Trust.

[2025]JRC197

ROYAL COURT
(Samedi)

30 July 2025

Before : Sir Michael Birt, Commissioner, sitting with Jurats Cornish and Powell

Between	**Geneva Trust Company (GTC) SA (formerly known as Rawlinson & Hunter Trustees SA)**	**Plaintiff**
And	**Robert Tchenguiz**	**Defendant**

Advocate J. M. P. Gleeson for the Plaintiff.

Advocate P. D. James for the Defendant.

JUDGMENT

THE COMMISSIONER:

1. In these proceedings the Plaintiff ("GTC"), as former trustee of the Tchenguiz Discretionary Trust (the "TDT") claims £744,774.57 against the Defendant pursuant to a deed of indemnity dated 14 April 2014 (the "Indemnity") in respect of legal costs it has incurred in connection with certain court proceedings in Guernsey.

2. On its face, the Indemnity purports to be signed by the Defendant but, following expert handwriting evidence, it is now accepted that the Defendant did not personally sign it. GTC's claim is maintained on the basis that the Indemnity was signed with the actual authority of the Defendant, alternatively that he is estopped on various bases from denying the validity of the Indemnity. If it is enforceable, issues then arise as to whether the claim was settled pursuant to a consent order made in proceedings in the Royal Court of Guernsey and as to the correct quantum of the claim.

3. The case was heard over some six days in March and what follows constitutes the court's decision on the various matters which were argued at the hearing. We propose to begin by a brief summary of the trust background and the relevant litigation in Guernsey before then summarising the contemporaneous documentary evidence leading up to and surrounding the execution of the Indemnity. We shall then summarise the oral evidence before turning to consider and determine the various issues raised before us.

The trust background

4. There is a complex background to various trusts for different members of the Tchenguiz family but for present purposes the relevant events can be summarised as follows.

5. In August 2007, there was a restructuring of the Tchenguiz Family Trust (the "TFT") whereby assets and liabilities were transferred from the TFT to the TDT. The assets of the TDT were to be held primarily for the benefit of the Defendant and his family. The trustees of the TDT at that time were Investec Trust Company Guernsey Limited and Bayeux Limited (together "I & B").

6. Complex loan and related arrangements were entered into by the trustees of the TDT, which involved subsidiary companies of the TDT (the "BVI Companies") and Kaupthing Bank HF ("Kaupthing"). In particular, the BVI Companies loaned monies upstream to the trustees of the TDT.

7. Defaults in the loan arrangements occurred during the financial crash and Kaupthing exercised its security. This ultimately led to the appointment of liquidators over the BVI Companies and the issue of multiple sets of proceedings before the Royal Court of Guernsey and elsewhere.

8. In March 2010 proceedings were issued by I & B (the "Loans Proceedings" and later called the "Proofs Proceedings") by which I & B sought determinations as to whether, in their capacity as trustees of the TDT, they had incurred any liability to the BVI Companies. On 22 April 2010, the liquidators of the BVI Companies demanded repayment of the loans from I & B as trustees of the TDT.

9. In July 2010, GTC was appointed as trustee of the TDT (and other trusts) in place of I & B and, as a result, became a party to the Loans Proceedings and to other proceedings before the Guernsey court in its capacity as trustee. GTC did not at any time hold the assets of the TDT. This was because it was realised that, if the trustees of the TDT were held liable to the BVI Companies, the TDT would be insolvent given the size of the loans from the BVI Companies. The Guernsey court

had ordered that the assets of the TDT should be held by receivers pending the outcome of the relevant litigation. Accordingly, GTC was dependent for payment of its fees and disbursements (including legal costs) upon informal funding arrangements whereby the Defendant and other trusts for the benefit of the Defendant and his family would fund GTC, including in respect of its involvement in the Loans Proceedings and other Guernsey proceedings (known respectively as Guernsey 2, Guernsey 3 and In Re E).

10. On 6 December 2013, Sir John Chadwick, Lieutenant Bailiff, sitting in the Royal Court of Guernsey, handed down his judgment in the Loans Proceedings ("the Chadwick judgment"). He held, amongst other matters, that despite the fact that the TDT was a Jersey law trust and the existence of Article 32 of the Trusts (Jersey) Law 1984 limiting the personal liability of trustees, I & B were personally liable to repay the loans from the BVI Companies, but they could have recourse to the assets of the TDT for this purpose. He also made substantial costs orders against GTC. The judgment therefore had two major consequences. First, it confirmed that the liabilities of the TDT exceeded its assets; second, it created a personal liability on the part of GTC to pay the costs orders. Because the liabilities of the TDT exceeded its assets, this meant that GTC would probably be unable to recover from the assets of the TDT the costs (or a substantial part thereof) which it had to pay pursuant to the costs orders.

Key personnel

11. Before turning to the events leading up to the execution of the Indemnity, we would mention briefly some of the key persons involved.

12. GTC was formerly known as Rawlinson & Hunter Trustees SA and is sometimes referred to as "R&H". It has at all times been incorporated and managed in Switzerland. We shall for convenience refer to it as GTC even in respect of periods when it was still known under its former name. Mr Rodney Hodges ("Mr Hodges") has at all material times been a director, although in 2014 he dealt primarily with the trusts held for the benefit of Vincent Tchenguiz rather than the TDT and other trusts held for the benefit of the Defendant. He is now the controlling shareholder in GTC.

13. Mr Richard Hillier ("Mr Hillier") was at the material time in 2014 a director and the largest shareholder in GTC. He was the director with primary responsibility for the TDT and other trusts held for the benefit of the Defendant and his family. He was the primary point of client contact and met regularly with the Defendant. From 2017 onwards, he suffered from ill health and had little ongoing involvement with the TDT. He retired as a director in April 2020 and became a consultant

but his consultancy contract was ended by Mr Hodges on 30 April 2021. He is no longer a shareholder.

14. Alizée Boyer ("Mrs Boyer") worked at GTC from September 2010 to May 2015. She was a trust officer and responsible for administration of the TDT and other Tchenguiz trusts under the supervision of the directors of GTC. Her role involved liaising with the Defendant's personal assistant, Sara Geraghty.

15. The Defendant is a well-established and successful businessman. He and his family were beneficiaries of a number of trusts of which GTC was the trustee, including the TDT. He was at all times based in London and his business address was at premises known as Leconfield House. Through various companies (which we shall refer to simply as R20 as an expression to cover them all as it is not necessary to distinguish them) he employed in-house legal advisers as well as his personal assistant.

16. Sara Geraghty ("SG") was the Defendant's personal assistant and *'de facto'* office manager at Leconfield House. According to the Defendant's eighth affidavit, she held this position from January 1995 until February 2016 and accordingly had served in this capacity for some 19 years by 2014.

17. Caroline Mayne ("Ms Mayne") was one of the Defendant's in-house lawyers employed by R20 until mid-2014. She appears to have been the relevant in-house legal adviser at the time of the Indemnity.

18. Nicole Martin ("Ms Martin") was previously employed by Ogier in Guernsey (who had acted for GTC) and had been involved in some of the Guernsey litigation. She began working as part of the Defendant's in-house legal team in the spring of 2014 and took over as Head of Legal later that year.

The Indemnity

19. It is convenient at this stage to set out the relevant terms of the Indemnity. It is expressed as being made between the Defendant and GTC, under its then name of Rawlinson & Hunter Trustees SA, described in the deed as *'R&H'*. It is dated 14 April 2014 in manuscript and on the front cover, the words *'draft – 14.04.14'* have been crossed out and replaced in manuscript by *'Execution version'*.

20. The recitals of the Indemnity are in the following terms:

> *"Recitals:*
>
> *(A) R&H is the current trustee of the Tchenguiz Discretionary Trust (the "TDT");*
>
> *(B) R&H is the Fifth Defendant in proceedings commenced in the Royal Court in Guernsey with file number 1462/2010 between (1) Investec Trust Guernsey Limited and (2) Bayeux Trustees Limited as Plaintiffs and (1) Glenalla Properties Limited; (2) Thorson Investments Limited; (3) Eliza Limited; and (4) Oscatello Investments Limited as the First to Fourth Defendants and Third Parties (the "Loans Proceedings");*
>
> *(C) On 6 December 2013, judgment of the Royal Court in the Guernsey Loans Proceedings was handed down by Lieutenant Bailiff Sir John Chadwick. The Royal Court dismissed R&H's defence, counterclaim, and third-party claims and made costs orders against R&H (the "Costs Orders");*
>
> *(D) On 20 January 2014, R&H filed an appeal against the order dated 6 December 2013. The Guernsey Loans Proceedings are currently pending in the Guernsey Court of Appeal and R&H's appeal is presently listed to be heard by the Court of Appeal in June 2014;*
>
> *(E) R&H is party to proceedings in relation to the TDT commenced in the Royal Court in Guernsey with file number 1505/2010 and proceeding under the description "In Re T" ("Guernsey 2");*
>
> *(F) R&H is the plaintiff in a claim against Investec Trust (Guernsey) Limited and Bayeux Trustees Limited pending in the Royal Court in Guernsey with file number 1793/2013 ("Guernsey 3");*
>
> *(G) R&H is party to proceedings in relation to the TDT commenced in the Royal Court in Guernsey with file number 1570/2010 and proceeding under the description "In Re E" ("Re E");*
>
> *(H) RT has agreed to indemnity R&H, whether acting in its personal capacity or as trustee of the TDT, in relation to the Loans Proceedings, Guernsey*

2, Guernsey 3 and Re E, together with all and any other proceedings which have been or may be commenced in Guernsey and which relate in any way to the TDT (together the "Guernsey Proceedings") on the terms and conditions set out in this Deed."

21. The effective indemnity is set out in clause 2.1 in the following terms:

"2.1 RT agrees and undertakes to R&H that he will at all times indemnify and keep indemnified R&H in its personal capacity, in its capacity as trustee of the TDT, and in any other fiduciary capacity in relation to the TDT, from and against:

2.1.1 all liability for legal costs in relation to all and any of the Guernsey Proceedings irrespective of whether such liability was incurred prior to or after the date of this Deed including:

(A) the legal costs of any other party to any of the Guernsey Proceedings for which R&H has been or may be found liable (including, for the avoidance of doubt) any liability pursuant to the Costs Orders); and

(B) any legal costs which R&H has incurred or will or may in the future incur in relation to any of the Guernsey Proceedings (irrespective of whether or not Beddoe relief has previously been, or is or may in the future be, obtained); and

2.1.2 all claims and demands arising from any judgment in favour of any other party to any of the Guernsey Proceedings which may be made on R&H."

At clause 5.1, the deed is expressed to be governed by and construed in accordance with English law. As can be seen, Clause 2.1.1 relates solely to legal costs in relation to any of the Guernsey Proceedings, whether costs incurred by GTC or costs of other parties awarded against GTC. Clause 2.1.2 covers any judgment against GTC in favour of any of the other parties to the Guernsey Proceedings. The Indemnity does not cover GTC's own fees, whether in relation to the Guernsey Proceedings or other matters.

22. The Indemnity is stated as being executed as a deed by the Defendant. There is what purports to be his signature, which is then witnessed by the signature of SG who has then also written her name in block capitals. The Indemnity is also stated as being executed as a deed by R&H acting

by Mr Hodges and Mr Hillier who have signed. Their signatures are witnessed by Mrs Boyer who has signed as a witness and then written her name in block letters.

Events leading up to the Indemnity as taken from contemporaneous documents

23. The court was alerted during the hearing to the fact that there was sometimes inconsistency in the stated times of emails in the papers before the court. It seems to have been accepted by all parties that this was explicable by the time difference between the UK and Switzerland and whether the version of the email before the court had been extracted from records in the UK or in Switzerland. There was no suggestion before us that anything turned on these timing inconsistencies and there appeared to be common ground as to the sequence of the relevant emails.

24. As already mentioned, Mr Hillier regularly held meetings with the Defendant in connection with trust matters. According to Mr Hillier's oral evidence, it was usually every two to three weeks at Leconfield House. An agenda would be prepared by GTC for such meetings. The first agenda to which we have been referred is stated to be for a meeting to be held at Leconfield House on 21 January 2014. The agenda lists a total of thirteen matters including at (2) *"SFO proceedings"*, at (3) *"Guernsey proceedings",* and at (12) "*Outstanding legal fees: Herbert Smith, Babbé Ogier*". Herbert Smith and Babbé represented GTC in the Loans Proceedings.

25. A second copy of the agenda has some manuscript writing on it and Mr Hillier accepted in evidence that this was his handwriting. It is likely that these were notes made at the time of the meeting. So far as relevant, Mr Hillier's notes say *"Indemnity R&H"* and *"Indemnity TDT".*

26. Following the Chadwick judgment, Herbert Smith Freehills ("Herbert Smith") and Babbé (the English solicitors and Guernsey advocates respectively acting for GTC in the Loans Proceedings) prepared a note of advice on the consequences of the judgment ("Herbert Smith Note"). The advice is dated 14 February 2014 and was circulated by email on the same date to Mr Hillier and Mr Andrew McCallum (another director and shareholder of GTC) at GTC and to Ms Mayne at R20. The advice went into some detail. The relevant parts were as follows:

> ***"2. As you know, we consider there is a real risk that the effect of LB Chadwick's order is that R&H is liable for the BVI Companies' costs without the protection of Article 32 (or Section 42, the Guernsey equivalent). Whilst LB Chadwick's order does not expressly state that the costs order is not limited to the value of the trust fund, it is clear from comments he has made that he***

considers R&H to be liable for the BVI Companies' costs irrespective of its ability to recover from the TDT.

3. If that is the position, then the BVI Companies would be able to recover their costs in full from R&H. R&H would then need to seek to claim reimbursement of these costs under its indemnity from the TDT. Where (as is the case here) the value of all the claims against the trust fund greatly exceeds the value of the trust fund there is a real risk that R&H, as one of several creditors of the TDT, would only be able to recover a very small proportion of its costs, possibly none.

4. Therefore the risk for R&H is that if the indemnity is of no practical value, R&H will be personally exposed for the BVI Companies' costs (subject to its ability to recover from other sources, for example any third party indemnity it may have). R&H has appealed LB Chadwick's ruling in relation to costs, although there can be no guarantee that R&H will succeed on this."

27. At para 18 the note said *"We do, however, strongly advise that, given the real risk of liability for R&H, you ensure that R&H is properly indemnified by the beneficiaries, or another Tchenguiz family trust, in respect of the costs of the Court of Appeal proceedings".*

28. The note went on to consider the desirability of seeking Beddoe relief but on balance advised against it. It concluded by saying at para 26 that a more practical solution would be for GTC to ensure that it had an effective indemnity.

29. A further agenda for a meeting on 28 February 2014 lists a number of the same matters as in the earlier agenda, including reference to the *'Guernsey position'* and *'Outstanding legal fees re Herbert Smith and Babbé'*. At item 2, under the heading *'SFO proceedings'*, there is a reference at (d) to '*Letter of indemnity for R&H'.* It is common ground that the Tchenguiz brothers were engaged in complex and high profile litigation against the Serious Fraud Office (SFO) and GTC in its capacity as trustee of two other trusts for the benefit of the Defendant and his family, known as the TDAT and NS1, was being requested to join as a party. GTC was asserting that, in order to participate and provide witness statements in support of the claim against the SFO, it would need to have indemnities in its capacity as trustee of these two trusts from the Defendant against any liabilities which it might incur in connection with the SFO litigation. It is also common ground that these were in due course forthcoming, and we shall refer to these as the "TDAT indemnity", the "NS1 indemnity" and together the "SFO Indemnities".

30. There is a handwritten note of Mr Hillier dated 4 March 2014 which appears to relate to numbered items on an agenda, although we have not seen an agenda for a meeting on that date. Under item 4, Mr Hillier has made a note *'Letter of indemnity → Robbie – indemnity, houses'.* It is not clear what this is referring to.

31. On 18 March 2014, there was a meeting of the shareholders of GTC held in Geneva. Present were Mr Hillier, Mr Hodges, Mr McCallum and two others. It seems clear that, by this stage, Herbert Smith had been instructed to draft an indemnity from the Defendant in favour of GTC in accordance with the recommendation in the Herbert Smith Note of 14 February because, under the heading of *'Legal matters'*, the minutes of the meeting include the passage: *"Herbert Smith are drafting an indemnity agreement regarding the costs awarded against R&H on Guernsey 1, which RT is to sign"*. RT is the term used to describe the Defendant. We were not provided with the instructions to Herbert Smith but it seems clear that it was GTC who instructed that firm to prepare an indemnity.

32. Indeed, shortly afterwards on 31 March, Mr Gareth Keillor of Herbert Smith forwarded a draft indemnity as between the Defendant and GTC in its capacity as trustee of the TDT. The covering email was addressed to Mr Hillier and, so far as relevant, said as follows:

> *"Dear Richard*
>
> *As requested, I attach a draft deed of indemnity from Robert Tchenguiz to R&H in relation to the Guernsey loans proceedings. We have tried to keep this as simple as possible. Some points to note are as follows:*
>
> *(a) We have drafted the indemnity so that it includes not only the loans proceedings (including the pending appeal), but also Guernsey 2 (the proceedings before LB Talbot). We have not, however, expanded the indemnity to include 'Guernsey 3' (the new claim against ITGL). Please let us know if you would like us to include Guernsey 3 within the indemnity."*

33. Mr Hillier forwarded the draft indemnity to Mr McCallum and Mr Hodges by email the same day inviting any comments. On 3 April, Mr Hodges emailed Mr Keillor at Herbert Smith suggesting various changes to the draft, the key one being that the indemnity should extend to all the Guernsey proceedings in which the TDT was involved.

34. On 14 April 2014, Mr Keillor emailed a revised draft of the deed of indemnity to Mr Hodges and Mr Hillier, as well as others at GTC. The revised draft covered all the proceedings in Guernsey as requested by Mr Hodges. The draft was dated 14.04.14. By email at 10.00 the next day, Mr Hodges emailed Mr Hillier forwarding drafts of the two SFO Indemnities *saying "Here are the two shorter ones. I need to speak to [Herbert Smith] ASAP re bigger one".* The reference to a *'bigger one'* was clearly a reference to the Indemnity and there appears to have been a telephone discussion between Mr Hodges and Herbert Smith on 15 April following which Mr Hodges was satisfied with the terms of the existing draft. No further draft was prepared.

35. On 30 April, Mr Hodges emailed Mr Hillier asking whether the TDT deed of indemnity had yet been signed.

36. There is then one of the regular agendas for a meeting on 1 May (although it seems clear that Mr Hillier in fact went to Leconfield House on 2 May). For the first time there is an agenda item 10 which states *"3 Indemnity letters RT"*. GTC's case is that this was clearly a reference to the Indemnity and the two SFO Indemnities.

37. At 20.04 on 1 May, Mr Hodges emailed copies of all three indemnities to Mr Hillier, at Mr Hillier's request according to Mr Hodges. At 09:30 the next day, 2 May, Mr Hillier emailed copies of all three draft indemnities to Mrs Boyer. These were immediately sent on by Mrs Boyer to SG (copied to Mr Hillier) with a request:

> *"Dear Sara*
>
> *Can you please make sure the attached documents are printed for you and Richard for your meeting?"*

38. The attached documents were drafts of the SFO Indemnities and the draft of the Indemnity dated 14.04.14.

39. On 8 May, Mrs Boyer emailed Ms Mayne, copied to SG, saying:

> *"3 matters I need to follow up on:*
>
> *1. The 3 indemnity letters to be signed by RT…."*

She sent a further chaser to Ms Mayne and SG on 15 May saying *"I would be grateful if you could revert regarding the below 3 matters!".* It seems clear from this that her understanding was that the Defendant was to sign the Indemnity and the SFO Indemnities.

40. On 21 May, Ms Mayne appears to have requested a copy of the Indemnity from Herbert Smith because at 14:02 on that day, Mr Keillor emailed a copy of the draft dated 14.04.14 to Ms Mayne, with a copy to SG, stating *"As requested, here is the draft deed of indemnity".*

41. On the same day at 16:33, SG emailed Mrs Boyer a copy of the signed Indemnity saying *"Please find enclosed signed indemnity as requested".* Importantly, that email and enclosure were copied to the Defendant, who appears to have been in Monaco at the time. The Indemnity purported to be signed by the Defendant and witnessed by SG, who had signed as a witness and also printed her name as being the witness. The document still had the words *"Draft – 14.04.14"* on the front cover.

42. Mrs Boyer immediately emailed the signed Indemnity to others in GTC, including Mr Hillier and Mr Hodges, saying *"Please see enclosed. It is in draft format…. was it agreed our end first?".* Mr Hillier replied shortly afterwards saying *"I think Rodney agreed this with Herbert Smith"* and the next morning, 22 May at 08:28, Mr Hodges replied to Mrs Boyer and others, including Mr Hillier, saying *"There should be 3 indemnities, big one and one each for TDAT and NS1".* The reference to the *'big one'* was clearly to the Indemnity and the other two were the SFO Indemnities.

43. Mrs Boyer then immediately emailed SG, with a copy to the Defendant, responding to SG's email the previous day saying *"Thank you Sara. Any chance with the other two?".* Shortly afterwards at 09:14, she sent a further email to SG asking that SG send the original copy of the signed Indemnity over to GTC for signature. SG replied the same day at 09:45 saying *"Yes I'm Fedexing to you".*

44. At 11:11 the same day, Mrs Boyer emailed Ms Mayne, copied to Mr Hillier and SG to again chase up the execution of the SFO Indemnities as follows (so far as relevant):

> *"I would be grateful if you could get an update for:*
>
> *1. The indemnity letters to be signed by RT for NS1 and TDAT.*
>
> *2. ..*

3. .."

45. Ms Mayne replied at 11:20 saying *"Hi. Point 1 and 2 are with Sara. I am bit swamped today with WS deadline so I will revert re 2 later!".*

46. On the morning of 23 May, Mrs Boyer emailed further copies of the two draft SFO Indemnities to SG. SG then emailed copies of those two indemnities to Ms Martin at 11:32 saying *"Can you give these the once over? I think it's just a confirmation re: disclosure of info from R&H regarding the trusts".* This latter sentence clearly showed a misunderstanding on the part of SG as to what the documents were. Ms Martin replied the same day at 12:11 to SG attaching amended versions of the two SFO indemnities saying *"I've made some suggested changes which should not be controversial – these are indemnities re the NS1 and TDAT"*.

47. SG then forwarded the two indemnities by email to the Defendant at 12:13 saying *"I got these checked by Nicole who said there is nothing controversial, but I need to get them to Alizée today"*. It seems that SG mistakenly sent the previous unamended versions because it is common ground that the amendments suggested by Ms Martin were not incorporated in any of the signed versions.

48. At 13:34 on the same day, SG forwarded to Mrs Boyer by email copies of the two SFO Indemnities apparently executed by the Defendant and witnessed by SG. Mrs Boyer in turn immediately forwarded these on to Mr Hillier and Mr Hodges as well as others in GTC.

49. Mrs Boyer's evidence, to which we refer below, is that she was not happy with the manner in which the SFO Indemnities had been executed because the place in which SG had written her name as a witness appeared to make it uncertain as to whether the deed was in fact signed by SG rather than the Defendant. It appears that Mrs Boyer telephoned SG to ask for the two indemnities to be re-executed, because on 27 May she emailed SG saying *"Further to our call last week, kindly make sure that I receive the proper original copy by Mail this week"*. She chased the matter again on 30 May by email to SG saying *"I don't seem to have received the original indemnities signed by RT!"* (original emphasis).

50. On 3 June at 12:36, Mrs Boyer, who had clearly not yet received the hard copies of any of the signed versions, emailed SG attaching the executed copy of the Indemnity (i.e. for the TDT) and copying the Defendant saying *"Did we get this original back??".* The signed copy of the Indemnity was attached. SG replied the same day saying *"Nope, hitting the post tonight – my fault. Did you get the other two, Marnie sent them".* The reference to *'other two'* is clearly a reference to the

SFO Indemnities. This email was also copied to the Defendant. Mrs Boyer replied the same day, copied to the Defendant, saying *"Not the original copies yet".* SG then replied saying *"Can you send the clean copy, sorry"*, presumably in order to get them re-executed.

51. Mrs Boyer received the three original signed indemnities the next day because on 4 June at 08.28, she emailed SG to say "I just received the 3 originals". This was clearly a reference to the signed versions of the Indemnity and the SFO Indemnities.

52. Mrs Boyer stated that she then noticed that the two original SFO Indemnities received were the ones which had been emailed on 23 May and which Mrs Boyer felt were not correctly executed as described above. She therefore emailed SG later that morning saying *"Sara, the wrong original (sic) were couriered to us (indemnities for NS1 and TDAT). Please make sure original copies signed by RT are sent over to us!".* SG replied almost immediately by email saying *"For g-d sake! Arrrgh. Will do!".* Mrs Boyer then emailed clean copies of the SFO Indemnities to SG shortly afterwards.

53. At some point thereafter duly executed originals of the SFO Indemnities were returned to GTC, although there was no evidence before us as to the date when this occurred. It is common ground that these two signed indemnities were executed by the Defendant personally and they were subsequently also executed on behalf of GTC.

54. The only other document we should refer to at this stage is a further note of advice from Herbert Smith, with the agreement of Babbé, dated 23 May (the "23 May Note"). It deals with the merits of the appeal against the Chadwick judgment and in passing at para 23 notes that *"…it is intended that Robert Tchenguiz will indemnify R&H in relation to costs…"*.

55. There matters seem to have rested for present purposes until 5 October 2017 when GTC presented a Representation in this court seeking the court's approval to GTC's decision to retire as trustee of eleven trusts for the benefit of the Defendant and his family (the "RT Trusts") including the TDT. This was in circumstances where the relationship between the Defendant and GTC (Mr Hodges in particular) had broken down, the Defendant had instituted certain proceedings concerning the trusteeship and the Defendant had on 3 October 2017 delivered a notice of removal of GTC as trustee of the TDT.

56. Amongst other relief sought in the Representation, GTC sought an order that all its outstanding fees, costs and liabilities should be met from the RT Trusts or by the Defendant and that GTC

should be provided with reasonable security for any existing, future or contingent liabilities as outgoing trustee of any of the trusts.

57. There was no mention in the Representation of the existence of the Indemnity. Its existence was only disclosed on 22 November 2017, which provoked a response from Viberts on behalf of the Defendant dated 5 December 2017 pointing out that the terms of the Indemnity provided for a contractual indemnity which went beyond what the law envisaged and rendered unnecessary the relief sought in the Representation by way of a further indemnity from the Defendant. The letter went on to say:

> *"As my client has no recollection of signing the Indemnity Document, or indeed, agreeing to provide such a broad indemnity, please provide a response to the following queries as a matter of urgency. If the provenance of the Indemnity Document can be confirmed, it may assist in resolving the issue of indemnity generally."*

The letter went on to request the original of the document together with all relevant email communications leading up to the execution of the document and other material.

58. We can perhaps dispose of a preliminary point at this stage. The Defendant, supported by an affidavit from Ms Martin, originally contended in the present proceedings that GTC had only executed the Indemnity in November 2017 i.e. when it was disclosed as outlined in the previous paragraph.

59. Mrs Boyer was the witness to the signature of Mr Hodges and Mr Hillier when they signed the Indemnity as directors of GTC. She explained that this had occurred soon after receipt of the original from SG on 4 June 2014, that she was the person who had inserted the date of 14 April 2014 as being the date of the Indemnity and she had crossed out *'Draft – 14.04.14'* on the front of the document and replaced it with *"Execution version".* She also confirmed that she had left the employment of GTC in May 2015 and therefore could not possibly have witnessed the signature in November 2017 as alleged by the Defendant and Ms Martin.

60. At the conclusion of Mrs Boyer's evidence before us, Advocate James confirmed that it was no longer part of the Defendant's case that the Indemnity was not in fact executed by GTC until 2017. We accept Mrs Boyer's evidence that it was executed by GTC shortly after 4 June 2014.

The present proceedings

61. The present proceedings were commenced by GTC in September 2018. They were originally listed for trial in March 2020, but that trial was vacated by consent. It was relisted for trial in October 2020 but that hearing was also vacated by consent and relisted for July 2021. In March 2021, the parties filed a consent order seeking to vacate that trial and re-fix it. Master Thompson ordered a stay of the proceedings pending determination of the Proofs Proceedings in Guernsey. We describe these in more detail later but it was clear that the outcome of the Proofs Proceedings would affect the amount claimed under the Indemnity as it would determine how much GTC would receive from the assets of the TDT.

62. On 27 September 2023, GTC applied to lift the stay, which was objected to by the Defendant as the Proofs Proceedings had not yet been determined. However, Master Cadin lifted the stay for the reasons in his judgment dated 31 October 2023. The matter eventually came on for hearing before this court on 10 March 2025.

Who signed the Indemnity?

63. The Defendant denies having signed the Indemnity. Both sides instructed handwriting experts; Fiona Marsh for GTC and Ellen Radley on behalf of the Defendant. They each produced a report and together a joint report dated 2 December 2019 setting out the areas of agreement and disagreement. Both experts agreed that there is *'strong evidence'* to indicate that the Defendant did not write the signature in his name on the Indemnity. In the light of this evidence, GTC accepted this position and did not contend otherwise. We have no hesitation in finding as a fact that the Defendant did not sign the Indemnity.

64. The question then is as to who did sign the Indemnity. Both experts were provided with documents said to have been signed by SG in the name of the Defendant. They were not signatures of SG using her own signature *'pp Robert Tchenguiz'*. They were all impersonations of the Defendant's signature by SG. According to Ms Radley's report, she was provided with twelve examples of such signatures and we assume that the same number was supplied to Ms Marsh, although she does not specifically list them in her report, referring simply to *'several sets of minutes submitted by R20 some of which have correspondence attached to them plus some letters'.*

65. Ms Marsh compared the signature on the Indemnity with the examples of signatures where SG had impersonated the signature of the Defendant (described in her report as *'the documents listed at 4 above'*) and summarised her opinion as follows:

"The questioned signature (i.e. the signature on the Indemnity) *bears a reasonable pictorial resemblance to the signatures on the documents listed at 4 above. It has either been written by the same person as the signatures or is a copy of this style of signature. I am unable to determine with any degree of certainty which alternative is the most likely. The result of this examination is, therefore, inconclusive."*

66. Ms Radley reached a firmer opinion, concluding that there was *'strong evidence'* that SG wrote the signature on the Indemnity. Having compared the signature on the Indemnity with the signatures in the name of the Defendant known to have been written by SG, she expressed her opinion as follows:

"81. I note a number of significant similarities between the questioned signature and the signatures known to have been written by Sara Geraghty presented and no significant differences.

82. Consequently, I am of the opinion that there is strong evidence to support the proposition that Sara Geraghty wrote the questioned signature in the name of Robert Tchenguiz on the Deed of Indemnity.

83. I have considered the alternative proposition, that this signature was written by another individual either coincidentally including features found in Sara Geraghty's style or copying her style of signature in the name of Robert Tchenguiz. Due to the correlation of detail between the questioned signature and signatures written by Miss Geraghty together with the fluency, pen pressure variation and spontaneity of execution exhibited in the questioned signature, I consider this possibility to be unlikely."

67. Neither handwriting expert was called to give evidence. However, we have had the advantage not only of reading their reports but also of hearing evidence about the surrounding circumstances in which the Indemnity was signed. Taking all these matters into account, we find on the balance of probability that the signature purporting to be that of the Defendant on the Indemnity was written by SG. We therefore proceed to consider the rest of the issues in this case on the basis of our finding that SG signed the Indemnity in the Defendant's name by impersonating his signature as she had done on other occasions.

68. While discussing the reports of the handwriting experts, we think it may be helpful to address one other issue. It is to be recalled that signed versions of the two SFO Indemnities were emailed to Mrs Boyer by SG on 23 May but, as explained earlier, Mrs Boyer asked for further versions to be

executed, which were subsequently sent to GTC. It is common ground that these subsequent original versions of the SFO Indemnities were signed by the Defendant.

69. The earlier versions (i.e. those sent by SG by email on 23 May and referred to in Ms Radley's report as *'the Previous Versions'*) were not supplied to Ms Marsh and accordingly she expressed no opinion about them.

70. However, they were supplied to Ms Radley and one of the questions asked of her on behalf of the Defendant was:

> *"Could you also indicate whether it is your view that the signatures on the two other Indemnities dated 7 April 2014, ("the Previous Versions") were that of the person who signed the disputed Deed in question in these proceedings?"*

71. Ms Radley did not feel able to answer the question specifically. She said at para 78 of her report that it would not be meaningful to compare the questioned signature on the Indemnity specifically against the two signatures written on the Previous Versions because, in a signature examination, one must compare a questioned signature against a large body of signatures known to have been written by the particular individual.

72. However, she was able to express an opinion in the following terms:

> *"66. I have intercompared all documents presented as bearing known signatures written by Sara Geraghty in the name of Robert Tchenguiz, including the signatures on the Previous Versions, and consider that they are consistent with being of common authorship.*
>
> *67. The phrase "consistent with" is generally used when there is a limitation of some nature on the examination. Restrictions can be the result of a number of causes, for example, writings that are brief in design and could easily be copied, a slightly limited number of sample signatures etc.*
>
> *68. The term is used to describe situations where findings are what would be expected to be found if a certain event had taken place i.e. if all the signatures were written by Sara Geraghty. It is not meant to be equated with absolute certainty but can regarded as covering a much broader spectrum of possibilities. I find no clear evidence to suggest these are of different authorship."* [Emphasis added]

73. The Defendant denies that he signed the Previous Versions and it is his case that these were signed by SG impersonating his signature. There is no suggestion in Ms Radley's report that the signatures on these two documents are the genuine signatures of the Defendant; nor is it part of GTC's case that they are. Whilst it is not essential for us to reach a decision on this aspect, having regard to the surrounding circumstances of the execution of the Previous Versions and Ms Radley's report, we find on the balance of probabilities that SG also wrote the Defendant's purported signature on the Previous Versions i.e. the versions of the SFO Indemnities which were emailed to Mrs Boyer by SG on 23 May 2014 and subsequently received in hard copy by GTC on 4 June, but never executed by GTC.

Issues for consideration

74. Against the background of our conclusion that SG signed the Indemnity in the Defendant's name, it seems to us that the following issues arise for determination:

(i) Did SG sign the Indemnity with the actual authority of the Defendant?

(ii) If not a valid deed, does the Indemnity nevertheless take effect as a contract?

(iii) Is the Defendant estopped from denying that the Indemnity takes effect as a deed?

(iv) If SG did not have the actual authority of the Defendant to sign the Indemnity in his name, is he nevertheless estopped from denying that the Indemnity is binding upon him pursuant to one or more of the doctrines of estoppel by representation, by silence or by negligence?

(v) If the Indemnity is otherwise enforceable, what is the effect of the consent order dated 9 July 2024 made in the Proof Proceedings in the Guernsey Royal Court? Does it extinguish or curtail GTC's right to claim under the Indemnity?

(vi) If not, various issues of principle in relation to the correct quantum of GTC's claim arise for decision.

The evidence

75. Before turning to consider the first of these issues, we need to summarise, so far as necessary, the evidence given before us. Most of the witnesses provided several affidavits or witness

statements earlier in the proceedings, often dealing with specific issues which arose at that time. At a directions hearing in January 2025, the Commissioner therefore directed that each witness who was to give evidence should swear a composite affidavit setting out his or her evidence in relation to all matters which were currently before the court but excluding matters which were no longer relevant.

For GTC

(i) Alizée Boyer

76. Mrs Boyer swore two affidavits which she adopted as her evidence-in-chief. She gave oral evidence by video link and was cross-examined by Advocate James. Much of her evidence relates to the various emails which were sent in 2014 and are not disputed. We would summarise the material parts of her evidence as follows.

77. As already mentioned, she was employed by GTC as a trust officer from September 2010 to May 2015. In the course of her employment she dealt with the various trusts held for the benefit of the Defendant and his family under the supervision of Mr Hillier and other directors.

78. She said that Mr Hillier would often meet with the Defendant at Leconfield House in London to discuss the Defendant's business and personal affairs. In advance of such meetings, she would liaise with Mr Hillier to prepare an agenda. She would then send the agenda and all the supporting documents to SG for SG to print them out and provide them to Mr Hillier and the Defendant at their meeting.

79. She was aware that the issue of indemnification was being discussed from January 2014 onwards as it began to appear in the agendas for the meetings. By the time of the agenda for 1 May, item 10 referred to *"3 Indemnity letters RT".* She confirmed that these were references to the Indemnity, the TDAT Indemnity and the NS1 Indemnity.

80. She confirmed that on 2 May, she sent an email to SG attaching the three draft indemnities and asking SG to print them out for the meeting which Mr Hillier and the Defendant were to have that day.

81. She confirmed that on 8 May, she emailed Ms Mayne, copied to SG, referring to three matters which needed to be followed up, including as the first item *'the 3 indemnity letters to be signed by RT'*. She sent a chaser to Ms Mayne and SG on 15 May.

82. The next thing that occurred so far as she was concerned was on 21 May when she received the email timed at 16:33 from SG stating *"Please find enclosed signed indemnity as requested"*. The email was copied to the Defendant and attached a signed copy of the Indemnity, i.e. the one for the TDT.

83. She noted that, although signed apparently by the Defendant, the document was still marked as *'Draft – 14.04.14'*. Accordingly, she immediately emailed Messrs Hillier and Hodges (and others at GTC) stating *"Please see enclosed. It is in draft format… was it agreed our end first?"*. Mr Hillier replied that same evening to the effect that he thought Mr Hodges had agreed it with Herbert Smith and Mr Hodges replied the next day at 06:29 saying "*There should be 3 indemnities…. Big one and one each for TDAT and NS1"*.

84. So far as the Indemnity was concerned, Mrs Boyer emailed SG on 22 May at 09:14 requesting that the original be sent for signature by GTC. She sent a chasing email on 3 June (copied to the Defendant) and the original signed Indemnity arrived on 4 June. She arranged for Mr Hillier and Mr Hodges to sign the Indemnity on behalf of GTC as directors and witnessed their signatures. She then dated it 14 April, crossed out *'Draft 14.04.14'* and wrote in *'Execution version'* on the front of the Indemnity. In her second affidavit, she said that the directors had confirmed that it would be appropriate to date the Indemnity 14 April. In her oral evidence she said that either the directors had confirmed this or she had decided to date it 14 April by reference to the date on the draft. We do not think that anything turns on this. There is no dispute that the hard copy document was purportedly signed by the Defendant on 21 May and it is no longer disputed that the Indemnity was executed on behalf of GTC at some point not long after receipt of the hard copy of the Indemnity on 4 June. It is not disputed that it was backdated to 14 April 2014 by Mrs Boyer.

85. Reverting to events of 22 May, having been prompted by Mr Hillier's email about the TDAT and NS1 Indemnities, Mrs Boyer emailed SG at 08:29 (copied to the Defendant) in response to her email of the previous day to say *"Thank you Sara. Any chance with theother [sic] two?"*. Shortly after that she emailed Ms Mayne at 11:11 saying *"I would be grateful if we could get an update for….1. The indemnity letters to be signed by RT for NS1 and TDAT"*.

86. Ms Mayne replied almost immediately saying that she was a bit swamped that day but that points 1 and 2 were with SG.

87. The following day, 23 May, following a telephone call from SG, Mrs Boyer emailed SG attaching the two outstanding draft indemnities in Word format in relation to the NS1 and TDAT trusts.

88. Later that day at 13:34, SG sent Mrs Boyer scanned copies of the TDAT and NS1 Indemnities which had been signed. The covering email simply read *"As promised! Sending the originals".* The Defendant was not copied to that email.

89. Mrs Boyer explained in her affidavit and in some detail in her oral evidence that she was not happy with the way in which the two SFO Indemnities had been executed. She said that, because SG had written her name as a witness immediately below the apparent signature of the Defendant, she was concerned that it might appear that SG, rather than the Defendant was the signatory. She said that there was a call with SG on the afternoon of 23 May during which she raised the issue about the execution of the two indemnities and asked for them to be re-executed. She followed this up by email on 27 May to SG stating *"Further to our call last week, kindly make sure that I receive the proper original copy by Mail this week".* She chased again on 30 May stating *"I don't seem to have received the original indemnities signed by RT!".*

90. As explained above, on 4 June Mrs Boyer received original versions of all three indemnities. However she noted that the versions of the NS1 and TDAT Indemnities were the ones that she considered had been wrongly executed, i.e. the ones which had been emailed on 23 May. Mrs Boyer accordingly emailed SG to say *"Sara, the wrong original (sic) were couriered to us (Indemnities NS1 and TDAT). Please make sure original copies signed by RT are sent over to us! Thank you".* SG replied saying *"For g-d sake! Arrrgh Will do!".* Almost immediately afterwards, Mrs Boyer emailed SG attaching clean copies of the TDAT and NS1 Indemnities, no doubt in order to assist re-execution.

91. Subsequently, the TDAT and the NS1 Indemnities signed by the Defendant personally were sent to GTC although there is no evidence before the court as to exactly when this occurred.

92. It was part of the Defendant's case (maintained by him in his oral evidence) that, particularly having regard to the issues identified by Mrs Boyer over the manner in which the SFO Indemnities were executed, Mrs Boyer knew that the Indemnity had not been signed by the Defendant personally. Thus, in her first affidavit, Mrs Boyer quoted from Ms Martin's fourteenth affidavit where at para 22(c) Ms Martin said:

> *"….the contemporaneous emails show that they [GTC] knew that the soft copy was not genuinely signed by [the Defendant]. Yet further, when the disputed document arrived in hard copy on 4 June 2014, alongside those for the TDAT and NS1 trusts, all documents were all explicitly rejected by R&H. In other words, they (through Alizée Boyer) clearly knew in June 2014 that the document was a dummy. R&H have never explained when, let alone why in the circumstances, the disputed*

deed was signed and dated by them (but I know it was not before 15 November 2017…..).”

93. In her evidence, Mrs Boyer strongly denied this. In response to questions from Advocate James, she made clear that she never at any stage thought that the Defendant had not executed the SFO Indemnities; it was merely that the manner in which SG had written her name as witness might give that impression. Similarly, she had no concerns about the genuineness of the Defendant’s signature on the Indemnity; indeed, had she had any concerns about the manner of execution of that document, she would have asked for it to be re-executed at the same time as she asked for re-execution of the TDAT and NS1 Indemnities. Contrary to what was said in Ms Martin’s affidavit, the Indemnity had not been rejected by GTC.

94. Mrs Boyer was also asked about her impression of SG’s qualities as the Defendant’s personal assistant. She said that all of those working for the Defendant were very professional people. She expressed the view that you did not get to become an assistant to someone like the Defendant if you were not good in your job. In her second affidavit at para 36 she said:

“…I strongly believe that Mr Tchenguiz would have known of and approved of anything Ms Geraghty was doing. She was terrified of him and checked everything with him – even down to whether a meeting was at 11am or 11.15am, she never made a decision about the tiniest thing without checking with him first. Knowing what she was like, she would never have done anything like this without Mr Tchenguiz’s approval, as I understand he is now saying.”

95. Advocate James pressed Mrs Boyer about her assertion that she had no suspicions about the genuineness of the Indemnity received by email on 21 May. He pointed out that the Defendant was in Monaco at the time, having chartered a yacht for which GTC, through Mrs Boyer, had paid for only a few days earlier. Mrs Boyer was clear in her response that it simply did not occur to her. Wealthy individuals such as the Defendant could move around frequently, she said, and it was not possible to keep track of their movements. Furthermore, documents could be signed from a yacht and in any event, she did not know when the Indemnity had been signed.

96. In relation to her concern about the manner in which the SFO Indemnities appeared to have been executed, she accepted that, with greater experience, she now knew that this was not a problem and documents were often executed in such a manner. However, at the time, as a junior trust officer, she thought that it was a problem.

97. The court finds Mrs Boyer to have been an honest and reliable witness who was doing her best to assist the court. She now works for another trust company in Switzerland and has not worked for GTC since 2015. She has no reason to tailor or embellish her evidence and in our judgment did not do so. Where she could not recall something, she would say so.

98. Notwithstanding the red flags referred to later and the other evidence in the case (including that of the Defendant), we have no hesitation in finding as follows in the light of her evidence:

    (i) She had no suspicion that the Defendant had not in fact signed the versions of the SFO Indemnities emailed on 23 May and subsequently received in hard copy on 4 June. Her concern was solely as to how it might appear because of the location of SG's name as a witness.

    (ii) Similarly, contrary to the assertion in Ms Martin's affidavit quoted above, Mrs Boyer did not at any stage suspect that the Defendant had not signed the Indemnity or that SG (or anyone else) had written his purported signature. She believed the Indemnity to have been signed by the Defendant.

(ii) Rodney Hodges

99. As already mentioned, Mr Hodges is now the controlling shareholder of GTC and was a director and shareholder in 2014, although he was mainly involved with trusts for the benefit of Vincent Tchenguiz, whereas Mr Hillier was the director with primary responsibility for those trusts which were for the benefit of the Defendant and his family, including the TDT.

100. Pursuant to the Commissioner's direction for consolidated affidavits, Mr Hodges swore his fourteenth affidavit on 19 February 2025. For the most part, it consists of a summary of the various emails and documents which we have summarised above although of course he had no involvement with many of them. We would summarise his additional evidence as follows.

101. He confirmed that, as mentioned at para 9 above, GTC never held any of the assets of the TDT itself as they were held by receivers. GTC relied upon assurances from the Defendant that its costs and expenses would be met and, until the breakdown in relations between GTC and the Defendant in 2017, the Defendant had always settled or procured the settlement of GTC's fees and expenses.

102. He said that the Chadwick judgment, combined with the advice in the Herbert Smith Note, resulted in a change of approach and he had discussed with Mr Hillier the need to obtain an indemnity from the Defendant given GTC's exposure. His recollection was that, following receipt of the Herbert Smith Note and meetings which Mr Hillier held with the Defendant as reflected in the agendas and notes referred to above, Mr Hillier had reported that the Defendant was willing in principle to provide an indemnity. As confirmed in the minutes of the shareholders' meeting on 18 March (see para 31 above) Herbert Smith were accordingly instructed to prepare a draft, which was forthcoming on 31 March.

103. He stated that GTC would not have instructed Herbert Smith to prepare a draft indemnity if it had not received in principle confirmation from the Defendant that he was willing to indemnify GTC in respect of the Guernsey Proceedings. Furthermore, if the Defendant had not been willing to provide such an indemnity, GTC would have considered an exit strategy.

104. He confirmed that, following receipt of the draft from Herbert Smith on 31 March, he had responded on 3 April suggesting certain amendments, including that the indemnity should be widened to cover all the Guernsey Proceedings. The revised draft was received from Herbert Smith on 14 April, the draft being dated 14.04.14. He had spoken with Herbert Smith the next day but had agreed that the indemnity should remain in the form of the draft dated 14.04.14.

105. His understanding from a discussion with Mr Hillier was that, following Mr Hillier's meeting with the Defendant on 2 May, the Defendant had agreed the terms of the indemnity and a version executed by the Defendant would be provided shortly.

106. His next direct involvement was following the 21 May email from SG to Mrs Boyer attaching what appeared to be the Indemnity signed by the Defendant. His response was to ask about the SFO Indemnities by emailing Mrs Boyer and Mr Hillier saying *"There should be 3 indemnities, big one and one each for TDAT and NS1".* His reference to the *"big one"* was to the Indemnity. He confirmed that, following receipt of the original Indemnity on 4 June, he and Mr Hillier signed the Indemnity and Mrs Boyer witnessed their signatures. She subsequently dated it 14 April 2014. Subsequently, following receipt of the SFO Indemnities, they were executed on behalf of GTC by Mr McCallum and Mr Hillier. They were dated 7 April 2014. He believed this was likely to have been on the basis that this was the date upon which he had approved the terms of the two SFO Indemnities on behalf of GTC.

107. He stated that GTC believed that the Indemnity had been validly executed by the Defendant and relied upon it in continuing to litigate in Guernsey, including in relation to the pursuit of the appeal

against the Chadwick judgment. Pursuing the appeal increased GTC's personal exposure in costs orders and in the absence of the Indemnity, GTC would not have adopted such an approach.

108. Herbert Smith subsequently charged £6,425 for the preparation of the Indemnity and this was subsequently paid by the Defendant or by one of his other trusts.

109. He explained that in 2017, Mr Hillier was ill and had been signed off work. In his absence, the relationship with the Defendant deteriorated. In particular, Mr Hodges accepted that he did not have a good relationship with the Defendant. In relation to the failure to refer to or produce the Indemnity when GTC instituted the proceedings in September 2017, Mr Hodges' evidence was that Mr McCallum had had to come up to speed in relation to TDT and other trusts held for the benefit of the Defendant and his family, given the absence of Mr Hillier. The Indemnity had been misfiled in the NS1 Trust file and this could be seen from the stamp on the Indemnity which mistakenly refers to it being in relation to the NS1 Trust. The Indemnity was accordingly not with documents relating to the TDT and it was only found when a search of other GTC files was instituted.

110. Mr Hodges also dealt with how the Loans Proceedings became known as the Proofs Proceedings, having the same case file reference as the Loans Proceedings. The aim of the Proofs Proceedings was for the Royal Court of Guernsey to determine how the assets of the TDT should be distributed amongst the various claimants given that the claims vastly exceeded the available assets and given also the decision of the Privy Council in October 2022 that claims against an insolvent trust should be dealt with *pari passu*.

111. The main claimants were I & B in respect of their liability to the BVI Companies and GTC in respect of its fees and legal costs. GTC submitted an updated proof of debt in the Proofs Proceedings on 29 September 2023 in the sum of £2,122,132 (all figures excluding references to pence) of which £854,055 related to GTC's own fees in respect of the TDT and £1,268,073 related to legal costs incurred by the TDT in relation to the Guernsey Proceedings.

112. On 9 July 2024, as described in more detail below, a consent order (the "Consent Order") was made by the Guernsey Court whereby GTC agreed to accept £1,200,000 in settlement of its claim of £2,122,132. GTC applied the sum of £1.2m first to settle its fees of £854,055, with the balance being applied towards settlement of its legal costs. After allowance for certain minor items and for the fact that GTC had incurred further legal costs of £353,626 with Bedell Cristin which had not been included in the updated proof of debt, GTC issued a Second Demand Letter on 24 January 2025 claiming £1,258,358 against the Defendant pursuant to the Indemnity in respect of its legal

costs. These were legal costs which GTC had paid to the relevant lawyers; so it was out of pocket.

113. In his affidavit at paras 109-110, Mr Hodges stated that, as part of the process of preparing his fourteenth affidavit, a review (the "Review") had been undertaken in respect of the legal costs as a result of which GTC was no longer claiming in respect of some invoices or in respect of parts of other invoices. As a result of the Review, on 19 February 2025 GTC's claim was reduced to £744,774, i.e. a reduction of over £500,000 from the amount claimed as recently as 24 January 2025.

114. Mr Hodges was cross-examined in some detail by Advocate James. Much of this was devoted to testing his credibility by reference to incidents and criticisms which had been made of his conduct in judgments by other courts, as outlined in Ms Martin's thirty-fourth affidavit. Not surprisingly, he was also cross-examined about the Review and how it was that GTC's claim had been reduced by such a substantial amount at such a late stage.

115. We have to say that Mr Hodges was not a very satisfactory witness. He tended to hesitate for long periods before answering even what seemed to be a fairly innocuous question as if he was searching for any hidden traps. When he did respond, his answers were often of such length and complexity that they were very hard to follow.

116. We do not think it is necessary to rehearse in detail his responses to the various matters raised with him by Advocate James. That is because, apart from in relation to matters of quantum and the Consent Order, they were essentially related to his credibility, and the fact is that he gave very little important direct evidence about the Indemnity because he was not involved with the Defendant at the material time and his evidence largely related to providing a narrative and background to the contemporaneous documents. Suffice it to say that our approach to his evidence is to treat it with caution unless it is consistent with or supported by the contemporaneous documents. It is clear that he harbours considerable antipathy towards the Defendant. He said that he believes a debtor should pay his debts and that he (Mr Hodges) should not have had to go through years of expensive litigation in order to get GTC's fees paid. Furthermore, the evidence from the incidents outlined by Ms Martin suggests that Mr Hodges is willing to go to considerable lengths to recover fees and expenses because GTC is out of pocket.

117. As to quantum and the Consent Order, we shall address these separately when we deal with those issues later in this judgment.

For the Defendant

(1) The Defendant

118. The Defendant's evidence-in-chief was contained in his eighth affidavit dated 18 July 2025. In essence, he denied ever agreeing to or signing the Indemnity. He explained that it has always been his practice only to sign legal documents after they have been reviewed and approved by his in-house lawyers; at the material time this was Ms Mayne. SG was authorised to sign certain documents on his behalf and on behalf of various companies that he was a director of. These documents were mainly administrative documents (for example agreements for the provision of services, purchase orders and like agreements). From time to time he would expressly approve, upon reviewing himself and/or receiving advice from his legal team, SG to sign other more advanced documents on his behalf on an ad hoc basis. She was not however authorised to sign all documents at all times and, particularly, she was not authorised to sign the Indemnity. He was not aware of the existence of the Indemnity until it was produced by GTC in late 2017.

119. In relation to the emails which were copied to him and to which the Indemnity (signed by SG) was attached, he said that he did not recall reading the emails or attachments, although he could not rule out having looked at them at the time. What he could rule out was having had any appreciation of the significance of what had transpired. He was on holiday in Monaco at the material time having left on 18 May and returned on 26 May. It would be unlike him to read much on holiday and he thought that GTC would know that.

120. He accepted that Mr Hillier, as the director of GTC with whom he regularly met, had raised the topic of indemnities with him in meetings from January 2014 but he recalled it as being in the context of the SFO Proceedings, where he agreed to provide the TDAT Indemnity and the NS1 Indemnity so that GTC, as trustee of those two trusts, could participate in the SFO Proceedings.

121. He accepted in principle that Mr Hillier may have raised the question of GTC wanting to obtain an indemnity for the Guernsey Proceedings, but this would have been limited to GTC's own fees, not to costs payable to other parties.

122. At the time, his relationship with GTC was a positive one and he considered that they worked well together. He asserted that there was no question of his deliberately trying to avoid any properly made requests from GTC and that if he had thought about it, he would have assumed that the reason that any general mention of an indemnity for TDT went no further, was that GTC was content to let it go.

123. He confirmed that the SFO Indemnities emailed to Mrs Boyer on 23 May and received by GTC in hard copy on 4 June were not signed by him and he believed they were signed by SG without his authority. He confirmed that following his return to London, he was asked to sign the SFO Indemnities, which he did.

124. The Defendant was cross-examined at some length by Advocate Gleeson. We have carefully considered the whole of the Defendant's evidence and will mention only the following aspects for the purposes of this judgment.

125. He confirmed that SG worked for him as his assistant for some twenty years and that he trusted her. He accepted that it was an important part of success as a prolific deal maker to keep on top of the detail of documents. He said he was an early riser. He would rise at 4am and watch CNN for twenty minutes before then turning to deal with his emails (of which there were a very substantial number every day) until about 8am and this was before he got to the office.

126. He was pressed on the fact that the 21 May email from SG to Mrs Boyer was copied to him and attached the signed Indemnity. His response on more than one occasion during the cross-examination was that he would not pay much attention to emails between two secretaries (as he called them) and would not spend time on such emails.

127. Although in his affidavit he had stated that he would from time to time expressly approve SG to sign *'more advanced documents'*, he said in oral evidence that he would never get his secretary to sign a legal document.

128. He was pressed on more than one occasion as to why SG should sign the three Indemnities if she did not have his authority. The Defendant speculated on more than one occasion that it was perhaps to *'gain favour'* with Mrs Boyer or to *'appease'* Mrs Boyer or to *'maybe make [Mrs Boyer] happy'.*

129. He reiterated that his conversations with Mr Hillier in the early part of 2014 were all about providing for GTC's fees and were not concerned with any legal costs which GTC had to pay. He said that GTC was not bothered about the adverse costs orders in the Guernsey Proceedings.

130. He sought at one point to make the point that it was pointless to ask him for an indemnity as he had no assets in his personal name and GTC knew this. A personal indemnity was therefore worthless. He made this assertion despite the fact GTC clearly thought an indemnity from him

was worth having as it had insisted on the SFO Indemnities as a condition of participating in the SFO litigation.

131. He repeated the case made in his pleading, namely that Mrs Boyer knew that the signature on the Indemnity was not his and that, when denying that this was so in her evidence, she *"was influenced by her ex-boss to say exactly what she had to do".* The reference to her *'ex-boss'* was clearly to Mr Hodges.

132. He was asked why SG and Ms Mayne were not being called as witnesses. He said that SG left as a disgruntled employee because he had reduced her responsibilities before she left. As to Ms Mayne, he said that the question should be asked of Ms Martin.

133. He queried whether he had in fact had a meeting with Mr Hillier on 2 May at Leconfield House as there was no reference to such a meeting in his appointments diary. He had other appointments, and he was due to be at Farnborough Airport by 4:30pm, which meant that he would have to leave at least an hour and forty minutes beforehand. However, he did not ultimately dispute that such a meeting may have taken place.

134. He was pressed about the fact that Ms Mayne had received a copy of the Herbert Smith Note (which recommended the provision of an indemnity), that she was aware that GTC was chasing for three indemnities, and that she received a copy of the draft of the Indemnity from Herbert Smith on the morning of 21 May. However he did not recollect her as ever having informed him of any of these matters.

135. He was also pressed on the fact that, on 23 May, SG had emailed drafts of the two SFO Indemnities to him in Monaco saying *"I got these checked by Nicole who said there is nothing controversial, but I need to get them to alizee today".* It was put to him that SG was clearly asking for his approval, but the Defendant denied that this was so and said it was simply to inform him of what was happening.

136. It is clear that the Defendant is a successful businessman and a powerful character of considerable intelligence, who is used to getting his own way. He repeatedly showed impatience with the questions of Advocate Gleeson (e.g. *"I'll play your game. Go ahead"* at day 4/7; *"Don't ask me the same question over and over again"* at day 4/39). He clearly has a considerable antipathy to Mr Hodges (for example, suggesting he had persuaded Mrs Boyer to give false evidence) and in our judgment is determined that GTC should not recover its legal costs from him. His evidence was often inconsistent with the contemporaneous documents (e.g. his

insistence that GTC was not concerned about the adverse costs but only with recovering its own fees). He sought to explain the fact that he was copied in to the 21 May email with its attachment of the Indemnity signed by SG yet raised no objection, by dismissing it as merely an email between two secretaries which he would not trouble with (giving the clear impression that such correspondence was beneath him despite it being from his trusted personal assistant of 19 years), despite the fact that it referred to an indemnity on its face and he was, even on his own admission, at that time heavily engaged in connection with the SFO litigation where indemnities were required as a matter of urgency. His oral evidence was not consistent with his previous evidence where he had said that he could not rule out having looked at the email but without appreciating its significance.

137. In summary, the court's assessment of the Defendant from his evidence generally was that he tended to answer questions in a way he felt furthered his case and was prepared to say what was necessary to avoid liability. He has considerable antipathy towards Mr Hodges just as Mr Hodges has considerable antipathy towards him. The court does not feel able to place any weight on his evidence except where it is supported by the contemporaneous documentary evidence or by the inherent probabilities.

(ii) Richard Hillier

138. Mr Hillier was in an unusual position at trial. He has in the past made a witness statement and an affidavit which were supportive of GTC's case in relation to the Indemnity. However, in his consolidated affidavit prepared for these proceedings ("Hillier 3"), as well as in an earlier witness statement dated 1 April 2024 ("the April 24 Statement"), he has changed his version of events in significant respects and his evidence is now aligned substantially with the case for the Defendant.

139. In these circumstances, we think it necessary to summarise, as briefly as possible, his earlier evidence, his evidence as set out in Hillier 3 and the April 24 Statement and finally his oral evidence under cross-examination.

140. His main earlier account is contained in a witness statement originally dated 18 March 2019 but then notarised on 1 April 2019, to which we shall refer as the "April 2019 Statement". He swore a second affidavit on 17 April 2019, but this was mostly concerned with dealing with an application for security for costs.

141. We would summarise his relevant earlier evidence as extracted from the April 2019 Statement and the second affidavit as follows.

142. Mr Hillier had met the Defendant in the 1990s and it was through his connection with the Defendant that GTC came to be appointed as trustee of the TDT and various other Tchenguiz trusts. He was the director of GTC with primary responsibility for the relationship with the Defendant. Because of the complexity of the various matters which had arisen, he would fly to London about every two weeks to have a meeting at Leconfield House with the Defendant. SG and Ms Mayne would attend those meetings or part of them as necessary.

143. He confirmed that, because of the ongoing litigation in Guernsey, GTC never had custody or control of the TDT assets. He said at [20] of the April 2019 Statement that GTC only ever agreed to become trustee on an understanding between the Defendant and himself that GTC would be appropriately reimbursed or paid for the expenses and costs of litigation, together with its own fees. He emphasised the point in the following terms at [30] of that witness statement:

> *"30. As I noted earlier, the basis upon which GTC took on the trusteeship of the TDT was that Robert provided me, on a number of occasions throughout GTC's trusteeship (of his family's trusts), with assurances to the effect that all expenses incurred, including in the circumstances any adverse costs orders and our fees would be settled by him or through his facilitation (in essence through other trust structures with his concurrence). As I noted above, Robert and I had known each other for many years, and I had always known him to be true to his word. In those circumstances, I never had any reason to anticipate that might change."*

144. He explained that in late 2013 Mr Hodges became concerned about the Guernsey litigation and told Mr Hillier on more than one occasion that GTC should consider obtaining formal indemnity agreements from the Defendant. He had told Mr Hodges of the Defendant's verbal assurances and that appeared to have been sufficient until then. Nevertheless, he began to have discussions with the Defendant about a formal indemnification.

145. Following the Chadwick judgment, Herbert Smith provided the advice contained in the Herbert Smith Note and recommended that GTC ought to ensure that it had appropriate indemnification to cover its liabilities.

146. He continued to raise the issue of indemnification periodically with the Defendant, and the item appeared on the agendas prepared by Mrs Boyer. He confirmed that he had made handwritten notes which showed that the Defendant and he had discussed indemnities on a number of occasions. He said the Defendant had assured him that indemnities would be provided and for his part he was never concerned that they would not be provided.

147. The Indemnity was eventually emailed to GTC on 21 May with the original copy being delivered by courier shortly thereafter. The original was then executed by GTC and dated 14 April, being the date it was produced in agreed form. He was not aware that SG signed documents for the Defendant. As far as GTC was concerned, it believed all the indemnities to have been signed by the Defendant and this followed on from his discussions with the Defendant during the course of which the Defendant had assured him on a number of occasions that indemnities would be provided.

148. In the course of 2016 and 2017 Mr Hillier became unwell and was frequently absent from the office. In his absence, Mr McCallum took over primary responsibility for the Defendant's affairs. Mr Hodges also became involved. There was a clash of personality with the Defendant. In addition, there was a difference of opinion between GTC on the one hand and the Defendant on the other as to whether certain settlement proposals in connection with the litigation both in Guernsey and the UK should be pursued. In any event, there came a time when the Defendant purported to appoint two additional trustees of the TDT; he then removed GTC as trustee and GTC commenced its Representation (referred to earlier). In relation to the fact that the Indemnity was not produced or referred to in the initial stages of the Representation, Mr Hillier explained that it had been misfiled in the NS1 file. It was only following repeated pressing by GTC's Jersey advocates, Dickinson Gleeson, as to whether there had been an indemnity that a thorough search was conducted, following which the Indemnity was found misfiled in the NS1 Trust records.

149. At [11] of his second affidavit, Mr Hillier stated that he was aware that the Defendant had made it plain that he was determined to cause harm to GTC and its business and had told other clients at GTC's business that they should move their affairs from GTC *"because it is insolvent".*

150. In the April 24 Statement and Hillier 3, Mr Hillier gave a rather different account in relation to the Indemnity. He said that the matter which his fellow directors at the first two quarterly partners' meetings in 2014 had asked him to raise with the Defendant related only to GTC's fees, not to any legal costs. He said that the minutes of the quarterly partners' meeting would show this. He was asked to obtain a guarantee of fees from the Defendant due to the Defendant's cashflow problems and he referred to this as *"the Guarantee".*

151. He subsequently met with the Defendant on a number of occasions at Leconfield House during the early part of 2014, as he had said previously, but his discussions with the Defendant only related to fees. He recalled a one page document (with a second signature page) signed by the Defendant which gave the requested Guarantee in relation to fees, although he did not have a copy. All the discussions with the Defendant about fees took place with the Defendant alone after the other agenda items had been dealt with and the other people involved in the meeting had

been asked to leave. After a few months and several meetings, the Defendant had eventually agreed to provide the Guarantee. He did not discuss with the Defendant the question of an indemnity for legal costs.

152. He had no recollection of signing the Indemnity after a signed version was emailed on 21 May. When Mrs Boyer emailed a copy of the signed Indemnity to him immediately following receipt on 21 May, he must have thought that this was the Guarantee relating to fees. It was not in his nature to check each and every email and attachment sent to him by his assistants. As to how it was that he had said something so different in the April 2019 Statement and his second affidavit, he said that the documents were prepared at a time when, due to his ill health, he had very little ongoing involvement. Furthermore, all litigation matters were dealt with by Mr Hodges. He summarised the position at [22] of Hillier 3 as follows:

> *"Consequently, in my role as an employee of GTC until 30 April 2020, I relied on Rodney to update me on relevant aspects of litigation matters from 2018. Leading up to, and from the time of GTC's removal as trustee of Robert's family trusts around 2019, (sic) I was asked to provide witness evidence on behalf of GTC. I understood that these witness statements (many of which were in the form of affidavits) were prepared for me to sign by GTC's lawyers on instructions from Rodney. The statements were provided to me by the lawyers in final form for review and signature and Rodney confirmed to me that the information contained in them was correct. Moreover, prior to Andrew's leaving GTC in late 2017/2018 (as mentioned above I am not certain on the dates), and because I was generally not in a good state of health, Andrew would also review the statements but subsequently it was Rodney who verified the accuracy of the factual content. When I signed the Previous Statements that had been submitted by me in these proceedings on behalf of GTC, I truly believed their content was true and correct to the best of my knowledge based on the information provided by the lawyers. It follows that some of the information in the Previous Statements was not based on my personal knowledge of events."*

153. On the fourth day of the hearing, Ms Martin swore a 37th affidavit which simply exhibited email exchanges in August and September 2017 between Mr Hillier and Advocate Swart of Dickinson Gleeson. These documents had apparently been obtained from the current trustees of the TDT. It was submitted that these emails showed the level of reliance which Mr Hillier placed on his lawyers and therefore supported his evidence as to how he had come to sign the April 2019 Statement.

154. Unsurprisingly, when giving his oral evidence, Mr Hillier was cross-examined about the change in his account. We have to say that we found his explanation for the change and his present account as contained in Hillier 3 to be singularly unconvincing. To give some examples:

(i) In answer to a question from the Commissioner, Mr Hillier said that he would not have read the statement prepared by Dickinson Gleeson for him to sign (as the April 2019 Statement) and indeed asserted that this was so for all legal documents he was sent. Later in his evidence, he seemed to say that he would read earlier drafts although he was not entirely clear.

(ii) Through a partial waiver of privilege, Mr Hillier and the court were presented with various documents surrounding the preparation and signature of the April 2019 Statement. We are satisfied that these show that, as one would expect, the statement was prepared following Mr Hillier's instructions. Thus, Mr Hillier attended at the office of Dickinson Gleeson in Jersey and met with an associate of the firm for approximately three hours on 4 March 2019. As Mr Hillier himself admitted, he was asked a lot of questions by the associate. A draft statement was then prepared by the associate and emailed to Mr Hillier on 15 March. Mr Hillier was asked to review it. A short while later a further version was emailed with tracked changes which had been introduced by the partner. The email asked for *"Any other comments?"*. There is evidence then of a telephone call between Mr Hillier and Advocate Swart to *"settle and agree"* the draft. A final version was then sent by email to Mr Hillier who was asked to sign it, which he did. In reaching this conclusion, we have taken into account the documents attached to Ms Martin's 37th affidavit. These show Mr Hillier asking Advocate Swart how he should respond to various incoming emails and asking Advocate Swart to draft replies for him (Mr Hillier) to send. However, this is by no means unusual and it was at a time when, on his own admission, Mr Hillier was largely absent through illness. Asking a lawyer to draft a responsive email is very different from swearing an affidavit or signing a witness statement intended for production as evidence in court proceedings. In those circumstances, the lawyer drafting the affidavit or statement has to obtain instructions from the witness as to what his evidence is. In short, the contents of the 37th affidavit do not cause us to have any doubt about our rejection of Mr Hillier's explanation of how he came to sign the April 2019 Statement.

(iii) We are satisfied that this was a perfectly normal and correct method of obtaining a statement. The information contained in the statement clearly came from Mr Hillier and was provided by him during the course of the interview with the associate. He had an opportunity to and apparently did make some changes. There is no evidence of any involvement on the part of Mr Hodges. We have no hesitation in rejecting Mr Hillier's explanation of how he

came to sign the April 2019 Statement and his assertion that, in effect, he was simply given the statement and told what to say by Mr Hodges and/or GTC's lawyers.

(iv) Mr Hillier asserted in Hillier 3 that his fellow directors had requested him to obtain a guarantee of fees at two quarterly partners' meetings in early 2014. We have the minutes of one such meeting on 18 March but, as described at para 31 above, those minutes say nothing about fees; on the contrary they refer to the fact that Herbert Smith was drafting an indemnity *"regarding the costs awarded against on R&H on Guernsey 1, which RT is to sign".* Indeed, there is not a single document that we have been referred to which refers to a guarantee (or indemnity for that matter) for fees.

(v) He said he had no memory of the Chadwick judgment as well as no memory of discussing an indemnity for legal fees with the Defendant despite that fact that the email from Herbert Smith dated 31 March, which attached a draft of the Indemnity, was addressed to Mr Hillier (rather than any of the other directors of GTC) who forwarded it on to Mr Hodges and Mr McCallum. His response to this was that he had no memory of the email from Herbert Smith. In our judgment, his evidence that he was never expected by his fellow directors to obtain the agreement of the Defendant to an indemnity for legal costs is simply not credible.

(vi) His memory was of a one page document (with a second page for signature) which was a guarantee for fees and which he presented to the Defendant. That was the only document he remembered presenting to the Defendant. However, there is simply no evidence before the court (other than Mr Hillier's evidence) that such a document ever existed or was requested. Although the Defendant agreed in his evidence that the only discussion with Mr Hillier was about GTC's fees rather than its legal costs, the Defendant made no mention of ever signing any document guaranteeing such fees.

(vii) In relation to the email from Mrs Boyer to SG on 2 May asking her to print out the three indemnities for Mr Hillier's meeting, he was adamant that he never showed the three indemnities to the Defendant at the meeting. He went on to say that he did not actually remember the meeting. When pressed as to how he was able to say that he definitely did not hand out the documents when he had no memory of the meeting, he backtracked a little and said that he had no memory of ever giving the documents to the Defendant. Either way, it seems to us inherently improbable that, the documents having been specifically printed out for the meeting and the issue of three indemnities being on the agenda for the meeting, Mr Hillier did not raise them at the meeting. In relation to why the agenda for that meeting referred to three indemnities, his response was that he did not remember why that item was on the agenda.

(viii) He was asked about the fact that the 21 May email with its attached signed version of the Indemnity was forwarded to him (and Mr Hodges) by Mrs Boyer upon receipt, yet he expressed no surprise as to what it was about, merely commenting by email that he thought Mr Hodges had agreed it with Herbert Smith. His response was that he could not answer why he did not ask what this Indemnity was all about or any questions about it.

155. In summary, the court does not feel able to place any weight on Mr Hillier's evidence except where it is consistent with the contemporaneous documents. For the most part, his earlier evidence as contained in the April 2019 Statement and his second affidavit is consistent with the contemporaneous documents whereas his current evidence as contained in Hillier 3 and the April 24 statement is clearly not.

(iii) Nicole Martin

156. Ms Martin's consolidated affidavit was her thirty-fourth affidavit ("Martin 34") sworn on 19 February 2025. Much of it consisted of submissions and arguments in favour of the Defendant's case. Affidavits are intended as evidence of facts; submissions are matters for skeleton arguments and oral arguments. We therefore confine ourselves in this summary to those parts of Ms Martin's evidence which constitute evidence of relevant facts.

157. She confirmed that she was a qualified barrister and began work in the Defendant's legal team at R20 in April 2014, having previously been employed by Ogier in Guernsey acting for GTC. She is now head of the legal team at R20.

158. She explained that there had been a good working relationship between GTC and the Defendant until 2016 but that it had broken down completely and irretrievably in 2017. As protector, the Defendant appointed two co-trustees of the TDT on 21 September 2017 and removed GTC as trustee on 3 October 2017. She gave a helpful summary of the various Guernsey Proceedings but, so far as necessary, we have already described these above.

159. She confirmed that in late 2013 or early 2014, it was established that GTC, as trustee of the TDAT and NS1, needed to be joined as a party to the SFO Proceedings in England and that, before agreeing to do so, GTC required to be indemnified by the Defendant in relation to their costs. She confirmed that she had been asked by SG to review the draft SFO Indemnities on 23 May. She considered them to be reasonable. She made a few minor amendments although she noted that these had not been carried forward into the executed version of the SFO Indemnities. She had no involvement in the preparation or signing of the Indemnity. She had not been

informed of the Herbert Smith Note or the subsequent advice from Herbert Smith in the 23 May Note and no one had ever mentioned the existence of the Indemnity to her. The first she knew of it was when it was disclosed by GTC in November 2017 following the institution of GTC's Representation on 5 October 2017.

160. At [144]-[148], Ms Martin gave some examples of what she said was poor conduct by GTC in relation to other matters which, in some cases, had led to strong criticism by courts in Guernsey and the BVI. We accept that these matters do not reflect well on GTC or Mr Hodges.

161. In relation to the issue before us, namely the Indemnity, she said at [78]-[80] that in about July 2014, which was a few months after she had started working from the R20 offices, Mr McCallum cautioned her regarding SG's tendency to sign documents which ought to have been signed by the Defendant. Mr McCallum did not refer to any particular documents (and in particular did not mention the SFO Indemnities) but was keen to ensure that she understood that for important legal documents, she ought to obtain a signature directly from the Defendant and not request that SG obtain it. She further asserted that in subsequent conversations, she understood that the concern raised by Mr McCallum regarding SG was shared by all three GTC directors. She had not mentioned this conversation to the Defendant.

162. Ms Martin also gave evidence about the Consent Order in the Guernsey Proceedings and in relation to the quantum of GTC's claim. We consider those matters later in this judgment.

163. In cross-examination, she was asked why neither SG nor Ms Mayne was being called to give evidence. She said that it had been her decision not to call them. In relation to SG, they had not heard from her since 2016, and she believed that reaching out to her would not have achieved anything as she believed SG would not have agreed to give evidence.

164. She believed that Ms Mayne would also not have given evidence. There had been other occasions when she had been approached but she had not been cooperative. She had been placed on gardening leave before she left and felt that she had been ousted from her job. Ms Martin therefore took the decision that Ms Mayne would not have assisted or cooperated if approached.

165. In relation to her assertion that not only Mr McCallum but the other directors of GTC were aware of SG's tendency to sign documents in the Defendant's name, it was put to her that this was inconsistent with the evidence which Mr Hillier had given, namely that he was unaware that SG ever signed on behalf of the Defendant. She accepted that she could not go behind Mr Hillier's

evidence and if the impression which she had from various conversations was not correct, it was not correct. The only person that she had actually spoken to her about it was Mr McCallum. If her impression was wrong, it was wrong.

166. Whilst it is clear that Ms Martin is a strong advocate for the Defendant who believes strongly in his case, we accept that, when giving purely factual evidence, she gave such evidence to the best of her recollection.

Issue 1 – Did SG sign the Indemnity with the actual authority of the Defendant?

Defendants' contentions

167. We would summarise the key points made by Advocate James on this aspect of the case as follows:

(i) He submitted that there was no real evidence to support the contention that the Defendant had authorised SG to sign the Indemnity by impersonating his signature; Advocate Gleeson's arguments were all a matter of inference built upon inference.

(ii) The only direct evidence came from the Defendant, who said specifically that he had not authorised SG to sign the Indemnity or, for that matter, the SFO Indemnities. The Defendant's evidence that he had never agreed to provide an indemnity in relation to the TDT for costs in connection with the Guernsey Proceedings and that his discussions with Mr Hillier in the first part of 2014 were all to do with a guarantee for GTC's fees, was supported by the evidence of Mr Hillier, who was the only person at GTC with direct knowledge of the position. The court should prefer the direct evidence of these two individuals rather than inferences drawn from circumstantial evidence.

(iii) Why would the Defendant proceed in such a manner? He was in Monaco but could easily sign the Indemnity (if he had ever agreed to provide it) on his return. There was no urgency for the Indemnity; the sole urgency related to the SFO Indemnities.

(iv) It was clear that SG was confused about the document which she was sending on 21 May. Thus, SG's email to Mrs Boyer (copied to the Defendant) attaching the signed Indemnity was sent at 16:33. A few minutes later, at 16:37, SG emailed Ms Mayne and Jo Rickard saying *"Indemnity done!".* Jo Rickard was a solicitor at Shearman and Sterling, which firm was acting for GTC in relation to the SFO Proceedings but had no involvement with the TDT or with the Guernsey Proceedings. Jo Rickard responded at 16.41 saying *"Great. We are*

going through the statement but have been told nothing will be signed until indemnity". SG then replied to Jo Rickard at 16:46 saying *"I sent it to Alizee 10 mins ago".* Advocate James argued that SG clearly thought she was dealing with an SFO Indemnity as Shearman and Sterling were only involved with the SFO Proceedings. This suggested that she had not received or thought that she had received any authority to sign the Indemnity but had signed it in error thinking that she was signing an SFO Indemnity.

(v) The matters for which GTC had been criticised by other courts and the other matters referred to by Ms Martin showed that GTC was at best a grossly negligent professional trustee and at worst had shown a wholesale disregard through Mr Hodges of the obligations governing trustees. These matters showed that GTC, with Mr Hodges in control, would stop at nothing to recover fees and costs. This cast doubt on Mr Hodges' credibility and on the genuineness of GTC's claim under the Indemnity.

Approach to evidence

168. The critical events in this case took place in 2014 i.e. some eleven years ago. Furthermore, this is a case where, as stated above, the court has serious reservations about the reliability of the evidence of Mr Hodges, the Defendant and Mr Hillier. In circumstances where these reservations exist, the events took place many years ago, there is strong mutual antipathy between the Defendant and Mr Hodges each of whom is determined to be the winner of this litigation and there is considerable contemporaneous documentary material, the observation of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3650 (Comm) at [22] is particularly helpful:

> ***"…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."***

169. We also bear in mind that, in the absence of any evidence from SG and Ms Mayne, there is no direct evidence as to the circumstances in which SG came to sign and send the Indemnity on 21 May and we are therefore relying on circumstantial evidence. We remind ourselves that, although circumstantial evidence can be powerful evidence and it is perfectly proper to draw common sense inferences from the surrounding circumstances, the court must not be drawn into speculation.

170. Bearing these principles in mind, we have come to the clear conclusion that GTC has proved on the balance of probabilities that SG signed the Indemnity (by impersonating the Defendant's signature) with the actual authority of the Defendant. She was therefore acting as his lawful agent and, subject to the various matters discussed hereafter, he is bound by that document.

171. Our reasons for reaching that conclusion can be summarised as follows:

(i) It is common ground that from the beginning of its trusteeship in July 2010, GTC did not have access to the assets of the TDT and was reliant on the Defendant to arrange payment of GTC's fees and expenses, including legal expenses. On this aspect, we therefore accept Mr Hillier's evidence at para 30 of his April 2019 Statement (see para 143 above), which was not disputed by the Defendant or Mr Hodges.

(ii) However, it is clear that things changed following the Chadwick judgment in December 2013, as a result of which GTC became personally liable for a substantial costs order. All the documentary evidence before us is consistent with GTC (through Mr Hodges in particular) being concerned at this and seeking an indemnity from the Defendant in respect of their legal costs, including the costs order made against it in the Chadwick judgment. Thus:

(a) On the agenda for the meeting between Mr Hillier and the Defendant on 21 January 2014, Mr Hillier wrote *"Indemnity R&H"* and *"Indemnity TDT".* This suggests that this topic was mentioned. Although the former entry could have referred to the SFO Indemnities, the latter could not.

(b) The Herbert Smith Note (see paras 26-28 above) recommended that GTC should seek an indemnity in respect of the costs orders in the Chadwick judgment. Whilst it is clear that Herbert Smith was instructed by GTC, the note was copied to Ms Mayne as a member of the Defendant's in-house legal team.

(c) A handwritten note of Mr Hillier's dated 4 March states *"Letter of indemnity → Robbie".*

(d) At the meeting of the shareholders of GTC on 18 March 2014, there is reference to the fact that Herbert Smith was drafting an indemnity "*regarding the costs awarded against R&H on Guernsey 1, which RT is to sign".* Mr Hillier's evidence was that GTC was concerned about its fees, not legal costs. The minute of the shareholders' meeting is wholly inconsistent with his evidence, both in referring to an indemnity for legal costs and in not making any mention of seeking a guarantee or other comfort in respect of GTC's fees.

(e) On 31 March, Herbert Smith produced a draft of the Indemnity. Interestingly, it was sent to Mr Hillier and it was he who sent it on to Mr Hodges and Mr McCallum. It makes Mr Hillier's asserted ignorance about any question of an indemnity for legal costs difficult to understand. The draft provided only for indemnity in respect of legal costs incurred by GTC or for any judgment against GTC in the relevant Guernsey Proceedings. It said nothing about indemnifying GTC in respect of its fees although, according to Mr Hillier and the Defendant, that is what GTC was concerned about. The fact that GTC went to the lengths of instructing Herbert Smith to prepare an indemnity in respect of legal costs in the Guernsey proceedings is wholly inconsistent with the Defendant's evidence that it was not bothered about the adverse costs order in the Chadwick judgment.

(f) Following comments by Mr Hodges, Herbert Smith sent a revised draft dated 14.04.14 to Mr Hillier as well as Mr Hodges on 14 April. Again it said nothing about GTC's fees. The only material change for present purposes from the earlier draft was that, following Mr Hodges' intervention it extended to cover all the various Guernsey Proceedings rather than just two of them.

(g) On 30 April, Mr Hodges emailed Mr Hillier attaching a copy of the 14.04.14 draft of the Indemnity saying *"Is this signed?".* This is entirely consistent with Mr Hodges' evidence (which we accept in this respect) that he understood that Mr Hillier had been having discussions with the Defendant about the provision of an indemnity in respect of legal costs and that the Defendant had agreed in principle. It is inconsistent with Mr Hillier's evidence that he had no knowledge of an indemnity for legal costs and had only discussed with the Defendant a guarantee for fees.

(h) The agenda for the meeting on 1 May (in fact held, as we find, on 2 May), specifically refers at item 10 to *"3 Indemnity letters RT"* and on the morning of 2 May, Mrs Boyer

emailed copies of the Indemnity and the two SFO Indemnities to SG asking her to print them out for the meeting which Mr Hillier was attending. This again is consistent with GTC's case that Mr Hillier was discussing an indemnity for legal costs with the Defendant. It seems to us highly unlikely that the draft indemnities were not at least presented to the Defendant for his consideration at the meeting on 2 May.

(i) In summary, there is ample contemporaneous documentary evidence that what GTC (particularly Mr Hodges) was concerned about was its liability for the costs orders in the Chadwick judgment and that it was seeking an indemnity from the Defendant as to such legal costs. There is no mention in any of the documents of any reference to a concern about an indemnity or guarantee for fees, as is asserted in the evidence of Mr Hillier and the Defendant. Furthermore, the fact that GTC went to the lengths of instructing Herbert Smith to prepare an indemnity and that Mr Hodges sent a chaser on 30 April to Mr Hillier enquiring whether the Indemnity was yet signed points strongly to a belief on GTC's part – no doubt as a result of the reports from Mr Hillier – that the Defendant was willing in principle to provide the requested indemnity. Insofar as the Indemnity covered legal costs, that would not have been a surprising expectation given that historically the Defendant had always arranged for GTC to be reimbursed for its fees and expenses, including legal costs. The Herbert Smith 23 May Note is also consistent with GTC having this belief and being concerned about legal costs because it states *"….it is intended that Robert Tchenguiz will indemnify R&H in relation to costs…".*

(iii) On 8 May and again on 15 May, Mrs Boyer sent chasing emails to Ms Mayne as well as to SG requesting that the three indemnity letters be signed by the Defendant. It follows that Ms Mayne, as in-house legal adviser to the Defendant, was aware that there were three indemnities to be signed, i.e. the Indemnity and the SFO Indemnities.

(iv) Turning to the events of 21 May, although this would not have been known to GTC at the time, it begins with a telephone call from Ms Mayne to Herbert Smith asking for a copy of the draft of the Indemnity, which is sent to her by email at 14:02. It is to be inferred therefore that she was giving attention to the Indemnity. The next thing that occurs so far as the documents are concerned is that at 16:33 (these times would seem to be UK times), SG emails a signed copy of the Indemnity to Mrs Boyer. Importantly, she copies this with the attachment to the Defendant who is in Monaco. Mrs Boyer, immediately upon receipt, forwards the email and attachment, *inter alia*, to Mr Hillier enquiring whether, given that it appeared to be in draft form, it had been agreed at the GTC end. Mr Hillier replied saying *"I think Rodney agreed this with Herbert Smith".* There is no reaction from Mr Hillier asking what this is all about because the only discussions he had ever had concerned fees. On the

contrary, he appears to know that the document has been the subject of discussion between Mr Hodges and Herbert Smith and this is not surprising following the various email exchanges when the drafts of the Indemnity were sent to GTC on 31 March and 14 April. His behaviour is inconsistent with his current evidence that all he ever discussed with the Defendant was a guarantee for fees, but is consistent with his original evidence as contained in his April 2019 Statement and second affidavit.

(v) Having received the Indemnity, Mrs Boyer then chased Ms Mayne, copied to SG and Mr Hillier, for the SFO Indemnities. On 23 May, SG consulted Ms Martin about the SFO Indemnities as described above and then emailed the Defendant at 12.13 saying *"I got these checked by Nicole who said there is nothing controversial, but I need to get them to Alizee today".* It seems that SG attached the previous versions (i.e. without Ms Martin's amendments) to the Defendant, but we do not think that anything turns on that. Approximately one and a half hours later at 13:34, SG sent Mrs Boyer copies of the two SFO Indemnities which she had signed. There then followed the various exchanges concerning the manner in which the SFO Indemnities had been signed, as described above, and in due course the versions of the SFO Indemnities signed by the Defendant personally were produced.

(vi) On the Defendant's case, SG signed both the Indemnity and the SFO Indemnities in his name without his authority. Yet, despite this, she copied the Indemnity, signed by her, to the Defendant at the same time as she sent it to Mrs Boyer. She also sent the SFO Indemnities to the Defendant on 23 May clearly, in our judgment, seeking his approval, but then, according to the Defendant, signed and sent the SFO Indemnities to Mrs Boyer despite having received no response from him and therefore no authority to sign them.

(vii) We regard it as inconceivable that, if she did not have his authority, SG would have copied the Defendant in to the email sending the signed Indemnity to Mrs Boyer on 21 May. Although in his affidavit, the Defendant said that he could not rule out having looked at the email, although he did not recall it, in his evidence he said that he would not look at an email between secretaries. Nevertheless, by sending him the Indemnity which she had signed (on his case without authority) she was clearly at high risk of her improper conduct being discovered. Similarly, on 23 May, she emailed him in advance to inform him that the SFO Indemnities needed to be sent out to Mrs Boyer. That seems inconsistent with her then signing them without his authority. This is particularly so bearing in mind Mrs Boyer's evidence, which we accept, that SG was terrified of the Defendant and would check everything with him. In our judgment, the fact that SG copied the signed Indemnity to the Defendant at the same time as she sent it to Mrs Boyer is powerful evidence that she had signed it with his authority.

(viii) Furthermore, no satisfactory reason has been put forward as to why SG would sign the Indemnity and the SFO Indemnities without authority. The only explanation put forward by the Defendant was that perhaps it was to please or gain favour with Mrs Boyer (see para 128 above). The evidence of Mrs Boyer, which we accept, was that SG was terrified of the Defendant and would check everything with him. The idea that, simply to please Mrs Boyer, she would sign three important legal documents in the Defendant's name without his authority is simply not credible.

(ix) Whilst the idea of a personal assistant impersonating the signature of her employer with his consent is unusual, we take account of the fact that it is not disputed that in this case it has occurred in the past. Thus, Ms Radley, the handwriting expert, was provided with some twelve examples where this had occurred as exhibited to her report. Furthermore, in his eighth affidavit, the Defendant said that SG was authorised by him to sign administrative documents (e.g. provision of electricity etc) and that from time to time he would expressly approve, upon reviewing a document and/or receiving advice by his legal team, SG to sign other more advanced documents on his behalf on an ad hoc basis. In his oral evidence he rowed back a little from this by saying (day 3/76) that he would never get his secretary to sign a legal document; but the fact that, with his authority, she has impersonated his signature on previous occasions makes it less unlikely than would otherwise be the case that the same occurred on this occasion.

(x) We do not think that Advocate James' argument concerning the fact that SG emailed Jo Rickard of Shearman and Sterling to inform her that an indemnity had been sent, carries the weight which he seeks to place on it. On the Defendant's case, SG had no authority to sign the SFO Indemnities or the Indemnity. Accordingly, any misunderstanding as to which indemnity she was signing would not, on the Defendant's case, explain why she thought she could sign that indemnity without the Defendant's authority. But more importantly, we know that Ms Mayne had asked for the Indemnity and that it had been sent to her by Herbert Smith approximately two hours before it was sent by SG to Mrs Boyer. It is to be inferred therefore that Ms Mayne intended to work on the Indemnity. SG copied her email to Jo Rickard informing her that the Indemnity had been signed to Ms Mayne which suggests that Ms Mayne had been involved with the Indemnity which SG had sent to Mrs Boyer. Ms Mayne would undoubtedly have known that this was the Indemnity relating to costs in Guernsey for the TDT rather than an SFO Indemnity for the TDAT and NS1 Trusts. In our judgment, a more likely explanation is that, in emailing Jo Rickard of Shearman and Sterling, SG simply sent her email to the wrong firm of solicitors and forgot which firm was acting in relation to the SFO matter and which in relation to the Guernsey litigation and the Indemnity. Either way, whilst we have taken this point into account, it does not detract from

or outweigh our view on all the other evidence that SG had been authorised by the Defendant to sign the Indemnity.

(xi) We reject the Defendant's evidence that he never authorised SG to sign the Indemnity in his name. Similarly, we reject Mr Hillier's evidence as contained in Hillier 3 and the April 24 Statement. In our judgment, he has been truthful in his original evidence as contained in the April 2019 Statement and his second affidavit which, unlike his current evidence, is consistent with the contemporaneous documents.

(xii) In the absence of evidence from SG and Ms Mayne, we cannot know for certain the circumstances in which the Defendant came to give his authority for SG to sign. But, for example, it could easily have been on the telephone at some time before the signed Indemnity was sent to Mrs Boyer, particularly if he was informed that Ms Mayne had approved its terms. Equally, we have found that the Indemnity was discussed at the meeting of Mr Hillier and the Defendant on 2 May (given the agenda, the fact that Mr Hodges was pressing for signature of the Indemnity and the printing out of the three indemnities prior to the meeting by SG). It is perfectly possible that at that meeting, the Defendant approved the giving of the Indemnity in principle and authorised SG to sign it subject to obtaining approval of the terms of the document from Ms Mayne, which would be consistent with what he says is his normal practice to only enter into documents after they have been approved by his in-house legal team. Given that Ms Mayne requested a copy of the Indemnity from Herbert Smith some two hours before it was sent to Mrs Boyer, it would be consistent with this scenario that, having reviewed the document, she gave it her approval and agreed to SG signing and sending it in accordance with the earlier authority given by the Defendant.

(xiii) However, we emphasise that it is not necessary for us to determine exactly how and when the Defendant gave his authority and we are not in a position to do so in the absence of evidence from SG and Ms Mayne. We have inserted the previous sub-paragraph simply to show that our conclusion that the Defendant authorised SG to sign the Indemnity is not inconsistent with the surrounding circumstances. The issue for determination is whether he did give his authority. For the reasons which we have given, we have come to the clear conclusion that he did authorise SG to sign the Indemnity on his behalf by, as she had on other occasions, impersonating his signature.

(xiv) We are also satisfied from the evidence of Mrs Boyer and Mr Hodges (which in this respect is consistent with the contemporaneous documents) as well as that of Mr Hillier (despite the fact that he was not giving evidence for GTC) that neither Mrs Boyer nor anyone else in

GTC had any suspicion that the Indemnity was not signed by the Defendant. We find that the reason it was not referred to immediately when GTC instituted its proceedings in October 2017 was not that it had not been signed at that stage or that GTC suspected that it had not been signed by the Defendant. We accept the explanation that Mr Hillier was not involved at that stage and that the Indemnity had been misfiled in the NS1 folder.

172. Finally, we should add that Advocate Gleeson invited us to draw adverse inferences against the Defendant from the fact that neither SG nor Ms Mayne had been called to give evidence by the Defendant. As can be seen, we have reached a clear conclusion without drawing any such adverse inferences and accordingly we need say no more on that topic.

Issue 2: Does the Indemnity take effect as a contract?

173. It is to be recalled that the Indemnity is governed by English law. Accordingly, both parties called expert evidence of English law. GTC called Mr Piers Feltham, a barrister practising from Radcliffe Chambers, Lincoln's Inn, and the Defendant called Mr Charles Hollander KC, a barrister practising from Brick Court Chambers, 7/8 Essex Street. Both experts produced two reports and together produced two joint reports ("Joint Report 1" and "Joint Report 2") setting out the areas of agreement and disagreement.

174. Both experts also gave oral evidence. We are quite satisfied that both of them are eminently well qualified to provide expert evidence of English law in the areas under consideration. They both gave evidence with full regard to their duties as expert witnesses and both clearly had in mind their duty to assist the court.

175. It was common ground between the experts that, because SG signed the Indemnity both as signatory and as attesting witness, it does not fulfil the requirements for a deed, which requirements are set out in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") as follows (so far as relevant):

> ***"Deeds and their execution***
>
> ***(1) …..***
>
> ***(2) An instrument shall not be a deed unless –***

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed

(i) by that person <u>or a person authorised to execute it in the name or on behalf of that person</u>, or

(ii) by one or more of those parties <u>or a person authorised to execute it in the name or on behalf of one or more of those parties</u>.

(2A) ….

(3) An instrument is validly executed as a deed by an individual if, and only if –

(a) it is signed –

(i) by him in the presence of a witness who attests the signature; or

(ii) …. and

(b) it is delivered as a deed.

(4) In sub-sections (2) and (3) "sign", in relation to an instrument, includes

(a) <u>an individual signing the name of the person or party on whose behalf he executes the instrument; and</u>

(b) making one's mark on the instrument, and "signature" is to be construed accordingly.

(4A) Sub-section (3) above applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual." *[Emphasis added]*

The underlined wording shows amendments which were introduced in 2005.

176. However, it is also common ground, as set out in Joint Report 2 at [5] and [6] that the Indemnity is enforceable as a contract if, but only if, GTC provided consideration under it for the Defendant's promise to indemnify GTC. The Defendant argues that GTC did not provide consideration for the Indemnity.

177. GTC takes a preliminary technical point. GTC pleads at para 5 of its Amended Particulars of Claim that the Indemnity *"took effect as a contract as a matter of English law, for which R&H gave consideration as pleaded at para 7(7)(a) and (c) below, whether or not it was technically a deed as a matter of English law…".* The matters pleaded as consideration (actually in paragraph 7(6)(a) and (c)) were that, in reliance on the Indemnity, GTC as trustee of the TDT continued the appeal to the Guernsey Court of Appeal against the Chadwick judgment and also continued with the conduct of matters in relation to Guernsey 2, Guernsey 3 and Re E.

178. In his Re-Re-Amended Answer at paragraph 6, the Defendant responded to the above contention as follows:

"For the avoidance of doubt, to the extent that it is pleaded in paragraph 7 (which is denied), and is now pleaded by amendment to paragraph 5, that the Alleged Indemnity constitutes or takes effect as a contract that binds Mr Tchenguiz, or is evidence of a contract between him and GTC… the same is denied for the following reasons:

a. He gave no consent to any such contract being formed;

b. No person, including Ms Geraghty, had his express or implied authority to conclude any such contract…"

Thus, there was no specific denial in the Answer that there was valid consideration as alleged by GTC; the only two grounds for denying the existence of a contract were that the Defendant had not consented to any such contract and that no person, including SG, had his express or implied authority to conclude any such contract.

179. We were informed that GTC's advocates had written to the Defendant's advocates pointing out this deficiency on 7 March 2025 but had apparently received no reply. GTC made the point in its opening written submissions at [89] that there was no denial of the existence of consideration and that it therefore appeared to be accepted. The point was repeated in GTC's closing submissions where it was also pointed out that no attempt had been made by the Defendant to address the issue by way of seeking an amendment, nor had any argument been put forward as to why it was unnecessary for him to plead a defence to this issue.

180. It seems to the court that GTC's argument is well-founded. No contention was taken on the pleadings to the assertion that there was consideration for the Indemnity and the matter was simply never addressed on behalf of the Defendant during the course of the hearing. Pleadings are intended to define the issues between the parties and, as a result of the terms of the Re-Re-Amended Answer, the issue of consideration is not identified as one on which the parties are divided. Accordingly, we consider that it is not open to the Defendant to rely on any alleged lack of consideration because the issue has not been pleaded.

181. However, it is fair to say that this is not an issue which was focused upon during the hearing and it might be considered overly technical to prevent the point from being raised. Accordingly, in case we are wrong on the technical ground, we shall deal with the issue of consideration on its merits.

182. Mr Hollander, at [8] of his second report, quoted the following extract from Chitty on Contracts (35th edition) as being a convenient summary of the basic principles of English law concerning consideration:

> ***"A traditional definition of consideration concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee (in that they may give value) or some benefit to the promisor (in that they may receive value). Usually, this detriment and benefit are merely the same thing looked at from different points of view. Thus payment by a buyer is consideration for the seller's promise to deliver and can be described either as a detriment to the buyer or as a benefit to the seller; and conversely delivery by a seller is consideration for the buyer's promise to pay and can be described either as detriment to the seller or as a benefit to the buyer. It should be emphasised that these statements relate to the consideration <u>for each promise</u> looked at separately. For example, the seller suffers a "detriment" when they deliver the goods and this enables them to enforce the buyer's promise to pay the price. It is quite irrelevant that the seller has made a good bargain and so gets a benefit from the performance of the contract. What the law is concerned with is the***

consideration <u>for a promise</u> – not the consideration <u>for a contract</u>." [Original emphasis]

183. It is also well established that past consideration is not good consideration. Thus at 6-029, Chitty states:

> ***"The consideration for a promise must be given in return for the promise. If the act or forbearance alleged to constitute the consideration has already been done before, and independently of, the giving of the promise, it is said to amount to "past consideration"; and such past acts or forbearances do not in law amount to consideration for the promise. If, for example, a thing is guaranteed by a seller <u>after</u> it has been sold the guarantee is not contractually binding on the seller as the consideration for their promise is past. Similarly a promise to make a payment in respect of past services is not contractually binding unless the conditions specified in para 6-033, below are satisfied or some other consideration is provided. For example, a promise to pay money may be made to an employee after their retirement or to an agent after the termination of the agency. If the sole consideration for the promise is the service previously rendered by the former employee or agent, it will be past consideration, so the promise will not be contractually binding. It will be so binding only if some consideration other than the past service has been provided by the promisee. Such other consideration may consist in their giving up rights which are outstanding (or are in good faith believed to be outstanding) under the original contract, or in their promising to perform or actually performing some other act or forbearance not due from them under the original contract; for example, in their validly promising not to compete with a promisor."***

184. Other than referring to the extract from Chitty, Mr Hollander did not deal with consideration in either of his reports nor did he give oral evidence on the issue. Mr Feltham, in his second report, argued that the Indemnity was an example of a unilateral contract under which the promisor promises to act (for instance by making payment) if the promisee does something (in the classic student textbook example, walking to York, or in this case incurring costs in litigation). If the promisee does the thing in question, that amounts to consideration. See for example <u>Carlill v Carbolic Smoke Ball Co</u> [1893] 1 QB 256.

185. In the present case, according to Mr Feltham, the condition of payment by the Defendant under the Indemnity is that GTC incurs litigation costs. If it does so, the Defendant promises to pay them. Continuing the litigation by appealing the Loans Proceedings or continuing with any of the other Guernsey proceedings would involve GTC incurring litigation costs. The incurring of

litigation costs by continuing the litigation was therefore the consideration for the undertaking of the Defendant in the Indemnity to indemnify GTC against costs.

186. The Defendant submitted that any consideration in this case was past consideration. Thus GTC had already appealed against the Chadwick decision at the beginning of 2014 and this was well before the signing of the Indemnity. GTC's very substantial personal exposure as a result of the Chadwick judgment meant that it was bound to continue with the appeal even if the Indemnity had not been provided, particularly as the appeal was due for hearing as early as June 2014. Similarly, GTC did not continue to participate in Guernsey 2 because of the Indemnity. In relation to Guernsey 3, there were no steps being taken at the time the Indemnity was entered into and the Re E proceedings had effectively come to an end by then.

187. In our judgment, GTC did provide consideration for the Indemnity. We would summarise our reasons as follows:

(i) Although litigation costs had already been incurred prior to the signing of the Indemnity (and were therefore past consideration), GTC continued with the appeal and therefore continued to incur legal costs and potential exposure to adverse costs orders against it. That amounts to future consideration and it is well-established in English law that the court does not examine the adequacy of consideration.

(ii) Similarly, it appears not to be disputed that some further steps were taken in connection with Guernsey 2 after the Indemnity and therefore GTC again would have incurred legal costs and exposed itself to potential adverse costs orders.

(iii) The Defendant submitted that GTC would have continued with the appeal against the Chadwick judgment in any event and pointed to Mr Hodges' rather delphic answers in cross-examination as to whether that would have been the position. However, Mr Hodges was questioned by Advocate James on the erroneous basis that the appeal was entirely for GTC's benefit because of its personal exposure to the costs orders whereas in fact, as the Herbert Smith 23 May Note made clear, the appeal was vital from the point of view of the beneficiaries of the TDT (including the Defendant). The result of the Chadwick judgment was that I&B were liable to the BVI Companies but could recover that liability from the assets of the TDT. Because of the size of the liability to the BVI Companies, the TDT was effectively worthless so far as the beneficiaries were concerned. It was therefore very much in their interest that the appeal should continue with a view to overturning the Chadwick judgment on these aspects. Thus, the questions put to Mr Hodges were on a false premise

and we do not think that it would be right to place undue weight on his answers in those circumstances. By contrast, Mr Hodges had stated in his 14th affidavit at [65]:

> *"GTC relied upon the Indemnity, for example, by continuing to pursue applications in the Guernsey proceedings in order to advance the interests of the beneficiaries of the TDT (including RT). One such example is the pursuit of appeals in relation to the 2013 judgment. By pursuing these appeals, and in line with the advice given in the Joint Note, GTC was increasing its "personal" exposure in relation to orders which might be made against it in the Guernsey proceedings. Absent the Indemnity and the "comfort" which it provided to GTC, GTC would not have adopted such an approach. As I said in my email of 22 May 2014 (see paragraph 54 above) the Indemnity was "the big one" – it was of material importance to GTC in how it would and did conduct its future business, including in relation to the Guernsey proceedings."*

Similarly, in re-examination, he said that, if the Indemnity had not been received, one of the things GTC would have considered was retiring. It is clear from the evidence as summarised above that Mr Hodges had been pressing for the Indemnity and wished to secure it at the earliest opportunity so as to protect against future costs as well as past costs.

(iv) In any event, there is clear authority for the principle that *'but for'* reliance is not a requirement for consideration to be found in the case of a unilateral contract. In the classic case of a promise to pay the promisee £100 if he walks to York, it does not matter that the promisee was going to walk to York in any event. The fact that he does so and fulfils the condition set by the promisor is sufficient to amount to consideration. See also Brikon Investments Limited v Carr [1979] QB 467; Shadwell v Shadwell (1860) 9 C.B.N.S. 159.

(v) Furthermore, as stated at 6-033 of Chitty:

> ***"An act done before the promise was made can be consideration for the promise if three conditions are satisfied. First, the act must have been done at the request of the promisor; secondly, it must have been understood that payment would be made; and thirdly, the payment, if it had been promised in advance, must have been legally recoverable."***

In the court's view, these three conditions are satisfied in the present case. As to the first, the Defendant clearly wished GTC as trustee of the TDT to appeal against the Chadwick judgment and therefore to incur legal costs. As to the second, we have already found that, as stated by Mr Hillier, it was always informally understood that the Defendant would reimburse GTC as

trustee both for its fees and for its legal costs. And as to third, an agreement to indemnify for future legal costs would clearly have been legally recoverable. Accordingly, we consider that there is valid consideration for the Indemnity on this basis as well as on those set out earlier.

(vi) In summary, GTC provided consideration by continuing to appeal the Chadwick judgment or participate in Guernsey 2 and thereby to incur legal costs and potentially incur liability for adverse costs to other parties.

188. In our judgment therefore, the Indemnity, even if it is not a deed, took effect as a contract. It follows that, the Indemnity having been signed by SG with the authority of the Defendant, it is binding upon and enforceable against him as a contract subject only to the issue of the Consent Order and issues over quantum, which we discuss below.

189. In those circumstances, it is not strictly necessary to resolve the matters argued before us as Issues 3 and 4 but, in case we are wrong in our above conclusion, we shall proceed to do so.

Issue 3: Is the Defendant estopped from denying that the Indemnity took effect as a deed?

190. We find that, in sending the copy of the signed Indemnity by email on 21 May saying *"Please find enclosed signed indemnity as requested"* and by then sending the hard copy of the signed Indemnity which was received by GTC on 4 June, SG was representing that the document had been validly executed by the Defendant or someone with his authority to do so and she had validly attested the signature ("the SG Representation"). See, by way of similar example, Shah v Shah [2002] QB 35 where at [13] Pill LJ said *"The delivery of the document constituted an unambiguous representation of fact that it was a deed".*

191. Whilst on our finding that SG signed the Indemnity with the actual authority of the Defendant, it is implicit that he also authorised her to send it to GTC, there is no suggestion that he gave actual authority for her wrongly to represent that the 'deed' was not only signed by him or on his behalf but that it had also been duly witnessed by someone different from the signatory. Accordingly, the question then arises as to whether SG had ostensible authority to make the SG Representation on behalf of the Defendant. The agreed legal principle was summarised in Joint Report 2 at [9] in the following terms:

> *"Correspondingly, whether an agent has B's ostensible authority to make a representation to A depends on whether B has held out the agent to A as having*

authority to make the representation on B's behalf, and thereby caused A to believe that the agent has such authority."

192. We were referred to a number of cases in which this topic has been touched upon in respect of a person who does not have ostensible authority to enter into a transaction on behalf of the principal but may have ostensible authority to represent that the transaction had been duly entered into by those having the authority to do so.

193. In Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd [1988] 1 WLR 16 at 28, Lord Bridge, speaking for a unanimous House of Lords, said as follows at page 28:

> ***"But what is here involved in the concept of ostensible authority? The issue of ostensible authority normally falls for decision where one party as agent has purported to undertake some obligation on behalf of another party as principal. In those circumstances, the party seeking to enforce the obligation in reliance on the agent's ostensible authority will need to show that the principal held the agent out as having the necessary authority so as to create an estoppel. But here there is no question of any obligation to be enforced. The question is simply whether a limitation upon the actual authority of an officer or employee of the I.T.C. who, acting honestly and in the course of his employment by the I.T.C., communicates a document to a third party prevents the document communicated becoming the property of the recipient, not withstanding that the recipient is unaware of any lack of authority. In the real world it seems to me that business would come to a standstill if persons who receive documents from clerks or secretaries, acting in the course of their employment, were not entitled to assume that those documents were sent with the authority of the employer, and if this is true of the ostensible authority of staff in such humble grades, it must equally be true of staff at higher levels. Thus, in my opinion, the very fact that an officer or employee of the I.T.C. was acting and known to be acting in the course of his employment in communicating documents to a third party would be strong prima facie evidence that he had at least ostensible authority to do so. To rebut the inference from that prima facie evidence it would be necessary, as I think, not only to prove absence of actual authority but also to show something in the circumstances in which the transaction took place sufficient to put the recipient of the document on inquiry that the I.T.C.'s officer or employee might be acting without authority."*** [Emphasis added]

194. In Kelly v Fraser [2013] 1 AC 450, speaking for a unanimous Privy Council, Lord Sumption said at [12]-[15] as follows:

"12. ….The "Ocean Frost" is not authority for the broader proposition that a person without authority of any kind to enter into a transaction cannot as a matter of law occupy a position in which he has ostensible authority to tell a third party that the proper person has authorised it.

13. To take an obvious example, the company secretary does not have the actual authority which the board of directors has, but he is likely to have its ostensible authority by virtue of his functions to communicate what the board has decided or to authenticate documents which record what it has decided. The ordinary authority to communicate a company's authorisation of a transaction will generally be more widely distributed than that, especially in a bureaucratically complex organisation and in the case of routine transactions. It is not at all uncommon for the authority to approve transactions to be limited to a handful of very senior officers, but for their approval to be communicated in the ordinary course of the company's administration by others whose function it is to do that. Browne-Wilkinson LJ was referring to situations of that kind when he said in Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Limited [1985] 2 Lloyd's Rep 36, at 43:

> ***"It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to effect the principal's position. But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out?"***

14. In First Energy (UK) Limited v Hungarian International Bank Limited [1993] 2 Lloyd's Rep 194 the plaintiff's representative negotiated a credit agreement with the regional manager of a bank, who had authority to negotiate the terms but told him that he had no authority to sanction the final deal, which was a matter for the bank's head office. The regional manager eventually wrote a letter amounting to an offer which was capable of immediate acceptance and was in fact accepted by the plaintiff. The Court of Appeal held that that was an implicit statement that head office had sanctioned the deal, which the regional manager had ostensible authority by virtue of his position

to communicate. There is, as Evans LJ said in that case, at p206: "No requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question on behalf of the principal."

15. It is clear from the judgments in First Energy that the Court of Appeal regarded their approach in that case as being wholly consistent with the law stated by Lord Keith in Armagas Limited v Mundogas SA [1986] AC 717. In the Board's opinion, they were right to regard them as consistent. Lord Keith's speech remains the classic statement of the relevant legal principles. An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authority of a company (or, for that matter, any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by some one held out by the company to make representations of that kind, may give rise to an estoppel. Every case calls for a careful examination of its particular facts."

195. Lord Sumption's observations in Kelly v Fraser were endorsed by the Privy Council in East Asia Company Limited v PT Satria Tirtatama Energindo [2019] UKPC 30. Having recalled that at [43] that a representation which creates apparent or ostensible authority will commonly arise from conduct, that is to say, by the principal permitting the agent to enter into contracts of a particular kind on his behalf, Lord Kitchin went on to say at [61]:

"…Similarly, there may be situations in which an agent who would have no authority to enter into transactions of a particular type is held out by the employer as the person who is permitted to communicate to outsiders that such a transaction has been approved by the principal or that some agent has been duly authorised to approve it: Kelly v Fraser…per Lord Sumption at paras 11-15."

196. As Lord Sumption makes clear, one must consider the facts of a particular case in order to see if a person has been held out by a principal to make representations of this kind. We are quite satisfied that, on the facts of this case, SG was held out by the Defendant as having authority to represent that transactions had been approved by the Defendant and/or that documents had been duly authorised and executed. She therefore had ostensible authority to make the SG

Representation referred to above. She was his trusted personal assistant who had held that responsible post for a challenging and demanding employer for some nineteen years in 2014. It was clear that the Defendant placed considerable confidence in her. Documents intended for the Defendant were sent to SG and she in turn sent them back. As Mr Hodges put it in oral evidence she was *"the portal into everything with Robert"*. On the evidence before us, that was an accurate statement and, as we say, we consider that she was held out by the Defendant as having authority to represent to GTC whether matters had been approved by the Defendant or whether the documents had been duly executed by him or on his behalf.

197. The question then arises as to whether, SG having made the SG Representation, the Defendant is estopped from denying that the Indemnity was duly executed as a deed. In this respect, Joint Report 1, having set out section 1 of the 1989 Act both in its original form and in its form following the amendment in 2005, went on to record as follows:

> ***"5. The 2005 Amendments therefore, inter alia, introduced:***
>
> ***(a) Clause 1(2)(b)(i), which allows that a deed may be executed by a person authorised to execute in the name of or on behalf of another person, and***
>
> ***(b) S.1(4)(a), which allows that a party may sign an instrument by another individual signing in his name or on his behalf.***
>
> ***6. There are two significant authorities relevant to estoppel in relation to s1 of the Act, Shah v Shah and Briggs v Gleeds.***
>
> ***7. These cases show:***
>
> ***(a) Where the instrument does not on its face comply with the formalities required by s1 of the Act, there can be no estoppel.***
>
> ***(b) Where the defect relates to attestation (or any other defects which do not offend the essential policy of s1), subject to (a) above, the principle of estoppel is capable of applying.***

8. The issue on which there was disagreement between the experts was on whether, and in what circumstances there could be estoppel where:

(a) The deed did not comply with the statute and

(b) It was not signed in accordance with the statutory requirement of s1(3), (4) and (4A).

9. The experts agree that estoppel will not operate, (notwithstanding that its constituent elements have been established) if the estoppel would unacceptably subvert the public policy of a statute or a rule of law. Whether this answer is made good, in the case of an estoppel against denying that a statutory requirement has been fulfilled 'depends on the nature of the enactment, the purpose of the provision and the social policy behind it'."

198. In <u>*Shah v Shah*</u> (supra), the deed in question had been duly signed by the parties to the deed but the signature of the attesting witness was added to the document shortly after it had been signed by the parties and not in their presence, as is required by section 1 of the 1989 Act. The document was then sent to the other party to the transaction who was unaware that the witness had not signed in the presence of the parties. At trial, the judge held that the signing parties were estopped from denying that the document was a valid deed. The Court of Appeal upheld that decision. So far as relevant for present purposes, Pill LJ, with whom Tuckey LJ and Sir Christopher Slade agreed, said as follows:

"28. For the claimant Mr Rayner James accepted that an estoppel could not defeat the absence of a signature, as distinct from a defect in or the absence of its attestation. The signature is fundamental to the validity of the deed. The absence of attestation in the manner required by section 1 does not, he submitted, subvert the policy of the Act. That policy seeks to ensure that signatures on deeds are authentic and to limit the possibility of disputes as to authenticity. There may, however, be cases, such as the present case, where the authenticity of the signatures is not in question and public policy need not and does not go so far as to prevent the raising of an estoppel where there is a defect in the manner of attestation.

29. …..

30. I have, however, come to the conclusion that there was no statutory intention to exclude the operation of an estoppel in all circumstances

or in circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed. The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature. Failure to comply with the additional formality of attestation should not in itself prevent a party into whose possession an apparently valid deed has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence. It should not permit a person to escape the consequences of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature. The fact that the requirements are partly for the protection of the signatory makes it less likely that Parliament intended that the need for them could in all circumstances be used to defeat the claim of another party.

31. Having regard to the purposes for which deeds are used and indeed in some cases required, and the long-term obligations which deeds will often create, there are policy reasons for not permitting a party to escape his obligations under the deed by reason of a defect, however minor, in the way his signature was attested. The possible adverse consequences if a signatory could, months or years later, disclaim liability upon a purported deed, which he had signed and delivered, on the mere ground that his signature had not been attested in his presence, are obvious. The lack of proper attestation will be peculiarly within the knowledge of the signatory and, as Sir Christopher Slade observed in the course of argument, will often not be within the knowledge of the other parties.

32. In this case the document was described as a deed and was signed. A witness, to whom the third and fourth defendants were well known, provided a form of attestation shortly afterwards and the only failure was that he did so without being in the presence of the third and fourth defendants when they signed.

33. Having considered the wording of section 1 in the context of its purpose and the policy considerations which apply to deeds, I am unable to detect a statutory intention totally to exclude the operation of an estoppel in relation to the application of the section or to exclude it in present circumstances. The section does not exclude an approach such as that following by Sir Nicolas Browne-Wilkinson VC in TCB Limited v Gray [1986] Ch

621. For the reasons I have given the delivery of the document, in my judgment, involved a clear representation that it had been signed by the third and fourth defendants in the presence of the witness and had, accordingly, been validly executed by them as a deed. The defendant's signatories well knew that it had not been signed by them in the presence of the witness, but they must be taken also to have known that the claimant would assume that it had been so signed and that the statutory requirements had accordingly been complied with so as to render it a valid deed. They intended it to be relied on as such and it was relied on. In laying down a requirement by way of attestation in section 1 of the 1989 Act, Parliament was not, in my judgment, excluding the possibility that an estoppel could be raised to prevent the signatory relying upon the need for the formalities required by the section. In my judgment, the judge was correct in permitting the estoppel to be raised in this case and in his conclusion that the claimant could bring an action upon the document as a deed."

199. In Briggs v Gleeds [2015] Ch 212, it was apparent on the face of the document that the signature of certain of the parties to the deed had not been attested by a witness. Newey J held that, where a document does not on its face comply with the requirements of section 1 of the 1989 Act in connection with deeds, no estoppel can arise. In the course of his judgment, he commented on the decision in Shah as follows:

"40. It is evident from Shah v Shah… that there are circumstances in which a person can be estopped from denying that a document was executed in accordance with the requirements of section 1 of the 1989 Act. It is also apparent from Pill LJ's judgment that attestation is less crucial than signature. On the other hand, Pill LJ did not decide that estoppel can be used in response to every sort of failure to comply with the 1989 Act. To the contrary, he expressed his conclusion narrowly: he was unable to detect a statutory intention "totally" to exclude the operation of an estoppel in relation to the application of section 1 or to exclude it "in present circumstances". It seems fair, moreover, to infer that Pill LJ would not have considered estoppel applicable if the defendants had not even signed the "deed". In Pill LJ's view, "a document cannot be a deed in the absence of a signature" and the public interest lies in the requirements for a signature."

200. Newey LJ went on to express the reasons for his conclusion that no estoppel could be invoked in that case as follows:

"43. In the end, I have concluded that estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act on its face or, at any rate, cannot be so invoked in the circumstances of the present case. My reasons include these:

(i) To state the obvious, Parliament has decided that, for an individual validly to execute a deed, he must sign "in the presence of a witness who attests the signature". That requirement has an evidential purpose: as Pill LJ noted in Shah… it "limits the scope for disputes as to whether the document was signed and the circumstances in which it was signed" and "gives some, but not complete, protection to other parties to the deed who can have more confidence in the genuineness of the signature by reason of the attestation". As Pill LJ further noted, the requirement also "gives some, but not complete, protection to a potential signatory who may be under a disability, either permanent or temporary". The Law Commission thought, too, that the need for attestation would "emphasise to the person executing the deed the importance of his act"…

(ii) Fulfilment of Parliament's and the Law Commission's objectives would be undermined, potentially to a serious extent, if estoppel could be invoked in circumstances such as those in the present case.

(iii) Shah v Shah shows, of course, that a person can sometimes be estopped from denying due attestation. The document with which the court was concerned in that case appeared, however, to be valid. Accordingly, Pill LJ said that failure to comply with the formality of attestation should not in itself prevent a party into whose possession "an apparently valid deed" has come from alleging that the signatory should not be permitted to rely on the absence of attestation in his presence. He also spoke of "an apparently valid deed" in the next sentence of his judgment.

(iv) The "deeds" at issue in the present case are not "apparently valid". It can be seen from each document that it was not executed in accordance with the 1989 Act. This distinction from Shah v Shah is a significant one. If estoppel can be invoked in relation to documents that are not "apparently valid", the documents cannot necessarily be taken at face value. "[A]s far as possible", however, "it should be clear on the face of the document whether or not it has been validly witnessed": see para 8.3(i) of the Law Commission Working Paper. That is especially so since the validity of a deed can matter for many years, and those considering "deeds" long after they have been executed may well

have no personal knowledge of the circumstances in which they were executed and access to little or no contemporary correspondence.

(v) If estoppel were available in circumstances such as those in the present case, a party to a "deed" who had not himself executed the document in accordance with section 1 of the 1989 Act could choose whether or not the document should be treated as valid. If it turned out to be in his interest to disavow the document, he could do so. If, on the other hand, the document proved to be advantageous to him, he could invoke estoppel….

(vi) Section 1 of the 1989 Act was in part designed to achieve certainty. It could, however, have the opposite consequence if estoppel were available in circumstances such as those in the present case. The effectiveness of a "deed" that had not, on the face of it, been validly executed could be left in doubt."

201. As can be seen, the distinction between Shah (where estoppel was permitted) and Briggs (where it was not permitted) was that in the former case, the document appeared on its face to comply with the attestation requirements for a deed whereas in the latter, it was apparent on the face of the document that the requirements for attestation had not been complied with.

202. At this stage of our judgment, we are considering whether an estoppel arises on the basis of our finding of fact, namely that SG signed the Indemnity on the authority of the Defendant. In those circumstances, the position seems to us to be as follows:

(i) There is a valid signature in accordance with sub-sections (2)(b)(i) and (4)(a) of section 1 of the 1989 Act, in that SG has signed in the name of the Defendant with his authority.

(ii) The deed has not been validly attested because SG has witnessed her own signature.

Accordingly, the defect is entirely one in relation to attestation as was the case in Shah.

203. As in Shah (but unlike in Briggs), the Indemnity is on its face validly attested as a deed. It is not apparent from the document that SG has signed on behalf of the Defendant; there is simply a signature purporting to be that of the Defendant. She has then signed as attesting witness using her own signature which is completely different and is stated to be her signature in that she has printed her name as attesting witness below her signature. On the face of the document, it complies with the requirements for a deed in that there is a signature of the principal together with

a signature of an attesting witness. In those circumstances, we consider that the case is akin to the position in Shah and that, subject to issues of reliance and red flags, the Defendant is estopped from contending that the document does not constitute a deed because of the defective attestation.

204. Advocate James pointed to several red flags which, he submitted, must or should have alerted GTC to the fact that the Indemnity had not been executed by the Defendant. These were as follows:

(i) GTC knew that the Defendant was in Monaco from 18-26 May and therefore not available to sign the Indemnity.

(ii) The improper execution of the SFO Indemnities cast doubt on the execution of the Indemnity.

(iii) The fact that the Indemnity as signed was still marked as a draft was suspicious.

(iv) The Indemnity was wrongly backdated to 14 April 2014 even though GTC first received the signed Indemnity by email on 21 May and the hard copy on 4 June 2014.

(v) GTC, through Mrs Boyer, knew that SG was overworked and making mistakes in relation to both the Indemnity and the SFO Indemnities.

(vi) Despite the very broad nature of the Indemnity and the fact that it plainly had far-reaching financial consequences for the Defendant, GTC never received any amendments or comments on the draft of the Indemnity from the Defendant's in-house legal team.

205. We do not find that these matters, whether considered individually or in aggregate, should have alerted GTC to the position or made it unreasonable for GTC to rely upon the Indemnity as a duly executed deed. Thus, by reference to the numbered sub-paragraphs in the preceding paragraph:

(i) We found Mrs Boyer's answers (summarised at para 95 above) on this point to be convincing. It was not reasonable to expect GTC to recall exactly where the Defendant might be at any given moment and, in any event, even if it had recalled that the Defendant was in Monaco, it was not to know when the document had been signed.

(ii) We accept Mrs Boyer's explanation as to her reasons for querying the SFO Indemnities. She never at any stage thought that the Defendant had not signed them; it was merely a question of the positioning of SG's name which might give that impression. As she said, there was no similar issue in relation to the Indemnity which appeared on its face to be perfectly properly signed. Accordingly we do not consider that the issues with the execution of the SFO Indemnities cast any doubt on the execution of the Indemnity.

(iii) The fact that the Indemnity was still marked as a draft caused Mrs Boyer to check with her directors that the document had been agreed by GTC but we do not see that it should have led to any doubt as to whether it had been executed by the Defendant.

(iv) The backdating was entirely the result of actions taken within GTC. We do not see how those actions could possibly cast any doubt or raise questions as to whether the Defendant had signed the document.

(v) It is correct that SG was making some mistakes, but GTC would not of course have been aware of some of them. Those of which GTC would have been aware were the fact that, despite requests, the original of the Indemnity was not sent until 3 June; that SG couriered the wrong versions of the SFO Indemnities (i.e. copies of the version sent on 22 May which had been rejected by Mrs Boyer); and she was clearly very pressed, saying for example in her email for 4 June to Mrs Boyer *"Yesterday was an effing nightmare".* However, we do not see that the fact that SG may have been somewhat pressed or that she made mistakes of the nature we have described could possibly be taken to suggest that she had signed the Indemnity in the name of the Defendant or to have alerted GTC to this possibility.

(vi) We do not think that the mere fact that GTC had not received any suggested amendments from the Defendant's legal team should have alerted it to the fact that the Indemnity had not been signed by the Defendant.

206. We are also satisfied that GTC relied upon the Representation that the Indemnity had been duly executed as a deed and acted to their detriment as a result. Thus, in the belief that it had a genuine and enforceable Indemnity from the Defendant, it did not ask for the document to be re-executed and it continued to participate in the relevant litigation thereby incurring further legal costs and potentially adverse costs orders.

207. In our judgment the requirements for an estoppel are satisfied and it would be unjust in those circumstances to allow the Defendant to deny that the Indemnity takes effect as a deed.

Accordingly, subject to the arguments below in relation to the Consent Order and quantum, the Indemnity is enforceable against the Defendant as a deed.

Summary so far

208. It may be helpful to summarise the effect of our conclusions so far:

(i) We find as a fact that the Defendant authorised SG to sign the Indemnity on his behalf by impersonating his signature. She accordingly signed with his actual authority.

(ii) The Defendant is estopped from denying that the Indemnity takes effect as a deed by reason of the defect in attestation, namely that SG both signed the Indemnity and attested her own signature.

(iii) Even if the Indemnity does not take effect as a deed, it takes effect as a contract on the basis that GTC provided good consideration for the provision of the Indemnity by the Defendant.

209. It follows that, apart from the issues of the Consent Order and quantum, it is not strictly necessary to consider the various other issues which have been raised, in particular those of estoppel which might arise in the event that SG had signed the Indemnity without the Defendant's authority. However, in case we are wrong on our finding as to actual authority, we propose to deal with those issues of estoppel before turning to the issue of the Consent Order and quantum.

Issue 4: If no actual authority for SG to sign, is the Defendant estopped from denying the validity of the Indemnity?

210. Issue 4 falls to be considered on the basis that, contrary to our finding of fact in relation to issue 1, SG acted without the authority of the Defendant when she signed the Indemnity in his name. The question then arises as to whether he is nevertheless estopped from denying that the Indemnity is binding upon him pursuant to one or more of the doctrines of estoppel by representation, by silence or by negligence.

(i) Estoppel by representation

211. We have already found under Issue 3 that SG made the SG Representation to GTC with the ostensible authority of the Defendant and that GTC acted to its detriment in reliance upon it. The fact that, on the basis presently being considered, she signed the Indemnity without the Defendant's authority makes no difference. She was held out by the Defendant as having authority to make representations of the nature concerned, she made the SG Representation by sending out the Indemnity as she did and GTC relied upon the SG Representation and acted to its detriment as a result.

212. It follows that the requirements for estoppel are satisfied. Accordingly, to the extent that the Indemnity would take effect as a contract, we hold that the Defendant is estopped from denying its validity. It is just and appropriate that he should be held to the SG Representation made with his ostensible authority.

213. However, the question then arises as to whether he is also estopped from denying that the Indemnity takes effect as a valid deed by reason of the SG Representation. This is the point upon which Mr Hollander and Mr Feltham disagree.

214. As quoted at para 197 above, the experts are agreed in Joint Report 1 at para 9 that estoppel will not operate (notwithstanding that its constituent elements have been established) if the estoppel would unacceptably subvert the public policy of a statute. In considering that aspect the court must have regard to the nature of the enactment, the purpose of the provision and the social policy behind it.

215. Mr Hollander is of the opinion that Shah and Briggs establish that, whilst a defect in attestation may in appropriate circumstances give rise to an estoppel preventing the signing party from denying that the document is valid as a deed as it would not unacceptably subvert the public policy of section 1 of the 1989 Act, that was not the case in the absence of a signature. He referred to the judgment of Pill LJ in Shah at [30] *"A document cannot be a deed in the absence of a signature"* and *"It [attestation] is not fundamental to the public interest, which is in the requirement for a signature"*. He also referred to the observation in Briggs at [40] where Newey J inferred that Pill LJ would not have considered estoppel applicable in Shah if the defendants had not even signed the document. Mr Hollander considered that an unauthorised impersonated signature was equivalent to the absence of a signature and accordingly estoppel could not be applied as its application would subvert the public policy of section 1, which required a signature.

216. Mr Feltham, on the other hand, was of the opinion that the key principle to emerge from Shah and Briggs (as well as in Bank of Scotland Plc v Waugh [2014] EWHC 2117 (Ch) which followed Briggs) was the difference between a patent defect (one which appeared on the face of the document) and a latent defect (where the document appeared on its face to be validly executed as a deed). In the case of the former (as in Briggs and Waugh) an estoppel cannot be invoked. But in the case of the latter (as in Shah) allowing an estoppel would not unacceptably subvert the public policy of section 1 of the 1989 Act, which was to promote certainty as to whether a document could be treated as a deed. He noted that the 2005 Amendment specifically envisaged a person being able to sign the name of another. In his opinion, an unauthorised signature was not the same as there being no signature, as envisaged by Pill LJ.

217. Both experts agreed that there was no decision which has decided this point. In the circumstances, we venture into this area of English law with some trepidation. The correct answer is not obvious and both experts put forward their opinion most persuasively. However, on balance, we have come to the conclusion that Mr Feltham's opinion is to be preferred. In brief summary, our reasons for so concluding are as follows:

(i) We are persuaded by Mr Feltham's view that the key point to emerge from Shah and Briggs is the difference between patent and latent defects in the execution of the document purporting to be a deed. Where the defect is patent, estoppel cannot be invoked, but where the defect is latent, an estoppel may arise.

(ii) The defect in the present case is latent as the Indemnity appears on its face to have been validly executed as a deed with a signature, a statement that it has been signed as a deed and an attesting signature, with the signature of the principal and the attesting signature being quite different.

(iii) However, this does not determine the matter as the court has to determine whether to allow an estoppel where the signature of the principal is an unauthorised impersonation of the principal's signature would unacceptably subvert the public policy reflected in section 1 of the 1989 Act.

(iv) We do not think that Shah and Briggs point as strongly in the direction of his opinion as Mr Hollander considers. In the passages referred to above, Pill LJ appears to be envisaging a situation where there is an absence of a signature i.e. no signature. That is not the situation here. There is a signature albeit, on the present assumption, an unauthorised one. The question therefore is whether the principles applied in Shah would lead to the same result where there is a signature, albeit, unknown to the counterparty, an unauthorised one.

(v) It appears to be generally accepted that one of the key objectives of the requirements set out in section 1 is to promote certainty. It should be clear on the face of the document whether or not it has been validly executed as a deed. One of the points made by Newey J at [43](v)] in Briggs was that to allow an estoppel in that case would have led to uncertainty.

(vi) We agree with Mr Feltham that not to allow estoppel in circumstances such as the present case would lead to uncertainty. As he put it at 13(e) of Joint Report 1:

> *"The policy of the statute is to promote certainty (by caution, evidence and labelling). Not to allow an estoppel – where a party has held out a deed apparently signed by him as having been signed by him and the other party has therefore relied on it as valid – would promote uncertainty (and unfairness) not certainty. The party who knew that the signature, which he said was by him, was in fact not by him, could then choose whether the document is treated as a valid deed (by revealing the truth or not). This reasoning applies with the same force to signature as it does to attestation."*

(vii) The court put to Mr Hollander during his evidence an example of where B has impersonated A's signature without A's authority and has then witnessed that signature but the document is then handed over to C in the presence of A who expressly confirms that the document has been validly executed by him as a deed. Could an estoppel arise in such extreme circumstances? Mr Hollander's reply was that it could not, no matter how gross the misrepresentation and how great the reliance and detriment to C.

(viii) We find it difficult to think that allowing an estoppel in such circumstances or in the present circumstances (where the representation was made by A, having been held out by B as having ostensible authority to make such a representation) would unacceptably subvert the objective of Parliament.

(ix) One can of course envisage hardship in the opposite direction if an estoppel is allowed. Thus where, in the above example, the representation is made by A alone and B has no knowledge of it, B could find himself bound by a document of which he had no knowledge. Mr Feltham's answer was that the law often had to choose between two innocent parties (in that case B and C). It would not be unfair or unreasonable for the law to rule that the loss should fall on B as he was the person who had held out A as having authority to make the representation to C and it was therefore not unreasonable that he rather than C should bear any consequences. The court found this response persuasive.

218. For these reasons, we conclude that to allow an estoppel in circumstances such as the present where, on the present basis, SG signed the Indemnity without the authority of Defendant but had ostensible authority to make the SG Representation, would not unacceptably subvert the public policy of section 1. On the contrary, where the defect in the signature is latent (as in this case), allowing an estoppel would, for the reasons set out, lead to greater certainty and a greater ability for a party to rely as a deed on a document which, on its face, purports to be duly executed as a deed.

219. In summary therefore, the necessary ingredients for an estoppel by representation being made out, we hold that, even if the Indemnity was signed by SG without the Defendant's actual authority, not only is the Defendant estopped from denying that the Indemnity takes effect as a contract but he is also estopped from denying that it takes effect as a deed.

(ii) Estoppel by silence

220. Mr Hollander and Mr Feltham were agreed upon the requirements for estoppel by silence (sometimes also referred to as by acquiescence). Paragraphs 13-18 of Joint Report 2 are in the following terms:

> *"Estoppel by silence*
>
> *13. Under the sub-category of estoppel by silence B may be estopped by an implied representation made by his silence if, but only if, he has remained silent in breach of a duty he owed to A to correct a mistaken belief of A.*
>
> *14. The test of whether B owed A such a duty to speak is whether a reasonable person in A's position would expect B, with knowledge of a mistake by A as to their respective rights and obligations, acting honestly and responsibly, to bring the true facts to A's attention.*
>
> *15. Since estoppel by silence is a form of estoppel by representation the circumstances must be such that B's silence is to be treated as an implied representation. Outside a relationship such as partnership or joint enterprise under which B has a duty to speak as an incident of a duty of good faith, the courts would not find a breach of duty to speak in the absence of impropriety of some description, but not necessarily dishonesty or intention to mislead, on the part of B. "That impropriety might, however, come from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party*

known to him to be under a mistake as to their respective rights and obligations". The impropriety there lies in B not speaking when a reasonable person in A's position would expect B to do so.

16. For B to be estopped by silence from denying the truth of A's mistaken belief B must therefore have knowledge of a mistake by A that effects their mutual rights and obligations. Knowledge includes Nelsonian "blind eye" knowledge (i.e. suspecting a mistake and deliberately not inquiring to avoid confirmation of what is suspected).

17. If, but only if, B has such knowledge of A's mistake, the question then arises whether B was under a duty to A to bring the true facts to A's attention. It is relevant to this issue that A and B had adverse interests and were not in a pre-existing contractual relationship. The test is whether a reasonable person in A's position would expect B, acting honestly and responsibly, to point out A's mistake, or a reasonable person in A's position would not regard that as to be expected of B.

18. The question is whether in the present case [the Defendant] knew [GTC] was under a mistake and whether a reasonable person in [GTC's] position would expect [the Defendant] to bring the true facts to [GTC's] attention are questions for the Jersey court."

221. It is not contended (correctly) by GTC that the case falls within the first category mentioned at [15] of Joint Report 2 quoted above so that the Defendant had a duty to speak as an incident of a duty of good faith. He was a beneficiary who did not owe such a duty to his trustee (unlike the reverse situation). There is therefore a requirement for some impropriety on the part of the Defendant, but this may lie in not speaking when a reasonable person in GTC's position would expect him to do so.

222. Applying the above principles to the circumstances of this case, it seems to us that the following questions arise for consideration, namely:

(i) Did the Defendant have knowledge (including Nelsonian knowledge) that GTC was under a mistake that affected their mutual rights and obligations?

(ii) If so, would a reasonable person in GTC's position expect the Defendant, acting honestly and responsibly, to point out GTC's mistake?

223. It is to be recalled that, at this stage, we are proceeding on the basis (contrary to our earlier finding of fact) that SG signed the Indemnity and forwarded it to GTC on 21 May without the Defendant's authority.

224. As to the first question, we find that GTC was under such a mistake. It had received a signed Indemnity which indemnified it against all legal costs in connection with the Guernsey Proceedings. As already stated earlier, it believed the Indemnity to have been duly executed by the Defendant and therefore enforceable against him when in fact (on the present assumption) it had not been so signed so that, absent any estoppel, it could not be enforced against the Defendant.

225. We were also satisfied that the Defendant had knowledge of this mistake. On our findings of fact, he had had discussions with Mr Hillier about the provision of an indemnity to GTC as trustee of the TDT in respect of the Guernsey legal costs. Against this background, he was copied in to the 21 May email from SG to Mrs Boyer attaching the copy of the Indemnity signed by SG in his name and stating *"Please find enclosed signed indemnity, as requested".*

226. Furthermore, he was copied in to four further emails referring to the Indemnity including two which again attached the signed Indemnity, namely Mrs Boyer's response on 22 May stating *"Thank you Sara. Any chance with the other two?"* and her further email to SG on 3 June stating *"Did we get this original back?".* In our judgment, it is inconceivable that, knowing that indemnities for the TDT and in respect of the SFO Proceedings were under active consideration, the Defendant did not look at any of these emails and did not appreciate that an indemnity, purporting to be signed by him, had been sent to GTC and that, as a result, GTC believed it held a valid indemnity from the Defendant in respect of the Guernsey costs. It follows that the answer to the first question is that the Defendant did have knowledge that GTC was under a mistake that affected their mutual rights and obligations.

227. Turning to the second question, we have no hesitation in concluding that a reasonable person in GTC's position would expect the Defendant, acting honestly and responsibly, to point out GTC's mistake.

228. As all the relevant witnesses agree, there was a very good relationship between GTC and the Defendant in 2014. GTC were incurring costs in relation to litigation and were charging fees but were reliant on the Defendant to ensure that these fees and costs were met because of the lack of net assets in the TDT. As Mr Hillier made clear, the Defendant had been true to his word and had procured that GTC was paid. Following the Chadwick judgment, GTC had made clear its need for a formal indemnity and discussions between Mr Hillier and the Defendant had taken

place as a result of which, as we have found, the Defendant agreed in principle to provide an indemnity against the legal costs in Guernsey. The Defendant was aware of GTC's request for an indemnity.

229. In these circumstances, it would not be honest or responsible for the Defendant, being aware that GTC thought that it had received the requested Indemnity whereas in fact, to the Defendant's knowledge, it had not been signed by him or on his authority, to stand by and say nothing to correct GTC's misunderstanding. In our judgment, any reasonable person in GTC's position would also be of that view.

230. We have already held that, despite the red flags referred to by the Defendant, the elements of reliance and detriment necessary for an estoppel to arise are satisfied in this case. It follows that all the requirements necessary for an estoppel by silence to be invoked are satisfied and accordingly we find that the Defendant is estopped by his silence in these circumstances from denying the validity of the Indemnity.

231. We should elaborate on this statement a little. As discussed earlier in this judgment, we are of the opinion that an estoppel can operate to prevent the Defendant not only from denying the validity of the Indemnity as a contract but also from denying its validity as a deed. This finding applies equally to our conclusion as to estoppel by silence. But if we are wrong on whether estoppel can operate to prevent the Defendant from denying the validity of the Indemnity as a deed (as discussed at paras 211 to 219 above) then our decision on estoppel by silence only operates to prevent him from denying the validity of the Indemnity as a contract.

(iii) Estoppel by negligence

232. We have already found that the Defendant is estopped both by reason of the SG Representation on the basis of her ostensible authority and by reason of the Defendant's silence. In the circumstances, we do not think it necessary to extend what is already a lengthy judgment by considering estoppel by negligence, which would only arise in the absence of the estoppels by representation and by silence, which we have found to be satisfied.

Issue 5: The effect of the Consent Order

233. The background to the Consent Order is set out at paras 110-112 above. In short, the Loans Proceedings became known as the Proofs Proceedings. They were necessary in view of the Privy Council decision that claims against a trust with insufficient assets to meet its liabilities should be

dealt with *pari passu*, coupled with the fact that the claims against the assets of the TDT (including in particular the claims of I&B resulting from their liability to the BVI Companies) greatly exceeded the TDT assets.

234. As GTC correctly asserted, the Proofs Proceedings were a form of quasi-insolvency proceedings with the various creditors of the TDT submitting proofs of debt and the court eventually having to decide how the assets of the TDT should be distributed between the various creditors in view of the insufficiency of the assets to meet all the claims. We would add that, technically speaking, it is of course incorrect to speak of a creditor of a trust or of a claim against a trust as a trust is not a legal entity. Claims are brought against the trustee who then seeks reimbursement out of the trust assets in order to meet the claim. However, the expression is a convenient shorthand to explain the position in practice.

235. The main parties to the Proofs Proceedings were I&B and GTC concerning their respective claims against the TDT. The Defendant (together with the then trustees of the TDAT) was given permission to join the Proofs Proceedings by order of the Guernsey court dated 30 June 2023. That order however made clear the very limited purpose for which they were permitted to join, namely *"for the sole purpose of determining whether the Applicants [the Defendant and the TDAT] are permitted to rely on the RT/TDAT Proofs…"*. In other words, the Defendant was a co-claimant, along with I&B and GTC, against the assets of the TDT.

236. GTC lodged an updated proof of debt on 29 September 2023 in the Proofs Proceedings in the sum (excluding pence) of £2,122,132. I&B also lodged an updated proof of debt on the same date in the sum of £33,076,154.

237. The Proofs Proceedings were subsequently settled pursuant to the Consent Order dated 9 July 2024. The relevant provisions of the Consent Order were as follows:

> ***"AND WHEREAS proofs of debt have been lodged by alleged creditors claiming against the assets of the TDT (TDT Creditors)***
>
> ***AND WHEREAS in pursuance of the 30 June 2023 Order, I&B lodged an updated proof of debt dated 29 September 2023 in the sum of £33,076,153.27 (updated I&B Proof of Debt), and GTC lodged an updated proof of debt dated 29 September 2023 in the sum of £2,122,132.63 (updated GTC Proof of Debt).***
>
> ***….***

AND WHEREAS I&B have agreed in principle (and subject to contract) to accept a sum to be paid out of the relevant Blocked Account in full and final settlement of the amounts claimed in the Updated I&B Proof of Debt (the I&B Settlement Sum);

AND WHEREAS GTC has agreed in principle to accept a sum of £1.2m to be paid out of the relevant Blocked Account, in full and final settlement of the amounts claimed in the Updated GTC Proof of Debt (the GTC Settlement Sum) (and for the avoidance of doubt without prejudice to any sums due and claimed against the current trustee of the TS Settlement by GTC as former trustee of the TS Settlement); [We shall refer to this as "the 6th Recital"]

….

AND WHEREAS GTC undertakes to the Court and to the other parties that it will not pursue any of the parties hereto for costs or any other claim relating to, arising from or otherwise connected to the facts and matters alleged in these proceedings (including the Proofs Proceedings), the Guernsey 2 Proceedings, the Delivery-Up Proceedings, the Guernsey 3 Proceedings and/or the TDT Documents Proceedings, or any other proceedings involving the TDT; [We shall refer to this as "the 9th Recital"]

…..

BY CONSENT IT IS ORDERED THAT:

1. ***The Updated GTC Proof of Debt shall be dismissed upon the payment of the GTC Settlement Sum the said payment to be made by the Joint Receivers within 5 days of this Order.***

2. ***Upon the dismissal of the Updated GTC Proof of Debt:***

    a. ***GTC shall be discharged from the Proofs Proceedings and the action herein be discontinued against GTC…***

    b. ***Save as provided for in this Order, GTC shall have no further claim to any of the assets of the TDT whether held by the Joint Receivers or otherwise.***

…."

238. As can be seen therefore, against its claim of £2,122,132 GTC accepted the sum of £1.2m out of the assets of the TDT.

239. The Defendant submits that the effect of the Consent Order is that GTC agreed to accept £1.2m in full and final settlement of its claim to fees and legal costs in connection with the Guernsey Proceedings and accordingly has no claim under the Indemnity for any further sum.

240. The Defendant submitted that the issue before the court was essentially a matter of the correct construction of the Consent Order. In this respect, there was no real difference between the parties as to the applicable principles.

241. In Marett v Marett [2008] JLR 384, Pleming JA, with the concurrence of Sumption and Nutting JJA, said as follows at [37]:

> ***"A consent order, although not necessarily a contract, is to be interpreted like a contract… When parties agree the provisions of a consent order, and the court subsequently gives effect to such an agreement by approving the provisions and embodying them (as here) in an order of the court, the legal effect of those provisions is derived from the court order itself and does not depend any longer on the agreement between the parties…."***

242. To like effect is the observation of Briggs J in Newall v Lewis [2008] EWHC 910 (Ch) at [25]:

> ***"The resolution of any issue as to the true construction of a consent order is to be conducted by reference to the ordinary principles governing the construction of contracts, subject only to the additional consideration that, because the consent order purports to be an exercise of the court's jurisdiction, any construction which appears to exceed that jurisdiction is prima facie to be avoided…."***

See also Botleigh Grange Hotel Limited v Her Majesty's Revenue and Customs [2018] EWCA Civ 1032 per Asplin LJ at [19].

243. There have been a number of recent cases on the interpretation of contracts but we content ourselves with citing the following. In Trico Limited v Buckingham [2020] JCA 067, the Court of

Appeal at [57] adopted as being equally applicable in Jersey the authoritative statement of the correct approach by the UK Supreme Court in Wood v Capita Insurance Services Limited [2017] AC 1173 where Lord Hodge said at [10]-[13]:

> ***"10. The Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds… Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations…***
>
> ***11. ….Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; …. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.***
>
> ***12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.***
>
> ***13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have***

chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…."

244. We are of course concerned with an order of the Royal Court of Guernsey but it was not suggested by either party that the approach to the construction of documents under Guernsey law differs in any respect from that under Jersey law or English law; see for example In the Matter of the ESMS Employee Benefit Trust [2023] GRC 075.

245. On behalf of the Defendant, Advocate James referred in particular to the 6th and 9th Recitals of the Consent Order. He submitted that it emerged clearly from these two provisions that GTC accepted the sum of £1.2m in full and final settlement of its claim to fees and costs of some £2.12m. Having done so, it could not now look to the Defendant under the Indemnity for the difference between the sum which it had accepted and its original claim. The Defendant was a party to the Consent Order. The 6th Recital made it clear that the sum of £1.2m was accepted in full and final settlement and the 9th Recital emphasised that point by GTC undertaking not to pursue any of the other parties (which included the Defendant) for costs or any other claim relating to, arising from or otherwise connected to the facts and matters alleged in, inter alia, the Proofs Proceedings. Furthermore, clause 2.5 of the Indemnity was relevant. This entitled the Defendant to be subrogated to the rights of GTC in relation to any liability discharged under the Indemnity. By entering into a settlement with the TDT, GTC had deprived the Defendant of his right of subrogation because the Consent Order provides for settlement once and for all in full and final settlement against the TDT assets. The Defendant would therefore have no right to pursue the TDT and its assets following the Consent Order. Thus GTC would effectively have done the opposite of what clause 2.5 required it to do, because that clause required GTC to take all steps to enable the Defendant to recover in respect of any amount which he paid. Clause 2.5 thus

supported the Defendant's case that the Consent Order was in full and final settlement and left no liabilities which could be recovered by GTC from the Defendant under the Indemnity.

246. We have carefully considered Advocate James' submissions, both oral and as set out in his opening and closing written submissions. However, in our judgment, the Consent Order does not prevent GTC from pursuing its claim under the Indemnity. We would summarise our reasons as follows:

(i) Given that the Consent Order was made by the Guernsey Royal Court in the Proofs Proceedings, we begin with the nature of those proceedings as an important part of the factual matrix. They involved a contest between various creditors as to how the assets of the TDT should be distributed as between those creditors. It was, as stated above, a form of quasi-insolvency process. It does not involve a claim by GTC against the Defendant or any of the other parties; they were simply competing creditors claiming against the (insufficient) assets of the TDT.

(ii) Turning to the wording of the Consent Order, we begin with the operative part of the Consent Order. In our judgment this does not assist Advocate James. It merely states, in effect, that GTC's claim in the Proofs Proceedings is dismissed and that GTC can bring no further claim against the TDT assets. There can be no real ambiguity about what it says. The order is indeed what one would expect in proceedings concerned with the allocation between creditors of the assets of TDT when GTC has agreed to accept a particular sum in full and final settlement of its claim against those assets. The operative part of the Consent Order says nothing about and cannot be construed as suggesting that GTC is prevented from continuing quite separate existing proceedings against the Defendant personally. Its effect is on its face confined to dismissing GTC's claim against the TDT assets and ensuring that it has no further claim to any such assets.

(iii) Advocate James placed reliance on the 6th Recital, with its reference to GTC accepting the sum of £1.2m "in full and final settlement of the amounts claimed in the Updated GTC Proof of Debt". Again, this has to be read in the context of this being an order made in order to settle the Proofs Proceedings. GTC's claim in those proceedings was to be paid the sum stated in the Updated GTC Proof of Debt (£2.1m) <u>out of the assets of the TDT</u>; this was what the proceedings were about. GTC was therefore accepting the sum of £1.2m in full and final settlement of that claim i.e. its claim to be paid out of the assets of the TDT. GTC was bringing no claim against the Defendant in the Proofs Proceedings and therefore settling its claim in those proceedings cannot reasonably be construed as settling a claim

against the Defendant which was not before the Guernsey court and did not relate to any claim against the TDT assets.

(iv) Similarly, we do not think that Advocate James' point concerning clause 2.5 of the Indemnity has any force. The existence of a particular clause in a quite separate agreement cannot realistically assist in construing an order of the Guernsey court relating to the settlement of proceedings before that court which have nothing to do with the separate agreement. The fact that the effect of the Consent Order, if construed as submitted by GTC, would be to render the right of subrogation conferred by clause 2.5 of the Indemnity of no practical use cannot be a convincing reason for construing the Consent Order other than in accordance with the language used and the factual matrix.

(v) In our judgment, Advocate James' strongest argument relates to the 9th Recital. On its face, this is widely drawn. But in our judgment, it must again be construed in the context of being part of an order of the court made to settle by agreement GTC's claim against the TDT assets. In our judgment, properly construed it does not extend to preventing GTC from seeking to enforce the Indemnity. We would summarise our reasons on this aspect as follows:

(a) As already stated, the 9th Recital is contained in a Guernsey court order settling specific Guernsey proceedings. The proceedings related solely to claims (including by GTC) to be paid out of the TDT assets. It would on the face of it be surprising if claims against other persons not related to the TDT assets were to be precluded by a Recital to such an order when the operative terms of the order do not so provide.

(b) The present proceedings arise in a different jurisdiction and were in existence well before the Consent Order. Again, it would be surprising if, merely by way of a Recital in Guernsey proceedings, the parties intended in effect to settle these very different proceedings in this jurisdiction where the claim is brought against the Defendant under a document which was not relevant to the Guernsey Proceedings.

(c) While the Indemnity is a primary obligation (unlike a guarantee) and not therefore dependent for its enforceability on GTC not being able to recover its fees and costs from the TDT assets, the commercial purpose of the Indemnity, as is apparent from its face and as we have found, was to protect GTC against legal costs incurred or awarded against it in the Guernsey Proceedings. This protection was thought to be necessary because it was anticipated that the TDT assets would be insufficient to pay all the liabilities. In those circumstances, GTC would be unable to recover all its legal

costs from the TDT and the important effect of the Indemnity would be that in those circumstances GTC could look to the Defendant for payment of its costs. GTC would not therefore be out of pocket.

(d) Given the commercial purpose of the Indemnity, it would be completely contrary to that purpose for acceptance of a lesser sum in the Proofs Proceedings because of an insufficiency of trust assets (thereby leaving a shortfall) to have the effect of preventing reliance on the Indemnity in the very circumstances in which it was intended to have effect. In our judgment, clear wording would be expected in order for the Consent Order to have this effect and the 9th Recital does not contain such clear wording.

(e) In our judgment, read in context, the 9th Recital is intended only to prevent claims against other parties which relate to or arise from or are otherwise connected to the claims against the TDT assets. That does not cover the Indemnity which is a personal claim against the Defendant unrelated to the TDT assets.

(f) If the Proofs Proceedings had proceeded to trial and the Guernsey court had held that GTC's claim against the TDT assets succeeded only to the extent of £1.2m rather than £2.1m (because of the application of the *pari passu* principle and the limited assets available), it is hard to conceive that this could possibly have prevented GTC from claiming for the shortfall under the Indemnity. We do not see that the mere fact that GTC accepted the £1.2m by agreement rather than pursuant to a court decision and in the course of that agreement said that it was accepting that sum in full and final settlement of the amounts in its claim in the Proofs Proceedings can be said to have the dramatic effect, as contended by the Defendant, of preventing GTC from claiming for the shortfall in respect of legal costs against the Defendant pursuant to the Indemnity.

247. We have reached our conclusion without consideration of the contents of the thirty-fifth affidavit of Ms Martin sworn on 18 February 2025. That affidavit exhibited various communications (including without prejudice communications) exchanged between the Defendant and his lawyers (including Ms Martin) and GTC and its lawyers during the period between September 2023 and July 2024 regarding possible settlement. We were informed by Advocate James that the affidavit was sworn in order to provide the factual matrix relevant to the Consent Order. However, for the most part the affidavit does not do this; on the contrary it contains details of negotiations between the parties.

248. As is clear from the authorities cited above, evidence of the negotiations between parties to a contract is inadmissible as an aid to construction of a contract (or consent order). However, it may be admissible in order to determine whether a contract has been agreed at all; see Rush and Tompkins v Greater London Council [1989] AC 1280 at 1300. It might be argued therefore that the material is admissible in order to ascertain whether the parties reached an overall agreement which included settling the present proceedings as contended by the Defendant.

249. We are by no means certain that the exception applies but, the evidence having been adduced without objection from GTC, we have looked at it in order to see if there is anything in it which shows that our construction of the Consent Order is erroneous and that the parties had, as the Defendant contends, reached an overall settlement whereby, in exchange for payment of £1.2m, GTC would forgo its claim under the Indemnity as well as in the Proofs Proceedings.

250. Our reading of the relevant emails is that, although at one stage an overall settlement was discussed, no agreement was reached and the figure of £1.2m was agreed in order to settle only the Proofs Proceedings. We have read all those exhibited to Ms Martin's affidavit and the following seem to be the most relevant:

(i) On 24 December 2023, the Defendant appears to have opened negotiations by emailing Mr Hodges to offer £900,000 to settle the Proofs Proceedings (referred to as the TDT claim) and what he referred to as the TS claim. Thus he said *"I envisage that the TDT and TS claims would be settled, and your indemnity claim in Jersey and the TFT matters in the BVI would remain on foot"* and later *"You will still be able to run your indemnity claim against me personally and if you succeed, I will owe you the balance of your taxed claim"*.

(ii) Mr Hodges responded on 3 January 2024 proposing a settlement whereby *"all matters in Guernsey and Jersey are brought to with no further claims"* in exchange for payment of £1.8m plus CHF 443,000.

(iii) Discussions appear to have continued in relation to a global settlement. Thus on 7 January, Mr Hodges said that GTC would accept £1.2m for TDT, £300,000 for TS and CHF 443,000 and £65,000 for certain Jersey costs litigation. The Defendant replied on 9 January agreeing £1.2m from TDT funds and £300,000 for the TS claim from TDT funds subject to certain conditions and other matters.

(iv) On 11 January, Mr Hodges proposed a global settlement figure of £2m to *"result in the end of all Guernsey and Jersey litigation and any other TS or TDT related litigation".* The Defendant responded the same day with a counter offer of £1.85m.

(v) By email dated 25 January 2024, the Defendant summarised the Jersey and Guernsey proceedings which were on foot and agreed that consent orders would be required in relation to each of them including the Indemnity proceedings.

(vi) By 1 February 2024, an amount of £1.95m appears to have been agreed in principle in relation to a global settlement. In an email from Alasdair Davidson of Bedell Cristin (acting for GTC) to Ms Martin, Mr Davidson stated *"The agreed figure to be paid to GTC will be £1.95m"*. In a response dated 30 January in which she added comments to that email, Ms Martin said *"The £1.95m represents three settlement sums, being matters relating to (i) proceedings in Jersey (ii) the TS and (iii) GT's claim into the TDT in the Proofs Proceedings"*. She said that the amount was agreed subject to certain conditions.

(vii) It appears that that proposed settlement did not proceed and on 8 February 2024, the Defendant sent an email to Mr Hodges expanding upon the contents of an earlier telephone call. The offer appears to have been for approximately £1.45m (£1.125m plus CHF 364,000). In the course of the email the Defendant said expressly *"Your indemnity claim would continue. We do not need a resolution on this now".* Thus the sum did not include settling the present Indemnity proceedings.

(viii) On 13 February, Ms Martin sent a further email to Mr Davidson in which, in relation to Jersey matters, she said as follows:

> ***"The indemnity proceedings – these proceedings were issued by GTC against Robert and stayed until GTC applied to have the stay lifted last year. As Robert has previously made clear to Rodney on several occasions, he does not require these proceedings to be withdrawn and is content for them to remain on foot however if GTC wish to include settlement of these proceedings then he is agreeable. These proceedings can be dismissed by a consent order with no order as to costs. The consent order should also discharge a previous order for security for costs which would then be returned to GTC/Dickinson Gleeson."***

The email went on to say that an overall settlement could still be reached at either £1.95m or £1.825m if I&B were also part of the settlement but failing that there could from the Defendant's

point of view still be a settlement achieved which, so far as Guernsey was concerned, would involve obtaining a release of £600,000 towards a £1.2m in settlement of all GTC's claims in the Proof Proceedings, with an additional £600,000 being released with the unblocking of TS funds, the release of funds of £375,000 in Jersey subject to certain conditions and certain payments in respect of the TS claims.

(ix) Negotiations on an overall settlement appear to have broken down with GTC refusing to accept anything less than £1.95m and there is no further reference to an overall settlement. Instead on 14 March, Babbé (acting for the Defendant) wrote to Bedell Cristin requesting, inter alia*, "Your client confirms that the £1.2m and the requested indemnity constitutes full settlement of its claims into the TDT and as such it has no further interest in the sums held in the blocked accounts and will take no steps to prevent any payments made or intended to be made from the blocked accounts"* and *"Your client is removed as a party to the 1462/2010 proceedings with no right of further participation".* 1462/2010 is the case file number of the Proofs Proceedings.

(x) A response was received the same day from Bedell Cristin on behalf of GTC confirming *"[GTC] will accept payment forthwith of £1.2 million from your client together with the requested indemnity in full and final settlement of all its direct claims made in the civil action 1462/2010 against the TDT".* It is not entirely clear what indemnity was being referred to there but it was clearly an additional indemnity of some description. The wording of these two emails is clearly restricting the £1.2m to a settlement of the Proofs Proceedings.

(xi) Thereafter discussions appear to have centred upon the terms of the Consent Order with various drafts being exchanged. Wording broadly equivalent to the 9th Recital appears to have been in the draft from the beginning and indeed the original wording appears to have been suggested by Bedell Cristin. However, there is nothing in the correspondence to which we have been referred or which we have identified which suggests that settlement of the present proceedings was part of the agreement whereby GTC accepted £1.2m in respect of its claim in the Proofs Proceedings.

251. In summary, we have identified nothing in the correspondence which suggests that the Defendant and GTC had reached an agreement whereby GTC agreed to release any liability of the Defendant under the Indemnity in exchange for the receipt of £1.2m from the TDT. On the contrary, the exchanges referred to above suggest that the present proceedings were not to be included. Accordingly, there is nothing in the material which has been produced to us which casts doubt on the interpretation of the Consent Order which we have reached without reference to such material.

Issue 6: Quantum

252. As already stated, GTC's claim in the Proofs Proceedings was for £2,122,132 of which £854,055 was in respect of GTC's own fees and £1,268,073 related to legal costs. On receipt of the £1.2m pursuant to the Consent Order, GTC appropriated the sum of £854,055 to pay its fees claim in full. It then applied the balance towards its claim for legal fees. This left a claimed balance (after adjustments as set out at para 112 above) in respect of legal costs (and therefore claimed against the Defendant under the Indemnity) of £1,258,358. Following the Review, carried out very shortly before the hearing, GTC then reduced this claim to £744,774.

253. Against this background, it seems to us that the following issues of principle arise for consideration in relation to quantum:

    (a) Was GTC entitled to appropriate a sum out of the £1.2m so as first to pay its fees, with only the balance being applied towards its claim for legal costs?

    (b) If so, is the Defendant entitled to question the level of fees claimed?

    (c) As to legal costs, can the Defendant challenge the quantum of the legal costs claimed?

Appropriation

254. The principles of appropriation between different debts owed to the same creditor are well-established and were stated as long ago as the 19th century by the House of Lords in The Mecca [1887] AC 286 where, at 298 Lord MacNaghten said as follows:

> ***"Now, my Lords, there can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor."***

255. The Consent Order said nothing about the manner in which the sum of £1.2m should be appropriated as between GTC's fees and its legal costs and accordingly GTC was free to appropriate the sum in such manner as it chose. It was suggested in Ms Martin's thirty-fourth affidavit at para 159 that, following the decision of the Privy Council that claims by creditors

against a trust are treated *pari passu*, any amounts recovered by an individual creditor must be treated *pari passu* between the different debts claimed by that creditor. The decision of the Privy Council was not concerned with how a creditor applies sums recovered as between that creditor's different claims and we do not think that the decision alters the long established principles of appropriation as set out in the preceding paragraph.

256. It follows that, in principle, GTC was entitled to apply the sum of £1.2m first in respect of its fees.

(b) Can the level of fees be challenged?

257. The general principle is that it is always open to a beneficiary to challenge the fees of a trustee and, if satisfied that there are proper grounds for doing so, the court will order such process as it thinks appropriate to assess the reasonableness of the fees. Such process will assess both whether the fees were reasonably incurred and whether they were reasonable in amount having regard, of course, to any agreed fee structure.

258. GTC referred, in its closing submissions, to the English case of Kea Investments Limited v Watson (Fladgate LLP Intervening) [2023] EWHC 1830 (Ch). An issue in that case was how amounts obtained by a claimant from a third party by settlement should be allocated against the claims against the relevant party. Having considered the decision of the English Court of Appeal in FM Capital Partners Limited v Marino [2021] QB 1, Miles J said at [36]-[37]:

> ***"36. The claimant's discretion as to allocation is however limited by a merits test which varies in its application according to the circumstances. Where the judge charged with fixing the amount of B's liability has provided over a trial, on the basis of which he or she can readily form a view of the merits of each of the claimant's claims against A, the judge can properly rely upon that view when determining to which of those claims the claimant may allocate his recoveries.***
>
> ***37. However, in other situations, where the judge charged with fixing the amount of B's liability is not in a position to form a view of the merits of each of the claimant's claims against A, it cannot be right for that judge to be expected to hear full argument on the merits of a defunct claim against A, who will not be before the court, merely in order to determine how the claimant's recoveries from A may be allocated, so as to determine the credit due to B. In such circumstances, therefore, the applicable merits test is that the claim against A is not obviously unsustainable. The claimant can be required to do no more than "to place before the court evidence which would have enabled***

the judge to form a general view as to its validity and quantum" and "upon which the judge could conclude that the….claim was a valid and viable claim"…"

259. Advocate Gleeson submitted that, as GTC's own fees were not being directly claimed in the present proceedings, it would, as suggested in Kea and Marino, be disproportionate to carry out a full taxation exercise simply to assess the correct figure which could then be appropriated to GTC's fees under the Consent Order. He further submitted that such an approach would undermine one of the key benefits of settling the claim for such fees, namely avoiding the time and expense of a full assessment. We are not convinced by the latter point as, given the lack of assets in the TDT as compared with the size of the claims, there was always going to be only a partial recovery of GTC's claim which related both to fees and legal expenses.

260. Advocate Gleeson further submitted that the claim for GTC's fees was not *'obviously unsustainable'* and the court should take a broad brush approach. He produced a schedule as part of his written closing submissions. He said that a substantial proportion of GTC's fees had already been the subject of assessment procedures by the Assistant Judicial Greffier in Jersey. There had apparently been a first assessment procedure and a second assessment procedure with other amounts not yet assessed. The fees had been expressed in Swiss Francs and totalled CHF 950,481 (equivalent to £854,055). Of these, only some CHF 240,442 had not yet been assessed. In respect of those which had been assessed, the average reduction pursuant to the assessment was 8.87% although some of the sums which had been subject to assessment had apparently been sent to Guernsey, presumably for further assessment although this was not clear. Be that as it may, he said that a broad brush approach would be to take an 8.87% reduction of the total fees figure of £854,055.

261. We do not accept that this would be a fair or appropriate way of proceeding for the following reasons:

    (i) Whilst in many cases, the approach in Kea and Marino may be appropriate, they were not trust cases. We think that considerable caution should be exercised before taking an approach which would, in effect, deprive a beneficiary of his ability to challenge the reasonableness of a trustee's fees.

    (ii) This is particularly so in the present case. As set out below in relation to legal costs, there is considerable reason to doubt the accuracy of the legal costs claimed by GTC and we see no reason why their calculations in relation to their fees should necessarily be any more reliable.

(iii) Advocate Gleeson produced his schedule for the first time in GTC's written closing submissions (which were filed contemporaneously with those of the Defendant) and it was not addressed during closing submissions, which were time limited. Accordingly we do not think that it would be right to proceed on the basis suggested by Advocate Gleeson without the Defendant having a full opportunity of challenging the schedule and the basis suggested by Advocate Gleeson.

(iv) An additional reason for not relying on the schedule at this stage is that we are not entirely clear as to the status of some of the Assistant Judicial Greffier's decisions and their relationship with any assessment procedures in Guernsey. Furthermore, we understand that the Defendant is appealing against the Assistant Judicial Greffier's decisions with the result that the percentage of the fees disallowed may change.

(v) The issue of GTC's fees has an important effect on the claim under the Indemnity. If the amount which can properly be claimed by GTC as fees is less than £854,055, this means that a greater proportion of the balance of £1.2m is to be appropriated to the claim for legal fees, with the result that the claim under the Indemnity will be less.

262. The court made clear at the outset of the hearing that it did not consider it was in a position to adjudicate on the detailed figures in GTC's claim at the present hearing and the hearing proceeded on that basis. Accordingly, we hold that there should be some form of assessment of the figure for GTC's fees which may properly be appropriated out of the £1.2m. We will hear the parties on what process should be adopted in order to achieve such an assessment. We should of course add that, to the extent that any final decision has been made by the Assistant Judicial Greffier and/or on any appeal concerning the reasonableness of GTC's fees, that decision may not be reopened by the Defendant. Fees approved in any such decision may properly be appropriated out of the £1.2m.

(c) Can a defendant challenge the quantity of legal costs claimed?

263. GTC accepts (para 126 of its closing submissions) that it is implicit in the Indemnity that there must be some limit to what can be claimed under the Indemnity in respect of legal costs. However it notes that there is no express limitation to costs that are reasonably incurred and clause 3 of the Indemnity is in the following terms:

> *"3. Operation*

3.1 Payment under this indemnity shall operate in the following way:-

3.1.1 on receipt by R&H of any documents requiring it to make payment in relation to matters which are on a prima facie basis covered by this indemnity (such as but not limited to solicitors' bills, orders or judgments), R&H shall submit copies of the same to RT; and

3.1.2 on receipt of such documents, RT will pay the amounts required to be paid by those documents in accordance with their terms for payment (or if there are no terms for payment, within seven days) provided that RT is reasonably satisfied on a prima facie basis that such amounts are covered by this indemnity."

GTC submits that it was therefore not envisaged that the claim in respect of legal costs should be subject to minute scrutiny as would be undertaken upon an assessment of trustee or litigation costs. Only a *prima facie* review standard was contemplated.

264. GTC submits that this is not surprising because at the time of the Indemnity, the parties' interests were closely aligned and in effect GTC was conducting litigation at the instigation/prompting of the Defendant. Nevertheless it was accepted that there were some implied limits and that GTC would not be able to recover costs which were wholly extravagant, excessive or egregious so that wholly and excessively unreasonable costs should be excluded.

265. We cannot accept this submission. In our judgment it is implicit that only costs reasonably incurred and reasonable in amount may be recovered pursuant to the Indemnity. We reach that conclusion for the following reasons:

(i) The Indemnity relates solely to legal costs incurred in relation to the Guernsey Proceedings. In all of those proceedings, GTC was participating as trustee of the TDT, not in any personal capacity.

(ii) The TDT is a trust governed by Jersey law and Article 26 of the Trusts (Jersey) Law 1984 is clear in providing that a trustee may only recover out of the trust fund expenses and liabilities *"reasonably necessary in connection with the trust".*

(iii) It would be surprising if an indemnity in respect of legal costs to be incurred by a trustee were intended to cover legal costs which were unreasonably incurred. In our judgment it

would require very clear wording to show that this was the intention rather than that the indemnity should only cover costs reasonably incurred.

(iv) We do not think that the reference to clause 3 of the Indemnity or the fact that the interests of the Defendant and GTC at the time were closely aligned leads to a different conclusion.

(v) There is no good reason to interpret the Indemnity in the manner suggested by Advocate Gleeson (which would in any event be difficult to apply within any certainty) rather than in accordance with the normal legal position in relation to expenses (including legal expenses) incurred by a trustee.

266. In our judgment it is undoubtedly necessary for there to be an assessment of legal costs claimed by GTC as there are considerable doubts as to whether some of the costs claimed by GTC are recoverable under the Indemnity. That is for the following reasons:

(i) It is to be recalled that the amount claimed in respect of legal costs in the Second Demand Letter dated 24 January 2025 was £1,258,358 after allowance for the sums recovered in Guernsey pursuant to the Consent Order. The legal costs claimed were of course also the basis for the sums claimed in the Proofs Proceedings as being properly payable out of the assets of the TDT and that claim had been lodged as long ago as September 2023. One is entitled to assume that GTC would have exercised appropriate care to ensure that the legal costs claimed in the Proofs Proceedings were properly payable out of the TDT assets.

(ii) Despite this, in his fourteenth affidavit sworn on 19 February 2025 for the purposes of these proceedings, Mr Hodges said that the Review had been carried out as part of the process of preparing that affidavit and this had resulted in the claim for legal costs under the Indemnity being reduced from £1,258,358 to £744,774, i.e. a reduction of £513,584 which equated to a reduction of approximately 40%.

(iii) Not surprisingly, Mr Hodges was cross-examined about this substantial reduction. Suffice it to say that his responses did not inspire confidence as to the rigour which had been applied by GTC either to the original figure or to the revised figure.

(iv) For example, it was put to Mr Hodges by Advocate James that even the revised figure contained in the Review included some entries which, on their face, were not properly payable by the TDT. Thus, in what has been referred to as the Chablis matter, Lieutenant Bailiff Marshall in the Royal Court of Guernsey found that GTC had wrongly removed £1m

which was intended to be preserved by way of security and paid this sum to itself. She was very critical of GTC's conduct, describing it as "*tactical and devious".* GTC was ordered to repay the £1m and was also ordered to pay indemnity costs. The Lieutenant Bailiff specifically stated that these costs were to be paid by GTC personally and could not be charged to the TDT, as the criticised actions had been taken on GTC's personal account. Despite this, the sums claimed following the Review are said by Advocate James to include legal costs stated as being incurred by GTC in relation to the Chablis issue.

(v) For these reasons, there are, in our judgment, real grounds for believing that GTC is not entitled to be paid all the legal costs claimed against the Defendant under the Indemnity. In those circumstances, it would be very unfair to prevent the Defendant from challenging the figures contained in the claim.

(vi) After a lengthy and not easy to understand explanation about the background to the Chablis matter, Mr Hodges nevertheless accepted (day 2/163) that such legal costs could not be claimed on the Indemnity. After further cross-examination he stated that the Review had been carried out on a broad brush approach and not item by item. He accepted that, under an item by item approach, there would be issues which would fall by the wayside. In other words, he acknowledged that a detailed assessment of the legal costs being claimed even after the Review might well identify costs which are not covered by the Indemnity.

267. As in connection with GTC's fees, we order that there be a process for assessment of the legal costs claimed by GTC under the Indemnity, but we reserve for a further hearing a decision as to exactly what form of process should be ordered.

268. On any such assessment, the assessor will be deciding whether the legal costs claimed were reasonably incurred and were reasonable in amount. In reaching that decision, the assessor may take into account the point made by Advocate Gleeson, namely that at the relevant time the interests of GTC as trustee of the TDT and the Defendant were closely aligned. Thus, if expenditure was undertaken at the request of or at an expense level requested by the Defendant, that could be taken into account in assessing whether, in the context of enforcement of the Indemnity, such costs were reasonably incurred or reasonable in amount.

269. We would also comment briefly on Advocate Gleeson's submission that the Indemnity, at clause 2.1, includes GTC *"in its personal capacity"* as well as *"in its capacity as trustee of the TDT".* This provision was clearly intended to cover matters such as adverse costs orders where, under the Chadwick judgment, GTC was personally liable for the costs of adverse parties in litigation even though it had been participating in the litigation only as trustee of the TDT. It certainly does not

extend to matters where GTC was acting on its own account, for example, as found by Lieutenant Bailiff Marshall, in the Chablis matter.

Summary of conclusions

270. We would summarise the decisions which we have reached as follows:

(i) The Indemnity was signed by SG on the actual authority of the Defendant.

(ii) The Defendant is estopped by Representation from denying that the Indemnity took effect as a deed.

(iii) Even if the Indemnity did not take effect as a deed, it took effect as a contract because GTC gave good consideration for the provision of the Indemnity.

(iv) Accordingly, subject to the decision at (vi), the Indemnity is valid and enforceable against the Defendant.

(v) If, contrary to the finding above, SG signed the Indemnity without the authority of the Defendant, he is nevertheless estopped from denying its validity as follows:

(a) He is estopped by representation from denying that it took effect as a deed, alternatively as a contract.

(b) He is also estopped by his silence from denying that it took effect as a deed, alternatively as a contract.

(vi) The settlement reflected in the Consent Order did not include GTC's claim under the Indemnity and does not prevent the current claim.

(vii) GTC was entitled to appropriate the sum of £1.2m first towards payment of its fees.

(viii) However, the sum deducted by GTC in respect of its fees from the sum received under the Consent Order is to be subject to an assessment of those fees as to whether they were

reasonably incurred and reasonable in amount. GTC is only entitled to appropriate such sum as is determined upon any such assessment.

(ix) The sum claimed as legal costs under the Indemnity is to be subject to assessment as to whether they were reasonably incurred and reasonable in amount. The Defendant is only liable under the Indemnity to pay GTC's legal costs as determined following such assessment.

(x) The court will hear the parties as to the form of the assessment to be ordered under (viii) and (ix) above if this cannot be agreed between the parties.

(xi) The court is willing to sit to determine any consequential issues raised by this judgment.

Authorities

Trusts (Jersey) Law 1984.

Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3650 (Comm).

Law of Property (Miscellaneous Provisions) Act 1989.

Chitty on Contracts (35th edition).

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256.

Brikon Investments Limited v Carr [1979] QB 467.

Shadwell v Shadwell (1860) 9 C.B.N.S. 159.

Shah v Shah [2002] QB 35.

Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd [1988] 1 WLR 16.

Kelly v Fraser [2013] 1 AC 450.

East Asia Company Limited v PT Satria Tirtatama Energindo [2019] UKPC 30.

Briggs v Gleeds [2015] Ch 212.

Bank of Scotland Plc v Waugh [2014] EWHC 2117 (Ch).

Marett v Marett [2008] JLR 384.

Newall v Lewis [2008] EWHC 910 (Ch).

Botleigh Grange Hotel Limited v Her Majesty's Revenue and Customs [2018] EWCA Civ 1032.

Trico Limited v Buckingham [2020] JCA 067.

Wood v Capita Insurance Services Limited [2017] AC 1173.

Matter of the ESMS Employee Benefit Trust [2023] GRC 075.

Rush and Tompkins v Greater London Council [1989] AC 1280.

The Mecca [1887] AC 286.

Kea Investments Limited v Watson (Fladgate LLP Intervening) [2023] EWHC 1830 (Ch).

FM Capital Partners Limited v Marino [2021] QB 1.