Parujan v Atlantic Western Trustees

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	07 March 2003
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[2003] JRC 45

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff, **and** Jurats Le Brocq **and** Le Breton.

Between
Yashvina Parujan
First Plaintiff
and
Atlantic Western Trustees Limited
First Defendant

Advocate M. H. D. Taylor **for the Plaintiff;**

Advocate D. F. Le Quesne **for the Defendant**.

Authorities

In re Malabry Investments Limited (1982) JJ 117.

Parujan v Atlantic Trustees (15th October, 2002) Jersey Unreported; [2002/195].

Lettersted v Broers (1884) 9 APP.CAS.371.

West v Lazards (1987–88) JLR 414.

Trusts (Jersey) Law 1984.

Application for directions under Article 47 of the Trusts (Jersey) Law, 1984 re: (i) right of a trustee to charge fees for the administration of the trust; (ii) should the trustee be ordered to repay to the trust amounts taken in order to meet legal fees incurred by it in connection with its disputes with the Settlor; (iii) whether the trustee overcharged the trusts; (iv) should the trustee be removed as trustee of the trust pursuant to Article 15 of the Trusts (Jersey) Law, 1984.

Bailiff

THE

Introduction.

1 On 21 January 1994 Yashvina Parujan ("Mrs Parujan") established a discretionary settlement known as the Maple Trust of which Atlantic Western Trustees Limited has and remains the trustee. Mrs Parujan was, and appears still to be, resident in Canada. In or about 1995, a second discretionary trust known as the Pan-Am Trust, in identical terms to the Maple Trust, is said by the trustee to have come into existence. The assets of the Maple Trust are the issued share capital of Acacia Properties Limited ("Acacia") and Lom Holdings Limited ("Lom"). According to the trustee, the Pan Am Trust hold the issued shares of a company incorporated in the British Virgin Islands called Shearson International Business Corporation ("Shearson"). By an undated letter of wishes, Mrs Parujan requested the trustee to consult with her brother, Harshad Kapadia ("HK") or Jayant Kapadia ("JK") at regular intervals and to consider their wishes in relation to the investment of funds, addition of beneficiaries and distributions to beneficiaries. In practice the main channel of communication has been between the trustee and HK.

2 On 10 August 2000 Mrs Parujan brought this representation seeking relief as set out in the amended prayer as follows:-

"(1) The Court grant leave to the Settlor to bring this Representation under Article 47(3) of the Trusts (Jersey) Law, 1984 as amended.

(2) An Order that the Trustee be served with a copy of this Representation and of the Affidavit of the Settlor and that it be convened before this Court on a date to be arranged.

(3) Order that the Trustee be removed immediately as Trustee of the Maple Trust and if the Court sees fit as Trustee of the Pan American Trust in favour of the New Trustee.

(4) Order that the Trustee obtain the immediate resignation of the directors of Acacia, Lom and Shearson in favour of persons to be nominated by the Settlor.

(5) Adjudicate on the claim that the Trustee has overcharged the trusts and companies having heard oral evidence and reviewed the Report of Royan Ellis and make such order as the Court sees fit in respect of the charges of the Trustee from the creation of the Trust and incorporation of the companies, or in the case of the Trust and incorporation of the companies, or in the case of Shearson, the date of purchase, to the 28 February 2001.

(6) Order that the Trustee repay all sums it has taken from the Trust structure to pay the legal fees it has incurred in this action.

(7) Make such other directions, if any, as the Court sees fit.

(8) Order that the costs of and incidental to this Representation should be paid by the Trustee personally on a full indemnity basis."

Review by Mr Royan Ellis.

3 The representation was adjourned on a number of occasions while the parties endeavoured to settle their differences. On 25 April, 2001, the Court made the adjournment conditional upon the parties engaging in discussions with a view to seeking the appointment of a mediator or arbitrator. Their discussions were fruitful to the extent that there was agreement to appoint Mr Royan Ellis to review the fees charged by the trustees for managing and administering what was called "the Structures", although that term was not defined. There seems to have been general agreement, however, that "the Structures" were the Maple Trust and the Pan American Trust, and their underlying companies. Mr Ellis, whose evidence we shall examine below, is a Fellow of the Chartered Institute of Bankers in Scotland and a Fellow of the Institute of Chartered Secretaries & Administrators. He has enjoyed a distinguished career in banking and trust administration, both in Jersey and elsewhere. Between 1983 and 1987 he was managing director of Samuel Montagu and Company (Jersey) Limited, and a director of its parent company. Between 1987 and 1988 he was managing director of Midland Bank Trust Company (Jersey) Limited and between 1989 and 1995, managing director of Westpac Banking Corporation (Jersey) Limited. When that company was sold to Henry Ansbacher in 1995, he became Head of

Offshore Banking in Henry Ansbacher Holdings Limited, a post which he held until retirement in 1997. Since retirement he has held a consultancy and other senior positions with Chase Manhattan Bank and Standard Chartered Bank (CI) Limited. Neither party challenged his status as an expert witness, although Mr Le Quesne for the trustee sought to discredit his evidence on several grounds, one of which was that he had not complied with his terms of reference.

4 We accordingly set out below the agreed terms of reference, and the preamble to them:-

> *"Preamble:*
>
> *The Reviewer's task is to consider the fees raised by the Company for managing and administrating the Structures and should use his experience in trust matters to consider whether those fees were reasonable and therefore justifiably charged.*
>
> *The Reviewer may include in his consideration of whether work by the Company was justified matters such as the necessity for the work, whether work was requested of the Company, whether it was in the best interests of beneficiaries and whether it was economically beneficial, but that such matters are illustrative only and not compulsory or exhaustive and above all the Reviewer should approach the matter in the manner he considers appropriate, provided that all times he adheres to the terms of reference hereinafter provided:*
>
> ***TERMS OF REFERENCE***
>
> *Task*
>
> *The Reviewer shall:*
>
> > *(A) Ascertain, for each piece of work carried out by the Company, by having regard to all the circumstances of that work, whether the work carried out and the time spent completing that work was reasonable;*
> >
> > *(B) In carrying out (A) above, have particular regard, and to consider separately, the time spent*
> >
> > > *(i) on the general management and administration of the Structures prior to 31 December 1999;*
> > >
> > > *(ii) from 1 January 2000 to date, that management and administration which related solely and exclusively to dealing with the complaint against the Company in regard to its management of the Structures;*
> > >
> > > *(iii) on the general management and administration of the Structures from 1 January 2000 to date not including the time which falls to be considered under (B)(ii) above;*

(iv) on compiling and supplying accounting information relating to the Structures.

(C) Not investigate the rates applied by the Company for its work except to the extent that he shall consider whether the work carried out was done so efficiently and in deciding this shall consider, in relation to each piece of work carried out, whether that work and the member of staff of the Company carrying out that work, were appropriately matched in terms of complexity and experience respectively."

5 Mr Ellis was given wide powers to gain access to documents, files and records and to interview parties. A number of obligations were also placed upon him as set out below:-

"Obligations

The Reviewer shall:

(A) At all times act independently from the parties to the dispute.

(B) Carry out all interviews with the parties concerned in the dispute separately and privately.

(C) Not divulge any information which comes to his knowledge directly or indirectly through carrying out his duties or exercising his powers other than in his final report.

(D) File his final report to the legal representatives of each of the parties to the dispute simultaneously so that those parties may use the same when the matter comes to be resolved by the court.

(E) At all times when carrying out his work to have in mind that his task is that of a reviewer whose final report is to be used by the parties to the dispute as evidence in legal proceedings and to assist the court by presenting his findings in a clear and concise manner.

(F) Although aware of the dispute between the parties over the existence or status of the Pan American Trust, deem that Trust to be a valid legal entity for the sake of his report."

6 It is perhaps unfortunate that the parties did not agree that Mr Ellis' findings should be binding upon them. Be that as it may, Mr Ellis conducted his review and submitted his report to the parties on or about 27 April 2002. The findings of the report were rejected by the trustee, and the representation accordingly returned to Court.

7 The Court recalls that these proceedings are brought under Article 47 of the Trusts (Jersey) Law 1984. In the view of the Court, the Law gives a wide power to determine how the issues between the parties should be resolved. Pursuant to that power, the Bailiff issued a

number of case management directions, and also directed that Mr Ellis should be summoned to give evidence. Mr Le Quesne for the trustee maintained that Mr Ellis was to be regarded as no more than a witness for Mrs Parujan. We do not agree. Mr Ellis was directed by his terms of reference “at all times [to] act independently from the parties to the dispute”. In the judgment of the Court, Mr Ellis' evidence was given entirely objectively and without any noticeable bias towards either party. We found him to be a trustworthy and straightforward witness whose evidence was given in a careful and measured way. He was at pains to be fair to both sides. His evidence is not of course binding on the Court any more than it was binding upon the parties, but it is nonetheless independent expert evidence, and for that reason valuable.

The issues

8 The issues we have to determine are fourfold:-

(i) does the trustee have the right to charge fees for the administration of the Pan American Trust or, more succinctly, does the Pan American Trust exist?

(ii) should the trustee be ordered to repay to the Maple Trust amounts taken in order to meet legal fees incurred by it in connection with its disputes with Mrs Parujan?

(iii) has the trustee overcharged the trusts?

(iv) should the trustee be removed as trustee of the Maple Trust and (if it exists) of the Pan American Trust pursuant to article 15 of the Trusts (Jersey) Law, 1984? We will deal with each of them in turn.

The Pan American Trust

9 The Pan American Trust was purportedly created in 1994 to hold the issued share capital of Shearson, a company incorporated in the British Virgin Islands. The evidence of Anthony Keith Evered (“Mr Evered”), a director of the trustee, is that, on the instructions of HK, the trust deed was sent to HK for onward transmission to the prospective settlor. HK agrees that he gave instructions in 1995 to the trustee to prepare documentation for the establishment of the Pan American Trust. It was initially intended that the Pan American Trust would hold the shares of Shearson. HK attests that he told the trustee in early 1996 that he would not be proceeding with the trust. For that reason he did not return the partially executed trust document. HK on the other hand concedes that he did at some stage tell the trustee that he would be returning the documentation. What is not in doubt, however, is that the trust deed was never executed by the trustee and that no copy of the trust deed is in existence. Counsel for the trustee submits that the apparent execution of the deed by the settlor (Mrs Parujan) was sufficient to bring the trust into being. We disagree. A discretionary trust may come into existence in two ways. First, a trust deed may be signed by a settlor and counter-signed by a trustee acknowledging the receipt of property that is held upon the trusts set out in the deed. Secondly, a person may receive property and execute a declaration of trust

stating that he holds that property upon the trusts, set out in the deed.

10 It is well settled (see *in re Malabry Investments Limited* (1982) JJ 117) that the creation of a trust requires certainty as to the subject matter, the beneficiaries and the beneficial interests. The only certainty here (although arguably even that is open to question) is as to subject matter, in that it is said that the trustee of the Pan American Trust owns the issued share capital of Shearson. Shearson is, however, itself an empty shell. The absence of a trust deed, compounded by the absence of any other compelling evidence as to who are the beneficiaries and what are the beneficial interests, means that the other two requisite certainties are missing. We have no hesitation in declaring that the Pan American Trust does not exist. The trustee holds the issued share capital of Shearson on a bare trust for the beneficiaries of the Maple Trust.

11 It follows that there is no power in the trustee to charge fees for the administration of the Pan American Trust. Nonetheless, there is no doubt that some work was done by the trustee, at the instance of HK, in relation to the purported administration of the Pan American Trust. The accounts of the so-called Pan American Trust and of Shearson show loans from the Maple Trust, principally in order to pay the administration and accountancy fees of the trustee. We assume that these loans are not mere paper transactions and funds actually passed from the Maple Trust to the Pan American Trust and/or Shearson. The only activity of Shearson appears to have been the grant of a power of attorney to HK to enable him to negotiate or complete some transactions in Portugal. We say 'appears' because the only copy of the power of attorney which we have seen is neither dated nor signed. In any event HK asserts that it has not been used.

12 Mr Ellis comments on the Pan American Trust and Shearson Structures in his report at page 15 in these terms:-

> *"HK apparently advised the trustees that he wished to retain Shearson but not the Pan American Trust.* The Pan American Trust and Shearson were effectively dormant throughout, but Atlantic continued to pursue the return of the trust instrument and to enquire of HK if he had exercised his power under the power of attorney. The Royal Court will rule on the efficacy of the inter trust loans but if there had been no related trust with available funds, Atlantic, at an early date, would have been forced to take a view on whether to maintain or abandon the structure. In my opinion they should have done so in any event, for the fees applied bear no relation to the value of assets in the Pan American/Shearson structure.
>
> *Atlantic had the opportunity to transfer Pan American Trust and Shearson to another service provider against a sufficient discharge and indemnity – probably a difficult option given the absence of a trust instrument, or to distribute the assets, ie the shares of Shearson, to a beneficiary, say to HK as the holder of the power of attorney, again against a sufficient discharge or indemnity.* Atlantic elected not to pursue either option and considerable cost ensued."

13 Mr Ellis analyses the fees charged between 1996 and 2001, and reaches the conclusion that there has been overcharging over that period in relation to the Pan American Trust of £10,391. In relation to Shearson the figure in the report appears to us to be arithmetically incorrect in that the variation in 1998 is £1,317 and not £1,217. Furthermore the total fees charged amount to £29,445 and not £31,932. The correct variation according to our calculations should be £20,695. We accept the evidence of Mr Ellis and accordingly find that there has been overcharging in relation to the whole structure of £31,086 (£20,695 and £10,391). We allow a charge of £4,274 for the Pan American Trust and a charge of £8,750 in relation to Shearson on a quantum meruit basis, and (on the basis of the assumption referred to in paragraph 10 above) order the trustee to repay to the Maple Trust the sum of £31,086.

Repayment of legal fees charged to Maple Trust

14 In his judgment (15th October, 2002) Jersey Unreported; [2002/195] on an interlocutory appeal against case management directions issued by the Bailiff, Southwell, JA stated at paragraph 2:-

> ***"There are some rather surprising features of the case, including ….*** the use by the trustee of trust funds in order to pay the legal costs of resisting this personal claim against the trustee. I anticipate that the relevant monies paid to Viberts will now be restored to the trust" .

15 It was even more surprising to the Court to learn during the evidence of Mr Alfred Walter Medlock ("Mr Medlock"), who is also a director of the trustee, (1) that he was unaware until very recently of the impropriety of using the trust fund to pay his own legal fees in hostile litigation with the beneficiaries and (2) that the money had still not been repaid. Mr Medlock stated that his legal advisers were aware of the source of the funds used to pay their fees, and counsel for the trustee did not demur. It is a clear breach of trust for a trustee to use the trust fund to pay its own legal fees in circumstances where it is engaged in hostile litigation with the beneficiaries of the trust. Mr Medlock stated in evidence that the amount involved (which we understand to be sums of £49,630.04 and £1,500) would be repaid to the trust, together with interest. In the event that this has not already been done, we order the trustee to repay to the Maple Trust forthwith the amounts taken with interest at the Court rate from the dates on which the fees were paid.

Alleged over-charging by the trustee

16 Mr Ellis was cross-examined at some length by counsel for the trustee on his report. His evidence was that the administration of the Maple Trust and its underlying companies ought to have been very straightforward. Lom held a licensing agreement demanding annual fixed payments and a property, while Acacia held only property. Both Lom and Acacia occasionally held stock exchange securities. Mr Ellis stated that the accounting

records were adequate, but he criticised the financial statements as being unduly complicated. A modest annual fee of £5,000 would, on the face of it, have appeared reasonable. What went wrong, according to Mr Ellis, was that the trustee failed to adopt a sufficiently robust approach in dealing with HK. HK either was unaware or chose to ignore the proper relationship between a settler and/or beneficiary and the trustee. He failed to inform the trustee of payments made through the underlying companies, engaged in property transactions without the consent of the trustee, and generally treated the trust property as if it were his own. HK told Mr Ellis that, in his view, the role of the trustee was passive; it was a “rubber stamp”. The trustee acquiesced in this approach by making payments at the request of HK without knowing why the payments were being made. In the view of Mr Ellis, the trustee should have confronted HK at an early stage. Such a confrontation would have brought a discipline to the relationship and eliminated the need for the trustee constantly to be obliged to seek information retrospectively, thus spending much time and incurring great expense.

17 Mr Ellis told the Court that in his view the trustee lost control of the situation. It should not have allowed transactions to proceed without sufficient information being provided by HK. Mr Ellis conceded that HK was a difficult client. He failed to answer letters and to respond to queries. But if the trustee had not allowed transactions to proceed without knowing what was going on, it would not have lost control. Having lost control, in the view of Mr Ellis, the trustee was not entitled to charge for time spent in trying, in effect, to retrieve the situation. Mr Ellis said that his sympathies naturally lay with the trustee and that he had himself experienced difficult clients. It gave him no pleasure to reach conclusions that were adverse to the trustee. Nonetheless, in his opinion the trust had been badly handled and there had been significant overcharging.

18 Counsel for the trustee criticized Mr Ellis' evidence as being unreliable in a number of ways. First, he submitted that Mr Ellis had not complied with his terms of reference. He had not ascertained “for each piece of work” whether the work was actually carried out and the time spent on the work was reasonable. Counsel conceded that if Mr Ellis had interpreted his brief in that way, he would have been faced with a mammoth task which could not realistically have been performed. We are not impressed by this submission. We cannot believe that the trustee's legal advisers would have been party to the setting of a task which they knew could not be performed. Mr Ellis' general task was “to consider the fees raised by [the trustee] … and should use his experience in trust matters to consider whether those fees were reasonable and therefore justifiably charged”. The specific tasks set out in the terms of reference must be read in the light of the general task set out in the preamble. We doubt whether this objection to the evidence of Mr Ellis would have been raised had the conclusion been favourable rather than adverse to the trustee.

19 Secondly, counsel submitted that Mr Ellis had not looked at the matching of members of staff and the relevant piece of work. Put another way, the reviewer should have ascertained whether each piece of work over the six years of administration had been performed at the right level. Furthermore, he had not gone back to the daily diaries of each staff member to check whether the piece of work charged for could be reconciled with the diaries and

timesheets. Counsel again conceded, in effect, that this would have been a Herculean, if not a Sisyphean task, but nevertheless submitted that the terms of reference required this to be done. We do not agree. The reviewer was able to perform the general task given to him by a different means, that is by reading all the files and notes of interviews and conversations, by examining the financial statements and accounts, and gaining a general sense of how the trust was administered. We reject this submission which is again tantamount to suggesting that the report should be rejected because the reviewer did not perform an impossible task.

20 Thirdly, counsel submitted that Mr Ellis had been asked to consider the reasonableness of the charges for work done and not the judgment of the trustee leading up to that work. For example, Mr Ellis had reached the view that the trustee should not have accepted the Bugbrook transaction without knowing much more about it. This was a judgment upon the trustee rather than the trustee's charges and was not something permitted by the terms of reference. It was not open to the reviewer to look at the decisions leading up to the doing of the work, but only the reasonableness of the charges. We also reject this submission which amounts to suggesting that if the trustee decided to do a piece of work, however unnecessary or ill-advised it might be, the reviewer could examine the reasonableness of the charge for that work, but not whether it needed to be done. This argument appears to us to run counter to the general task set out in the preamble which included a consideration of whether “these were … justifiably charged”.

21 Fourthly, counsel argued that Mr Ellis should not have disallowed most of the time charged after the end of the first quarter of 2000 on the basis that the trustee should by then have retired. In the view of Mr Ellis, the trustee should have retired within three months of being asked to do so at the end of 1999. Counsel submitted that the reviewer was not asked to make judgments of that kind, but only to assess the reasonableness of the charges. This argument again appears to us to be misconceived. The reviewer was asked to use his knowledge and experience to assess the reasonableness of the fees. In our judgment, this task necessitated a view being taken as to how the trustee had exercised its powers and duties in the management and administration of the trust. Fees are not charged in a vacuum; they must be related not merely to the specific task involved but to the overall performance of the trustee's functions.

22 Fifthly, counsel submitted that Mr Ellis had constantly referred to the trustee not being in control, whereas this was not a matter for him. Counsel conceded that the trustee might not have been sufficiently assertive with HK. He contended, however, that it would be a gross injustice to the trustee if it were not recompensed for work carried out as the result of the behaviour of HK. He had in effect caused the work to be carried out; he should accordingly pay for it. This is an important submission and we will return to it below.

23 Sixthly, counsel submitted that Mr Ellis' report should not be accepted in relation to work carried out for the Pinedale arbitration, where the witness had conceded in cross examination that the trustee was entitled to be paid. We again return to that submission below.

24 Mr Evered made a number of detailed criticisms in his affidavit of Mr Ellis' report, but to the extent that they were not explored in cross examination, we have found it difficult to reach any conclusion on these points of dispute as to detail. It is true that counsel were under strict time constraints imposed by the Court. However, the cross examination of Mr Ellis by counsel for the trustee closed with some thirty minutes to spare; the opportunity to explore these points was not taken.

25 The general thrust of Mr Evered's evidence was that work for which charges had been raised had all been carried out. Furthermore, he considered that all the charges were reasonable. He pointed out that fees for managing dormant companies were not infrequently £2,000 or £2,500 per annum, whereas the trustee's charges were only £1,100 per annum. In general he expressed the view that the figures produced by Mr Ellis were unrealistic. His view was that this complaint about fees had been brought to a head by his refusal to give perjured evidence in an arbitration relating to the Pinedale property in which HK lived. He asserted that HK had intimated that there would be no problem about the trustee's fees if this false evidence had been given.

26 Mr Medlock's evidence was generally consistent with that of Mr Evered. He did not accept that the charges raised by the trustee were unreasonable. He said that HK had been a good client of his firm, but that they had fallen out in 1996.

27 HK was cross examined on his affidavits and denied that he had solicited perjured evidence as alleged by Mr Evered. As we do not propose to rely upon the evidence of HK in arriving at our conclusions, we think that no purpose would be served in describing his evidence in any detail. Suffice it to say that HK did not impress us as a witness. He was often unwilling to answer questions directly and was at times evasive. Parts of his evidence were incredible. We well understand why Mr Ellis characterised him as a “difficult client”.

28 So far as it is necessary to characterise the evidence of the witnesses for the trustee, we think that it was given honestly. Mr Evered became involved in the administration of the trust only in 1999 whereas Mr Medlock had been involved at the outset. Mr Medlock gave us the impression of a man not in control of his brief and at times out of his depth. Both he and Mr Evered seemed vulnerable to criticism. Both were conscious that the best interests of the beneficiaries had not always been served by the trustee.

Conclusion

29 We have already rejected the submissions of counsel for the trustee in relation to the general approach of Mr Ellis in formulating his report and in giving his evidence. We think that Mr Ellis was right in his assessment that the trustee failed to exercise sufficient control over the trust and was constantly trying to recover information which ought to have been in his possession at the outset. Mr Medlock himself stated at paragraph 10(b) of his affidavit of

31st October 2002:-

> *"One disadvantage of the way HK worked was that we were continually chasing him for information which should have been provided at the inception of each project or action; he would put us off, by saying that he was busy or suchlike, which doubtless was true, but as I explained to him, there was considerable extra cost to the trust as a result"*.

Mr Evered stated at paragraph 4.2 of his affidavit of 31st October 2002:-

> *"Towards the end of 1999 the dispute between Mr Harshad Kapadia ('HK') and Mr Medlock came to a head.* Financial statements had been provided, in good time, for the period up to the end of 1996, but none had been produced since then. From what I have seen in the files, the delay in producing financial statements was due to the lack of information about many payments in and out, and about transactions generally, and it appeared that, although HK often said that he would provide the information, it was not provided".

30 Much of the correspondence illustrates the same theme. On 17 September 1997, Mr Medlock wrote to HK complaining:-

> *"I am becoming increasingly concerned at the present situation and the lack of the communication between us.* So far I can see there are now several properties in the company some of which may be generating income. …. I am gravely concerned that I am being prevented from fulfilling my duties as director of the company due to the lack of co-operation and the breakdown in communications between us. Unless you now provide me with all details regarding the activities of the company and the present status of the company I feel it will be necessary for me to make full enquiries with all relevant agencies to obtain the necessary information and subsequently to either curtail your own authority to act on behalf of the company, or cancel such authority completely".

31 The trustee did not really know what was being done in the name of the trust. A trustee should be in the saddle and firmly holding the reins; he should not be running after the horse desperately trying to mount it. Counsel for the trustee contended, as we have noted above, that HK was responsible for this state of affairs and that the trustee was accordingly entitled to charge for all the extra work involved. We cannot accept that submission. A trustee has a duty to act competently. Article 17(1) of the Trusts (Jersey) Law 1984 provides that:-

> ***"(1) A trustee shall in the execution of his duties and in the exercise of his powers and discretions – act – with a due diligence; as would a prudent person; to the best of his ability and skill; and observe the utmost good faith."***

32 In our judgment the trustee failed to act prudently and with due diligence. It allowed itself to

be swamped by the demands of a difficult client and failed to perform to the standards required of a trustee in this jurisdiction.

33 We think that the conduct of HK is however a relevant factor and one to be taken into account. Mr Ellis took the same view. At paragraph 5 (viii) he stated:-

> *"In my opinion both HK and [the trustee] must share the responsibility for the extraordinary costs of the Maple Trust Structure for the years until 1999.* I have endeavoured to apportion costs for those years."

34 In summary, subject to what appears below in relation to the Pinedale arbitration, we accept the evidence of Mr Ellis and his assessment of what is reasonably due to the trustee. The amended prayer to the representation requires us to make such order as we think fit in respect of the charges of the trustee up to 28th February 2001. The figures in the Ellis report are calculated to 31st December 2001 but we hope we can rely upon the parties to make the appropriate adjustments.

35 We accordingly find that the reasonable fees which should have been charged are as follows:-

Maple Trust	1995–2001	£5,650
Lom	1995 – 2001	£18,871
Acacia	1995–2001	£35,865

36 To those figures must be added expenses which we understand not to be in dispute, except in relation to Lom. Mr Ellis found that the expenses were excessive to the extent of £2,302. We accept that evidence and that figure must be subtracted from the allowable expenses. There should also be added to the reasonable fees for Acacia the sum of £6,194 charged by invoice number 1332 dated 20th May 1999 for services rendered in relation to the Pinedale arbitration. Mr Ellis accepted in cross examination that his report was in error to that extent, and that the trustee was entitled to be paid for this additional work. Any surplus fees charged must be returned to the Maple Trust or the underlying company as the case may be. We would only add, in an attempt to assist the settlement of outstanding issues, that our inclination is that the trustee is also entitled, on a quantum meruit basis, to fees from 28th February 2001 to date on the same scale as set out in Mr Ellis' report. In the event of any disagreement we authorise the trustee to pay into an escrow account in the names of the legal advisers to the trustee and the representor a sum representing the amount of fees claimed, and we give liberty to apply to either party.

Should the trustee be removed?

37 Counsel for the trustee argued that the trustee had already agreed to retire and that there was no need for any order to be made. The retirement of the trustee and its replacement should be allowed to run its course in an orderly way. Mr Taylor on behalf of the representor submitted that the court should exercise its power under the Trusts (Jersey) Law 1984 to remove the trustee from office and to appoint Investec (Guernsey) Limited in its place.

38 Counsel for the representor drew to our attention a passage from the judgment of Lord Blackburn in *Lettersted v Broers* (1884) 9 APP.CAS. 371 which was cited with approval by this court in *West v Lazards* 1987–88 JLR 414:-

> ***"In exercising so delicate a jurisdiction as that of removing trustees, their lordships do not venture to lay down any general rule beyond the very broad principle … that their main guide must be the welfare of the beneficiaries.*** Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety…. It is quite true that friction or hostility, between trustees and the immediate possessor of the trust estate, is not of itself a reason for the removal of trustees. But where the hostility is grounded on the mode in which the trust has been administered… it is certainly not to be disregarded…. If it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground he refused to do so, it seems to their lordships that the court might think it proper to remove him."

39 A number of factors seem to us to be relevant in this context.

(i) The trustee was asked to retire by the beneficiaries at the end of 1999. Over three years later the trustee is still in office notwithstanding its expressed wish to retire.

(ii) There is no doubt that the relationship between the trustee and some of the beneficiaries has completely broken down. There have been allegations and counter allegations of lying and deceit. As counsel for the representor rightly stated, the parties have been at loggerheads for years.

(iii) This mutual antipathy cannot be regarded as being in the best interests of the beneficiaries as a whole.

(iv) The conduct of the trustee in charging excessive fees, as we have found, is another factor promoting disharmony between the parties.

(v) We have found that the trustee has committed a breach of trust in using the trust

fund to pay its own legal fees in hostile litigation.

40 In our judgment this unhappy state of affairs should, in the interests of all parties, be brought to an end forthwith. In the exercise of our jurisdiction under Articles 15 and 47 of the Trusts (Jersey) Law 1984, we order the immediate removal of the trustee from office and the appointment of Investec (Guernsey) Limited in its place. We order the trustee to procure that new directors of Lom, Acacia and Shearson be appointed in accordance with the directions of the new trustee. We also order the trustee to take all such steps as may be necessary to vest the trust property in Investec (Guernsey) Limited.

41 Article 30 of the Trusts (Jersey) Law 1984 creates a statutory indemnity in favour of the trustee removed from office. We give liberty to apply however to any party, and to Investec (Guernsey) Limited, should further submissions be necessary in that regard.