between the position of the plaintiff as counterclaimant and that of a plaintiff commencing two sets of proceedings (para 103).

178. Thirdly, against that background he considered what directions he would have made "in the Spring of 2012", faced with a proposal to add the present claims to the relief being sought in Guernsey 1. In that event, he thought it unlikely that he would have made an order vacating the Guernsey 1 trial, listed for hearing in June 2012, and that "the position would have essentially been as it now is". As he explained:

> "I take the view that the BVI Companies would not have wished to have these claims heard at the same time as the proceedings dealing with the loans to them. No one has offered any accurate estimate of how long the trial before the Lieutenant Bailiff would have become had there been a single trial, but it seems to me not to be unreasonable to expect the trial to have doubled in length. This would have had no bearing on the resolution of the issues between the BVI Companies and the other parties. Guernsey 1 started life with the defendants applying for directions. This was solely in the context of the loans and so a reasonably narrow issue. It would, in my view, have been transformed into quite a different trial if the allegations now raised by the Plaintiff had also been included."

In those circumstances, he would, he thought, have ordered the trial in Guernsey 1 to proceed as planned, and delayed the additional claims for another day, "thereby avoiding the BVI Companies being involved in matters that were of no interest to them" (para 104).

179. Fourthly, having commented on other aspects, including the relationship with the Somerfield claim, and the differences in the nature of the relief being sought in the two proceedings, he concluded:

> "In my opinion, this issue is very finely balanced. If I could have been persuaded that there would only have been a short delay in re-listing the trial dates and that the length of the trial would not have increased by very much at all, I would probably have concluded that the only aspect to sever was the Somerfield Litigation claim. However, if I had recognised that it would delay the trial involving the BVI Companies and result in them having to waste time sitting through too many days of evidence and argument that had no relevance to their participation in the trial, I would probably have concluded that it was most sensible to proceed as planned and leave the new claims to be

> commenced in separate proceedings, as has been the case. The defendants, through Advocate Wessels, have not provided a clear picture as to what the pros and cons of this case management aspect would have been at the time they would have been under consideration and, because the defendants bear the burden of establishing the abuse of process on which they rely, that is why I have concluded, on balance, that I would have been more likely to have decided that the additional claims the plaintiff wished to raise should not be included in Guernsey 1 but dealt with separately. In some respects, this is the result of the overall impression I have formed as to the most effective way to manage the claims. Splitting the trial broadly as the plaintiff has done by the way it has pursued its claims separately against the defendants 'feels' the right way to have dealt with them." (para 106)

180. The Court of Appeal disagreed, holding that the Deputy Bailiff's analysis ought to have led him to the conclusion that the allegations not only could, but should, have been brought in Guernsey 1. It took issue with his focus on the degree of overlap in the *pleaded* issues, rather than an analysis of the *substance* of the respective claims:

> "Upon such an analysis it can be seen that, although there is not a precise identity between the two, the claims in both actions involve (i) essentially the same parties (ii) acting in essentially the same capacities (iii) in relation to events occurring in essentially the same time period (iv) and in relation to essentially the same series of transactions (v) raising essentially the same cause of action (breach of trust) (vi) whose disposal would turn on essentially the same documentary evidence and (vii) essentially the same witnesses. That is the accumulation of reasons why, having decided that the allegations in the Cause *could* have been brought in Guernsey 1, the court below ought then to have come to the conclusion that, absent any special reason, those allegations *should* have been brought in Guernsey 1." (para 87) (emphasis in original)

181. The court then considered the Deputy Bailiff's hypothetical case-management exercise. It understood the logic of this to have been that the "basis and compulsitor" for the new allegations were the then recovered documentation; and that, given the stage which Guernsey 1 had reached, an application for amendment would be required, so that the decision whether to

include the new allegations would be for the court rather than the litigant. In this respect, the court said, the judge had erred: "in that he took into account a matter which, in the whole circumstances before him, was irrelevant: that is, what might or might not have happened at a case management conference" (paras 88-89).

182. The general principle was that a person should not be vexed twice with litigation unless there is good reason. It having been found that the new claims could have been brought in Guernsey 1, what was lacking was "any sufficient evidence or reasoned basis to explain when the claims in this Cause were first identified and why the new allegations were not brought in Guernsey 1" (para 89). The court pointed out that at the time of their counterclaim in Guernsey 1, R&H had access to hard copy trust documentation and to witnesses including Mr Robert Tchenguiz, and that before being made a party to Guernsey 1 they had started their own proceedings for delivery up of electronic trust documentation, for the purpose, inter alia, of appraising any culpable conduct by I&B in respect of the losses sustained by the trust.

183. In response to R&H's suggestion that concentration on Guernsey 1 had diverted their attention from the recovered documentation, the court commented:

> "… there is no evidence that the proposed new allegations depend upon information only discovered from an examination by the plaintiff of the documents recovered in late 2011 or early 2012. Nor is there any suggestion that the proposed new allegations depend upon witness evidence from individuals who were not known or available to the present plaintiff prior to having access to those documents. To the contrary, we were informed by counsel for the plaintiff that amongst the relevant witnesses supporting the new allegations would be those who gave evidence on behalf of the plaintiff in Guernsey 1." (para 92)

The court concluded on this aspect:

> "In almost every civil litigation there comes a point when the evidential burden moves from one party to another: and may do on more than one occasion. Here, the learned Deputy Bailiff, having identified that the present plaintiff could have raised the relevant part of the present Cause as part of Guernsey 1, should have recognised that it was incumbent upon the plaintiff to explain, credibly, why that was not done. Failing such a credible explanation it seems

> to us to follow, on the balance of probabilities, that the party complaining is entitled to a determination that the failure to raise in the earlier litigation that which could have been so raised is an abuse through double vexation. Absent that credible explanation, consideration of what might or might not have occurred at a case management conference was an irrelevant consideration as the complaining party was already entitled to the order striking out the offending pleading …" (para 93)

184. In this appeal the reasoning of the Court of Appeal is criticised on four main grounds. First, it is said that its approach, notably in para 93 (quoted above), was inconsistent with the principle that the burden of proof lies on the party alleging abuse. Secondly, even on the basis of that approach, the court was wrong to say that R&H had failed to advance a sufficient explanation for the timing of the new claim. Thirdly, the court was wrong to hold that consideration of a hypothetical case management hearing was "irrelevant", such an approach having been endorsed in the authorities, such as (most recently) *Otkritie Capital International Ltd v Threadneedle Asset Management Ltd* [2017] EWCA Civ 274; [2017] CP Rep 27. Finally, the court had no proper basis for overturning the Deputy Bailiff's assessment of the degree of overlap between the two sets of proceedings.

185. For the Board, the first question is whether the Court of Appeal had sufficient grounds for questioning the reasoning of the Deputy Bailiff. It found two principal errors, first in his assessment of the degree of overlap, secondly in his reliance on hypothetical case-management. The Board considers that on both aspects the Court of Appeal's criticisms were well founded.

186. On the first, the Deputy Bailiff seems to have regarded the breach of trust aspects as no more than incidental to Guernsey 1, which was "fundamentally about the loans", such loans being no more than "part of the canvas" on which the new allegations were to be painted. This, in the Board's view, was to look at the issue from the wrong perspective. As the Deputy Bailiff rightly acknowledged later in his judgment, the issue of abuse had to be looked at from the point of view of R&H, not so much as defendants to the original proceedings, but as claimants in their own right. It was in that capacity, and as respects the substance of their claims against I&B, that their conduct of the two sets of proceedings had to be judged. From that point of view, the allegations of breach of trust were central to their case in Guernsey 1 as in Guernsey 3. It is true that the issues and the forms of relief were formulated in somewhat different terms, and that the breach of trust issues in Guernsey 3 were more widely expressed. But the claims in both related to the same series of transactions carried out by I&B in the critical period. The Court of Appeal was entitled to find that they

raised essentially the same issues between the same parties, depending on much of the same evidence, oral and documentary.

187. As to the hypothetical case management exercise, the problem was not so much the principle, as the underlying assumptions. The Deputy Bailiff had proceeded on the basis that the claims in Guernsey 3 had emerged for the first time from the documentation made available in late 2011/early 2012, leading to a hypothetical application to amend and directions hearing in Spring 2012, very shortly before the trial set for June of that year. As the Court of Appeal pointed out, this assumption was unwarranted. There was no evidence that the substance of the claims in Guernsey 3 was not sufficiently known to R&H at the time they formulated their counterclaim in Guernsey 1.

188. Before the Board, Mr Hollander has argued that sufficient explanations were put forward to the Court of Appeal for delaying the Guernsey 3 claims. These included the tightness of the timetable already set for Guernsey 1, the practical and financial problems of reviewing the 50,000 documents made available in the period up to January 2012, and the fact that Mr Robert Tchenguiz himself was subject to an SFO investigation for part of the relevant period. Like the Deputy Bailiff, they also point to the probability of objections from the BVI companies to such a substantial extension of the Guernsey 1 proceedings.

189. In the Board's view, none of these points explains the failure to formulate the full claim at the outset, nor the Deputy Bailiff's assumption of a directions hearing delayed until the Spring of 2012. Such points may have added to the difficulties and expense of preparing for trial, but, as the Deputy Bailiff himself accepted, funding could have been found if necessary. The BVI companies were not before the court in Guernsey 3, and it is doubtful how much weight should have been given to speculations about their likely response to a hypothetical amendment application in Spring 2012. But that problem would not have arisen if the claims had been fully pleaded at the outset. There might at that stage have been an argument for dealing with the enforceability of the loans as a preliminary issue, but that possibility does not seem to have been canvassed by anyone.

190. In the Board's view, therefore, the Court of Appeal was entitled to reject the Deputy Bailiff's reasoning, and to form its own view of the merits. That leaves Mr Hollander's submission that the Court of Appeal itself erred, by in effect reversing the burden of proof. The Board does not accept this criticism. The court had itself set out the agreed principles, beginning with a clear statement that the burden of establishing an abuse of process lay on the person alleging abuse. It might have been better in para 93 to avoid reference to a shifting evidential burden. The issue was not so much about evidence, as about the substance of the respective allegations, applying (in Lord Bingham of

Cornhill's words in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31) a broad merits-based approach. However, as the court emphasised, the underlying principle was that a party is not to be vexed twice with litigation unless there is good reason. The court was entitled to conclude that the claims were sufficiently related to meet this test, and that in the absence of any persuasive reason for the new claims not having been included in the earlier litigation, the abuse had been made out.

191. The Board therefore concludes that both appeals in the Guernsey 3 litigation should fail.

Conclusions

192. The Board will therefore humbly advise Her Majesty that Oscatello's appeal against the judgment of the Court of Appeal on the question of restitution should be dismissed, that the BVI companies' appeal in relation to the application of article 32 of the TJL and all of the appeals advanced by the current trustees or R&H should be dismissed, and that the BVI companies' appeal against the costs judgment of 19 April 2016 should be allowed to the extent set out in para 156 above.

193. The parties to these appeals are invited to make written submissions on the question of costs within 21 days of the handing down of this judgment and to submit any replies within 14 days thereafter.

LORD MANCE:

194. I am in agreement with the Board's judgment, save on two points relating to the Board's treatment of articles 32 and 26 of Trusts (Jersey) Law 1984 ("TJL"). Both will, I believe, merit further consideration on another occasion. The first point relating to article 32 affects the scope of I&B's liability. The second point appears irrelevant to the outcome of this appeal.

Article 32

195. Article 32 of the TJL appears in Part 2 of that Law, which (by article 6) applies only to Jersey Trusts. Article 32 reads:

> "32. Trustee's liability to third parties

(1) Where a trustee is a party to any transaction or matter affecting the trust -

(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;

(b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity ..."

196. Part II of The Trusts (Guernsey) Law 2007 ("TGL") is by article 5 applicable only to Guernsey trusts. It contains a provision parallel, but not identical, to article 32 of the Jersey law as follows:

"**Dealings by trustees with third parties.**

42.(1) Subject to subsection (3), where, in a transaction or matter affecting a trust, a trustee informs a third party that he is acting as trustee or the third party is otherwise aware of the fact, the trustee does not incur any personal liability and a claim by the third party in respect of the transaction or matter extends only to the trust property.

(2) If the trustee fails to inform the third party that he is acting as trustee and the third party is otherwise unaware of the fact -

(a) he incurs personal liability to the third party in respect of the transaction or matter, and

(b) he has a right of indemnity against the trust property in respect of his personal liability, unless he acted in breach of trust.

> (3) Nothing in this section prejudices a trustee's liability for breach of trust or any claim for breach of warranty of authority.
>
> (4) This section applies to a transaction notwithstanding the lex causae of the transaction, unless the terms of the transaction expressly provide to the contrary."

197. In the Board's majority judgment on this point, two analyses or strands of reasoning are advanced based upon article 32 of the TJL, while a third supporting analysis seeks to derive comfort from a supposed symmetry between the immunity from execution of trust property and the suggested immunity of trustees' personal property under article 32(1)(a).

198. According to the first (more radical) analysis or strand, paras 73 and 83 et seq, article 32 addresses the "status" of a trustee, and is binding as against the world at large, irrespective of the proper law governing the third party transaction and irrespective of the forum of the litigation. On this analysis, article 32(1)(a) introduces into the law a novel concept, viz that a person with known trust obligations can be regarded as a separate person or as having a separate identity from a person acting on his own behalf.

199. A useful starting point is the nature of a trust under Jersey law. Article 2 of the TJL, states:

> "**Existence of a trust**
>
> A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right) -
>
> (a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;
>
> (b) for any purpose which is not for the benefit only of the trustee; or

> (c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b)."

200. More specifically, as a matter both of general common law and Jersey law, a trust is a relationship between a trustee and a beneficiary or beneficiaries for a specified purpose, in relation to property (including rights) of some form or other, which relationship will bind the trustee and any third party receiving or acquiring such property with notice of the trust. The relationship is one that will be enforced (at least in a country recognising the concept of a trust) irrespective whether the lex situs of the trust property recognises the concept of a trust. This is subject only to the rule that the title to trust property may be overridden by a dealing which has that effect under the lex situs of the property.

201. These points are recognised in para 59 in the Board's majority judgment, and were discussed in detail in the Supreme Court's recent decision in *Akers v Samba Financial Group* [2017] UKSC 6; [2017] AC 424. Whether the relationship is to be seen as giving the beneficiaries a purely personal or a proprietary interest remains a matter of academic controversy, of no relevance to the appeal, though it is commonly described as giving a proprietary interest: *Akers v Samba*, paras 15-16.

202. There is nothing in the nature of the trust as indicated in article 2 and as explained above which either requires or suggests that a person who is a trustee has any separate identity or status as such. The trustee deals with the outside world as an individual or corporate person. There is no question of the trust being a separate entity, or being represented by the trustee as its agent: *Virgo, Principles of Equity and Trusts* 2nd ed (2016), p 589. As regards the beneficiaries, the trustee is simply bound by the trust obligations. Where these relate to property, the property is protected as against the trustee and, to a considerable extent though not completely, also against third parties. Under the common law, therefore, a trustee undertakes third party transactions and other dealings in his (or its) own capacity as an individual (or body corporate), and is personally liable accordingly, irrespective whether or not the transactions and dealings relate to property the subject of any trust obligations. Because equity will recognise and enforce the beneficiaries' interests, as explained above, the trust assets will only be available to meet such liability to the extent that the trustee can look to them for indemnity against third party liability (in which case the third party will also have a right of subrogation).

203. The trustee can of course vary and limit the scope of his or its personal liability, or of the property by reference to which it may be satisfied, by agreement with the third party. A recognised way of doing this is to ensure that

he contracts "as trustee only" - the word "only" being on authority critical. In the present case, there is no such agreement, and Jersey law is not the governing law of the contract or the law of the forum.

204. This appeal therefore raises a significant question regarding the appropriate characterisation or classification of article 32(1)(a) of the TJL. This is to be answered according to principles established by the law of the forum: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 407, per Auld LJ; *Dicey, Morris & Collins, The Conflict of Laws* 15th ed (2012) paras 2-011-012; *Cheshire, North & Fawcett, Private International Law* 15th ed (2017) p 43. The law of the forum is here Guernsey law. There is no reason in this context to regard the principles of Guernsey law as differing from those of English common law (apart from EU Regulations). The principles have been developed, and exercise must be undertaken in, an internationalist spirit, and the ultimate aim is "to identify the most *appropriate* law to govern a particular issue": *Raffeisen Zentralbank Österrisch AG v Five Star Trading LLC* [2001] EWCA Civ 68; [2001] QB 825, para 27 per Mance LJ. Under such principles, the court must look at the substance and effect - and I notionally underline these words - of the foreign rule of law, not the form or nomenclature adopted by the foreign law: see *Adams v National Bank of Greece SA* [1958] 2 QB 59, 75, per Diplock J; [1961] AC 255, 274-275, per Viscount Simonds; *Dicey, Morris & Collins*, paras 2-033-034; *Cheshire, North & Fawcett*, p 50.

205. Here, as in *Adams*, the choice of category presented is between status and contract. If article 32(1)(a) works a change in I&B's status or capacity, then article 32(1)(a) will potentially apply in Guernsey litigation about a transaction entered into by I&B as known trustees, irrespective of the law governing the transaction. If article 32(1)(a) does no more in substance than restrict I&B's liability to third parties, then it is addressing a subject which is essentially contractual and it will be irrelevant unless the relevant transaction is subject to Jersey law or (perhaps) unless it is being litigated in Jersey (neither of which situations here applies). I&B's case is that article 32(1)(a) is to be regarded as working a change in their status or capacity. The current trustees and the BVI companies submit that article 32(1)(a) is in substance no more than an attempt to limit claims against I&B.

206. Reliance is placed by I&B on the well-established principle that English courts "give recognition, by a comity of nations, to a legal personality created by the law of another country": *Chaff and Hay Acquisition Committee v J A Hemphill and Sons Pty Ltd* (1947) 74 CLR 375, 390, per McTiernan J, cited with approval by Lord Templeman in *Arab Monetary Fund v Hashim (No 3)* [1991] 2 AC 114, 162B; and see *Bumper Development Corp v Comr of Police of the Metropolis* [1991] 1 WLR 1362 and *Dicey, Morris and Collins's Conflict of Laws* 15th ed, Rule 19, para 7-017. Further: "A general partnership enjoying

[under its governing law] a degree of legal personality which enables it to enter into a contract in its own name, but which is not a corporation" may be sued in England either as a separate entity or in the names of its members, but with the caveat, in the latter case, that it is sued as a separate entity and that no relief is sought against its members: *Oxnard Financing SA v Rahn* [1998] 1 WLR 1465, 1476. In these cases, the foreign corporation or partnership is constituted or treated as a separate entity by the law governing the corporation or partnership. There is a clear separation between the corporation or partnership and its members.

207. The question is whether, as a matter of ordinary common law conflict of laws characterisation, article 32(1)(a) gives rise to anything similar or analogous to a foreign corporation or partnership, simply because a trustee is known to be acting as such. To my mind, that is a surprising and erroneous proposition, for a number of reasons.

208. First, article 32(1)(a) neither recognises the trustee as acting in a representative capacity on behalf of the trust nor recognises the trust as having a separate persona and assets which are directly engaged by the trustee's activity as trustee. According to the Board's decision on this appeal, article 32(1)(a) has a purely personal effect as between the trustee and the third party. It does not cap or affect the quantum of I&B's third party liability, but it limits the enforcement of such liability to such amount (if any) as the trustee is entitled to claim by way of indemnity from the trust assets: see para 62. That this was (however odd - see below) the legislative intention and that the Board is correct in this respect is confirmed by paragraph 2.4.4 of the Consultation Paper which preceded the No 4 Amendment, by which article 32(1)(a) was finally included in the TJL as it currently stands: *Trusts (Jersey) Law 1984: Proposed Amendments*, Economic Development Committee of the States of Jersey, 25 November 2004.

209. The position is therefore in sharp contrast with that in such United States authority as the Board seeks to pray in aid in support of its recognition of a new "status" (see paras 97 and 101 above, and see further paras 217 to 220 below). Under article 32(1)(a), as at common law, the trustee remains an individual person, and the trust remains a matter between him or it and the beneficiaries. In so far as article 32(1)(a) purports to limit the trustee's third party liability, that is a limitation which will only be effective if Jersey law falls to be applied. That will only be the case if Jersey law is the proper law of the transaction or, if article 32(1)(a) is treated as a mandatory provision, then if Jersey is the forum of the litigation.

210. Secondly, this analysis is supported on the face of article 32, by its heading: "Trustee's liability to third parties". Where (as here) the relevant

transactions are contractual loans, the question of the trustee's liability to the third party is regulated by the proper law of the contractual relationship with the third party. If and to the extent that article 32(1)(a) also embraces a transaction or matter involving tortious liability, that would be governed, generally and subject to the exception recognised in *Boys v Chaplin* [1971] AC 356, by the common law rule requiring double actionability. In either case, the heading points positively away from any analysis according to which article 32(1)(a) is even purporting to clothe trustees with some novel status, rather than to regulate their relationship with third parties. Unlike the position in *Adams*, article 32(1)(a) does not dissimulate its effect by terminology suggestive of status or capacity. It openly describes itself as addressing the simple question of third party liability, which is also what its terms do on analysis address.

211. Thirdly, it would be unwise and inappropriate for common law conflicts of law rules of characterisation to accept a concept of status or capacity as loose as that inherent in the Board's majority approach. The majority approach to article 32(1)(a) has potentially wide ramifications. Could a foreign jurisdiction prescribe, as a matter of status or capacity and so in a manner which common law conflicts rules must accept, that an individual domiciled (or perhaps carrying on business) within its relevant jurisdiction or a corporation incorporated there, should, if known to be acting in relation to one particular business, only be liable to third parties to the extent that any such liability could be met from assets attributable to that business? To regard "not being liable" or "not being liable in respect of certain assets" as a matter going to "status" or "capacity" in any private international law sense is a misuse of language.

212. Moreover, if article 32(1)(a) were to be seen as constituting a trustee with a separate status or capacity, it is not clear why Jersey law could not provide that, even if the other party does not know that a trustee is acting as trustee, still any claim against a trustee who is in fact acting as trustee should extend only to the trust property. I understand that the answer to this is said to be that there is a two-stage enquiry. At the first stage, the enquiry is with whom the third party contracted, which it is acknowledged depends on the proper law of the contract. If the contract is with someone who is or appears to be contracting personally, that is the end of the matter. But if the contract is with someone who is known to be acting as trustee, then a second stage enquiry arises, namely what is the effect of being a trustee under whatever law governs the relevant trust. If that law provides (like article 32(1)(a)) that the trustee is in such circumstances only liable by reference to the trust property, that provision will affect the trustee's status and exclude personal liability. Under this suggested two-stage enquiry, the two stages are contradictory. The first stage leads to a conclusion that the contract is with the trustee personally to the full extent of his assets. The second stage achieves an opposite result. This is to say the least confusing, and the reason why is that both stages are in reality claiming to address the same issue, namely the extent of the trustee's liability. This is a contractual issue, capable of

being addressed contractually. In other words, if a trustee acting as such wants to avoid exposure of his personal assets he has only to stipulate as much.

213. Fourthly, on the majority of the Board's analysis, a third party dealing with a known trustee, who does not take the trouble to limit his liability contractually, must not only concern himself with the governing law of the relevant transaction or dealing, but must also (a) obtain copies of the trust documentation, (b) seek to identify from it the law governing the relevant trust and (c) must then examine the trust law of that country to see whether it may contain some provision, which may be said to affect the "status" of the trustee and vary the contractual rights and liabilities which would otherwise exist. I do not consider that common law characterisation should welcome so elusive a concept of status.

214. The mere fact that a third party knows that the other party is "acting as trustee" may give him no means of taking any of these steps. Even if he succeeds in obtaining the relevant trust documentation, the applicable trust law may in some cases itself be a matter of doubt or potential litigation. Consider the scope for argument about this, which is evident from article 4 of the TJL, providing:

> "**Proper law of a trust**
>
> (1) Subject to article 41, the proper law of a trust shall be the law of the jurisdiction -
>
> > (a) expressed by the terms of the trust as the proper law; or failing that
> >
> > (b) to be implied from the terms of the trust; or failing either
> >
> > (c) with which the trust at the time it was created had the closest connection.
>
> (2) The references in paragraph (1) to 'failing that' or 'failing either' include references to cases -
>
> > (a) where no law is expressed or implied under sub-paragraph (a) or (b) of that paragraph; and

(b) where a law is so expressed or implied, but that law does not provide for trusts or the category of trusts concerned.

(3) In ascertaining, for the purpose of paragraph (1)(c), the law with which a trust had the closest connection, reference shall be made in particular to -

(a) the place of administration of the trust designated by the settlor;

(b) the situs of the assets of the trust;

(c) the place of residence or business of the trustee;

(d) the objects of the trust and the places where they are to be fulfilled."

215. Another consideration is that trust documentation may provide for the proper law of a trust to change, eg with a change of trustees: see eg *Crociani v Crociani* [2014] UKPC, paras 7-8. It may also be arguable whether a trust provision is or is not a proper law provision: see eg *Crociani v Crociani*, paras 13-15 and 23-29, where, despite the "obvious force" and "initial … attraction" in the point that it operated as an exclusive jurisdiction clause, a trust provision in an agreement that the trust's affairs were to be "subject to the exclusive jurisdiction of [Jersey]", was in context held to operate as a proper law provision.

216. I turn to such authority as I&B are able to muster in support of their analysis. None of the three cases referred to by the majority judgment of the Board in paras 85-87 in my opinion carries I&B's case any distance. They all concern situations of partnerships contracting as such in circumstances where the law governing the partnership either gave it legal personality or treated it as a separate entity on whose behalf its partners acted and which could be sued separately from its partners. In contrast, there is here, as I have pointed out, no question of the trustee being treated as representing the trust, or of the trust being treated as a separate entity which could be sued separately. Thus, in all three cases cited, the liability of the individual defendants was regulated by the local law separately from that of the partnership. In *Alloush* (1985) NLJ 1012 (CA), the partnership was a distinct legal entity, but the local Jordanian law made the partners liable for its debts, subject only to a procedural bar which could be

disregarded when the forum was English. If the bar had been substantive, then it would have had to be respected by English law. In *Rowan* [1998] CLC 1574, the Dutch partnership had no separate legal personality, but could sue and be sued in its own name, and the partners' only liability under Dutch law arose not under the contract entered into by the partnership, but by statute under article 18 of the Dutch Commercial Code. On that basis, the partners were not entitled to the benefit of a contractual time bar, which applied to proceedings against the partnership.

217. In *Oxnard* [1998] 1 WLR 1465, the partnership was again not a corporation, but was in certain respects an entity separate from its partners, in that it could, under Swiss law, make contracts and sue and be sued in its own name. The individual partners could not, under substantive Swiss law, be sued save in three cases (bankruptcy, dissolution of the partnership or unsuccessful debt enforcement proceedings against the partnership), none of which applied. So as a matter of substantive Swiss law, there was no claim against the partners as such. The partnership itself, Rahn & Bodmer, had been sued in its own name as a partnership in England. However, this was not permissible under English procedural law in relation to a foreign partnership. In these circumstances, the claimants applied to add the individual partners' names, with a suffix indicating that they were being sued as "partners in, and trading as, Rahn & Bodmer". The Court of Appeal upheld this as a permissible means of suing the partnership under English procedural law.

218. None of these three cases lends any support to the view that article 32(1)(a) should as a matter of common law conflicts of law characterisation be seen as giving a person known to be acting as a trustee two different statuses.

219. Far from supporting any such view, United States authority in my opinion undermines it. Where United States law has departed from the traditional view that the trustee contracts personally, even if he is acting in the trust's interests, the natural concomitant has been a direct right of action against the trust, in other words the effective personification or "entitification" of the trust. The position is stated in *Scott and Ascher on Trusts* 5th ed (2007):

> "… the trend is to relieve the trustee of personal liability under a wide range of circumstances on contracts made and torts committed by the trustee or the trustee's employees during the course of trust administration. Naturally, there is a concomitant trend to permit these third persons to satisfy their claims directly from the trust estate, by suing the trustee in a representative capacity." (pp 1870-1871, section 26.1)"

Scott and Ascher continue:

> "One of the most significant differences between the new rules and the traditional rules is that the new rules shift the risks of dealing with an insolvent trustee. Under the traditional rules, it was the third party who contracted with a trustee who ran the risk that the trustee might be insolvent when the time for performance arrived. Under the new rules this risk now falls on the trust estate. For the most part, trustees act reasonably in entering into contracts for the benefit of the trust estate. Such trustees have always been entitled to indemnification and, indeed exoneration … The new rules make no changes in this regard. It is when the trustee not only is insolvent but also has acted unreasonably or unfaithfully in entering into a contract that the new rules change the ultimate outcome. In such a case, the third party can now reach the trust estate directly, notwithstanding the trustee's insolvency, leaving the trust estate with no effective recourse against the insolvent trustee. This shift, however seems entirely appropriate. For one thing, the trust is the 'enterprise' that has generated the contract; it should, therefore, incur the costs of performing the contract, even if an imprudent or unfaithful trustee, acting on the trust's behalf, has entered into a contract that is not in all respects proper from the trust's point of view. For another thing, the selection of a trustee is, at least in the first instance, completely within the settlor's control. (pp 1877-1878, section 26.2) …
>
> We have seen that, under the emerging notion of trustee liability, a trustee is ordinarily liable in a representative capacity, and not personally, and that a third person can generally assert a claim against the trust assets simply by suing the trustee." (p 1895, section 26.5)

220. The American Law Institute's *Restatement of the Law, Trusts* Vol 4, (2012) reflects this emerging trend in paras 105 and 106, which state:

> "**105. Claim against Trust.**
>
> A third party may assert a claim against a trust for a liability incurred in trust administration by proceeding against the

trustee in the trustee's representative capacity, whether or not the trustee is personally liable (see para 106).

106: Personal Liability of Trustee; Limitations

A trustee is personally liable:

(1) On a contract entered into in the course of trust administration only if:

(a) In so doing, the trustee committed a breach of trust; or

(b) The trustee's representative capacity was undisclosed and unknown to the third party; or

(c) The contract so provides;

(2) For a tort committed in the course of trust administration, or for an obligation arising from the trustee's ownership or control of trust property, only if the trustee is personally at fault."

221. Thus in one of the early cases indicating a move in the United States towards the "modern" trend, *Ewing v Foley* 115 Tex 222 (1926), the Texas court held that a trust estate was directly liable for the acts of the agents of the trustees and executors of the estate when the trustee was not guilty of personal fault or negligence. The court held that it would be unjust to hold the trustees personally liable since they were not personally at fault. More recently, some State legislation has given express statutory effect to the modern trend, in detailed terms which find no parallel in the TJL: see eg Delaware Statutory Trust Act (2009), which expressly introduces the concept of a statutory trust, defined as an unincorporated association (para 3801(g)), but which can sue and be sued and whose property is "subject to attachment and execution as if it were a corporation" (para 3804), and whose trustees are concomitantly "entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organised under the general corporation law of the State" (para 3803). The National Conference of Commissioners on Uniform State Laws have gone a step further, preparing a model Uniform Statutory Trust Entity Act (so far only enacted in Kentucky), offering the possibility of a trust, which by

statutory provision is, as the Prefatory Note explains, "a juridical entity, separate from its trustees and beneficial owners, that has capacity to sue and be sued, own property and transact in its own name". These features are secured by inter alia section 302 ("A statutory trust is an entity separate from its trustees and beneficial owner"), section 307 (giving it power to hold or take title in its own name, or in the name of a trustee in the trustees' capacity as trustee), section 308 ("A statutory trust may sue and be sued in its own name") and section 209 (requiring the trust to maintain an agent for service of process).

222. No-one suggests that the law of Jersey reflects the features of, or comes close to, the United States legal position explained in paras 219 to 221 above. Whatever the position would be under common law conflict of laws rules in a case involving a trust subject to the law of one of the states of the United States which accepts what Scott and Asher call the "modern" rule, the present case is fundamentally different. Here, there is no question of the trustee actually acting in a representative capacity or of the trust being personified or of it or its property being liable to suit at the instance of any third party creditor of the trustee. The third party contracts with the trustee, alone, and any limitation on the trustee's liability is a matter purely between the trustee and the third party, subject to the law governing their relationship, unless this is overridden by some mandatory provision of the law of the forum of litigation. On this point, I therefore reach the same conclusion as Lord Briggs. The majority decision to the contrary is a radical and unprincipled innovation, with potentially far-reaching consequences, even if, at present, it may be confined to Jersey law. It would have been less controversial if the majority ratio had been confined to the second and narrower analysis (below), in respect of which I find myself the sole dissentient. But the whole area will at some stage merit revisiting, because of its potential significance.

223. Before considering the second analysis, I should make two further observations about other aspects of the Board's majority judgment.

a) The whole Board has, rightly, rejected the idea that article 32(1)(a) operates to cap the trustee's liability to a third party. But the majority argue that article 32(1)(a) confines the third party, when it comes to enforcing that liability, to taking advantage (in particular by subrogation) of any right of indemnity which the trustee may have to the third party. That creates an unusual legal situation, which may require attention in another case. Judgment is given against the trustee for the full amount, but execution is in some way confined by reference to whatever right of indemnity the trustee may possess. The majority judgment leaves unexamined the evident unfairness to the creditor of leaving him to rely on a claim through the trustee, when the trustee may, due to his own breach of trust in relation to the relevant or some past transaction, have no

right of indemnity of which the third party can take advantage. In the United States context, this is addressed by para 106 of the American Law Institute Restatement on Trusts, but article 32(1)(a) contains no such qualification. Is it to be implied into article 32(1)(a), as the majority construe it, that the trustee will not by his own breach of trust have deprived the third party of a right of subrogation to be indemnified out of the trust assets which the trustee would, but for such breach, have had? Again, the law governing the relationship between the trustee and third party can no doubt achieve such a result, as can the law of the forum by mandatory rule. But I see no principled basis for categorising any of such issues as anything other than issues regarding third party liability.

b) The Board also accepts that article 32(1)(a) is confined to liabilities arising from "some pre-existing relationship to which the trustee can be said to be a 'party'" (para 61(1)). But it is suggested that this would include a claim in tort, eg for negligent misrepresentation. This may be the logical consequence of the Board's majority judgment, but it is in my view also indicative of its weakness on this present issue. What is being suggested is that common law rules of characterisation would treat as a matter of status or capacity an issue arising from the tortious misleading, whether negligent or presumably deliberate, of a third party by a known trustee, acting "as such", and would, under article 32(1)(a), leave the third party without any remedy against the trustee personally or against the trust directly. The same would, presumably, have to apply to a trustee who mixed third party assets with the assets of the trust. However, in all these cases, the tort, even if merely negligent, would also (subject at least to any term in the trust deed) constitute a breach of trust depriving the third party of any right of subrogation. Again, this will, I think, benefit by further consideration on some future occasion.

224. The second analysis or strand of reasoning, paras 74 and 93 et seq, depends on what is said to be the inter-action between the law of Guernsey as the law of the forum and article 32 of the TJL. The TGL contains in Part III, which by section 64 is applicable only to a foreign trust, the following provision:

"**Enforceability of foreign trusts.**

65. (1) Subject to subsection (2), a foreign trust is governed by, and shall be interpreted in accordance with, its proper law.

> (2) A foreign trust is unenforceable in Guernsey to the extent that -
>
> (a) it purports to do anything contrary to the law of Guernsey,
>
> (b) it confers or imposes any right or function the exercise or discharge of which would be contrary to the law of Guernsey, or
>
> (c) the Royal Court declares that it is immoral or contrary to public policy."

Subject to the addition of a further (but presently irrelevant) head of unenforceability relating to trusts purporting to apply directly to immovable property in Jersey, article 49 of the TJL is in like terms.

225. On the basis of section 65 and having regard also to section 42 of the TGL, it is argued that Guernsey law, as the law of the forum, will look to article 32(1)(a) of the Jersey law, and will recognise Jersey law as governing the question whether a trustee, known to be acting as such, is liable personally towards a third party. A number of points make me unable to accept this analysis. It treats section 65 of the TGL as involving a radical alteration of ordinary common law principles of characterisation, which one would otherwise expect to apply in Guernsey. It does so on the basis that the provision in section 65 for the "enforceability of a foreign trust" to be "governed by, and … interpreted in accordance with, its proper law" is capable of embracing article 32 of the TJL, addressing "Trustee's liability to third parties". It seeks to derive support for this from section 42 of the TGL, itself entitled "Dealings by trustees with third parties". Neither article 32 of the TJL nor section 42 of the TGL fits within any ordinary understanding of "governance". This analysis necessarily also treats article 32 of the Jersey law as a mandatory provision, intended to apply irrespective of the governing law of the third party transaction. For the conflicts of laws principles of one jurisdiction to give effect to the mandatory laws of another jurisdiction would to say the least be unusual.

226. More fundamentally, any argument that the co-existence of article 32 of the Jersey law and section 42 of the Guernsey law affects the status of a trustee reverts in reality to the first analysis and begs the question. The assumption which underpins the second analysis is that neither article has that effect by itself. The result of the second analysis would therefore be that section 42 of the Guernsey law applies in Guernsey litigation (and perhaps also where the third

party transaction is subject to Guernsey law); but would be of no effect in, say, English litigation about a transaction subject to English law agreed between the trustees of a Guernsey trust and a third party. Equally, article 32 of the Jersey law could have no effect in English litigation about a transaction subject to English law agreed between the trustees of a Jersey trust and a third party. Yet it is argued that the combination of sections 42 and 65 in the Guernsey law and articles 32 and 49 of the Jersey law will have the effect of limiting the trustees' liability by reference to the trust property, in litigation in either jurisdiction about a transaction subject to English law agreed between the trustees (known to be acting as such) of a Jersey or a Guernsey trust and a third party. The result is a patchwork, arising because the provision that the enforceability of a foreign trust is "governed by, and … interpreted in accordance with" its proper law, is given a sense expanded well beyond its obviously limited sense. I see no basis for giving it such a sense when to do so would involve a considerable departure from the normal legal position. Such a departure would require far clearer words. "Governance" means "governance". It deals with the internal relations of trustee and beneficiaries. It has nothing to do with third party relations between the trustee and a third party.

227. The third, supposedly supporting analysis or strand of reasoning, paras 75 and 97 et seq, suggests that there is a symmetry between the immunity of trust assets from execution at the instance of a personal creditor of the trustee and the suggested immunity of a trustee's personal assets from execution at the hands of a creditor dealing with the trustee as trustee. A scenario is postulated in which a trustee makes a contract under a law which does not recognise trusts, and it is said, at para 100, that it would be extraordinary if the creditor in respect of a personal liability could sue him in a common law country and be able to enforce judgments against assets vested in him as trustee.

228. It would indeed be extraordinary if that were so. But a major fallacy is inherent in the example. The example postulates that, on I&B's case, the liability of the trust assets in the common law jurisdiction could or would depend on the proper law governing the transaction. It certainly would not. The rights of beneficiaries operate on the conscience of those party to or having notice of them. They are enforced accordingly by common law jurisdictions, which do recognise the existence of such rights under trust - not by reference to the law governing the relevant third party transaction: see the full discussion on this topic in *Akers v Samba*, cited in para 201 above.

229. In the light of the misplaced scenario considered in the previous two paragraphs, the third analysis continues with the rhetorical question "why, in a common law jurisdiction in which the default position is that the trustee who, as trustee, when making a contract affecting the trust does not expose his personal assets to liability, should the courts override that immunity by reference to the

proper law of the contract, any more than in the converse situation just described?". (The "converse situation" is that considered in the preceding paragraphs of this judgment.) The answer is that the two situations are not comparable. A trust is a recognised relationship between a trustee and beneficiaries, commonly involving the administration of trust property, which those with notice of the trust must respect as such. A contract is also a legal institution which binds those party to it according to its terms. Where a common law court holds a trustee personally liable, that is because he has contracted to be personally liable, and has not excluded his personal assets from execution.

230. There is no question therefore of the contract overriding some "immunity" inherent in the proper law of the trust. It begs the question to start with the assumption that the liability of a trustee who is known to be acting as such, but does not restrict his liability, is "overriding" the proper law of the trust. As noted in para 212 above, even those advancing the first analysis accept that the first-stage enquiry is: with whom did the third party contract? The starting point is, in other words, the contractual position; it is not the law governing the trust. It is the proponents of the third analysis who are, in substance, arguing that the proper law of the contract can be overridden by the law governing the trust.

231. For reasons already given, there is in my view no basis under common law conflicts of laws principles for treating article 32(1)(a) as giving the priority to the law governing the trust over that of the law governing the contractual relationship, which the Board majority judgment suggests. There are also considerable pragmatic reasons for not doing so. If a trustee wishes to avoid execution against his personal assets, he has only to contract expressly to that effect. The security and effect of third party transactions will potentially be adversely affected by each of the three analyses which have been advanced in this case.

Reasonably incurred

232. I turn to the other point about which I have a significant reservation. That relates to article 26 of the TJL, whereby "a trustee may reimburse himself out of the trust or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust". An entitlement to reimbursement in respect of expenses or liabilities "reasonably incurred" is familiar in several legal contexts. Take as one example section 19(1)(a) of the Landlord and Tenant Act 1985, whereby leaseholders are only liable to pay service charges to the extent that they are reasonably incurred. If a landlord commits tenants to a long-term maintenance or cleaning contract, which proves to be exorbitant, and which the landlord could and should reasonably have cancelled, can the landlord really say that the contract was in order when made, and he was entitled to ignore its

subsequent unreasonableness? Indeed, the Court of Appeal has held in *Waaler v Hounslow London Borough Council* [2017] EWCA Civ 45; [2017] 1 WLR 2817 that what matters is not the landlord's decision-making process, but the outcome. The issue there was whether it was sufficient to engage competent contractors, or whether one also looked at the quality of the work done. But I think the same principle must extend for example to a situation, where it became clear that, although the contractors engaged had not yet messed up the work, they did not have the competence to complete it and would mess it up unless removed.

233. A provision such as article 26 is designed to operate, and only matters, at the time *when reimbursement is claimed* in respect of expenses or liabilities actually incurred. The requirement that the expenses or liability be "reasonably incurred" looks back over the whole period up to that moment. Looking back to determine whether an expense or liability was reasonably incurred, it would be illogical if reimbursement depended upon whether or not the expense or liability was unreasonably incurred from its inception or was unreasonably incurred because the person seeking reimbursement unreasonably failed to take an opportunity to eliminate it or mitigate it or insure against it. The drafter cannot sensibly have intended to distinguish a liability unreasonably incurred because a contract should never have been made from a liability unreasonably continued, because a break clause should have been exercised to bring it to an end.

234. No principled rationale can be suggested for a distinction between a claim for reimbursement in respect of an expense or liability unreasonably incurred because it should never have been incurred in the first place and an expense or liability unreasonably incurred because the person claiming reimbursement has allowed it to continue and failed to mitigate it.

235. It is immaterial that there might, on the particular facts of the present case, have been a fall-back reason for non-recovery of expense or liability unreasonably continued, if it had been possible for R&H to establish gross negligence. Such a provision would not always be present, and, even where present, it can afford no reason for distorting the interpretation of article 26 of the Jersey law. There is no logic or likelihood in the parties' intending to preclude reimbursement of an expense or liability which was from the outset unreasonably incurred but to preclude reimbursement of an expense or liability which was unreasonably continued only if this was due to gross negligence. The two situations are conceptually parallel, and the same test should apply to each. Of course, the calculation of the extent to which the expense or liability was unreasonably incurred will in each case depend on the circumstances, and the cost of avoiding or mitigating an expense or liability which was in the event allowed unreasonably to continue may be greater than any offsetting allowance which might be suggested in relation to an expense or liability which was from

the outset unreasonably incurred. But that in no way affects the principle behind or the interpretation of article 26.

Conclusion

236. In the light of my views on the legal position under article 32, I would hold that any liability which I&B had arising out of their conduct as trustees was enforceable against I&B's personal assets in the usual way, and was not restricted by reference to any right which I&B may have had to be indemnified out of the trust assets. The majority view to the contrary makes it unnecessary for me to consider further the practical consequences of this conclusion. As far as article 26 is concerned, it does not appear that my views could or would have led to a different outcome on this appeal, had they prevailed: see para 115 of the Board's judgment.

LORD BRIGGS:

237. I agree with all the conclusions in the main judgment. Subject only to one point I also agree with all its reasoning. My only point of disagreement is with the first of the three strands of the reasoning for the Board's conclusion that the private international law of Guernsey would recognise Jersey trust law as the applicable law for the purpose of determining the issues about the assets to which the BVI companies may have recourse in relation to the contractual liabilities of I&B: see paras 83 to 92 of the main judgment.

238. The majority take the view that the issues are to be characterised as turning upon the status of I&B as trustees of a Jersey trust. Applying settled law that the liability to third parties of members or officers of foreign entities will be determined in accordance with the law of that entity (such as a company or partnership with separate legal personality) they say that:

> "… the time has come to recognise that as a general rule the common law will recognise and give effect to limitations of liability which arise under an entity's constitutive law by reason of the particular status or capacity in which its members or officers assume an obligation."

Critically, they apply this principle not only to entities which do have separate legal personality, but also to trusts, which do not, and which may not really be entities at all: see paras 88-89 of the main judgment. It is implicit in their reasoning that this analysis would apply to the private international law of

England and Scotland, as much as to Guernsey, Jersey and other common law jurisdictions whose domestic law already recognises the limited liability of trustees, as a matter of their trust law.

239. I have not been persuaded that this case provides a sufficient basis to recognise, for the first time, such a general common law principle. I accept of course that the principles of the private international law of Guernsey are largely derived from and are substantially the same as those of England. But English law has yet to make what I regard as the significant leap from applying the proper law of a true entity for the purpose of recognising a limitation of liability in favour of its members or officers, to doing the same thing in favour of trustees, treating a trust for that purpose as a quasi-entity.

240. It is common ground that English domestic law has not done so in favour of trustees generally, where the trust is governed by English law. That is why trustees have to contract in very specific terms "as trustees only" if they wish to limit their liability. The limitation thereby achieved is contractual. It does not arise from their status as trustees, even if that is known to their counterparty. Put another way, the question whether the trustees' liability is limited depends on the law of contract, not the law of trusts. In those circumstances I would regard it as a step-change in English law to recognise the proper law of a foreign trust as capable of limiting the trustees' liability by reason of their status as trustees, where English law does not do so in relation to an English trust, and does not treat the issue as a question of trust law at all.

241. It may be that this is a step which English private international law ought to take, but I do not regard a case about the private international law of Guernsey, in a Guernsey appeal, as an appropriate platform upon which to do so. In sharp contrast, Guernsey domestic law does recognise trustees as having limited liability by virtue of their status as trustees of a Guernsey trust, and the limitation arises as part of Guernsey trust law, under the TGL. There is therefore no similar step-change required of Guernsey private international law in treating the limitation of a trustee's liability as depending upon the proper law of a foreign trust, even if, contrary to my view, the TGL does not already expressly so provide. For that reason I agree fully with the second and third strands of the Board's reasoning for its conclusion, with which I also agree, that Jersey trust law, and art 32 of the TJL in particular, is decisive of these issues.

242. I have since, preparing this opinion in draft, had the benefit of reading the dissenting opinion of Lord Mance. It will be apparent that I agree with the general thrust of his opinion in relation to the first strand of the majority's reasoning for applying article 32 of the TJL in Guernsey, on his assumption that the private international law of Guernsey is the same as it is in England. But for

the reasons given above, encapsulated in the second and third strands of the reasoning of the majority, I respectfully disagree with that assumption. Nor does his reasoning for disagreeing with those second and third strands persuade me to the view that either of them is wrong.

243. As to the second strand, while the concept of governance might, viewed on its own, be regarded as a less than ideal way of referring to the relations between trustees and third parties, its use as a label for all the matters dealt with in Part II of the TGL, including relations with third parties among many other matters, does not strike me as being inappropriate, and makes sense of the structure of the statutory scheme, viewed as a whole.

244. Lord Mance's disagreement with the third strand seems to me to be based essentially upon his perception that the common law treats the extent of the liability of the trustee who contracts with a third party as dependent upon the terms of the contract. In the common law of England I agree that this is so. But statute has intervened in Guernsey so that, in a wholly domestic situation where the trustee is a trustee of a Guernsey trust, this is not so. His liability is limited by trust law, regardless whether he has limited (or not limited) his liability under the contract.

245. Finally I agree with Lord Mance that there may be pragmatic reasons, in this context, for not giving priority to the law of the trust over the law governing the contractual relationship. English common law recognises that this should not be done. But those reasons have not dissuaded the legislature in Guernsey from doing just that, in a domestic context. Where therefore the foreign law of the relevant trust is substantially the same as Guernsey law in reversing the original common law priorities, I do not see how those pragmatic reasons can prevail in this court, which sits for this purpose as the final court of appeal of Guernsey.