Caversham Trustees Lmited

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Clapham, King
Judgment Date:	23 April 2008
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Court:	Royal Court
Date:	23 April 2008

Text

In the Matter of Caversham Trustees Limited and Andrew Crichton
And in the Matter of Essel and Bruce Trusts
And in the Matter of Article 51 and 53 of the Trusts (Jersey) Law 1984, As Amended

[2008] JRC 65

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Clapham **and** King.

ROYAL COURT

(Samedi Division)

Authorities

Ogier Trustee (Jersey) Limited v C.I. Law Trustees Limited [2006] JRC 158.

In the matter of the Carafe Trust [2005] JLR 159.

Advocate C. J. Scholefield **for Berend Van Dalfsen**.

Advocate F. B. Robertson **for Caversham Trustees Limited and Andrew Crichton**.

COMMISSIONER:

1 The Court sat on 4th and 5th of March 2008 to determine a preliminary issue in relation to a claim for losses, if any, arising from any delay in the transfer of trust assets.

Background

2 Berend Van Dalfsen ("Mr Van Dalfsen") is the real settlor and regarded as the principal beneficiary of the Bruce Trust, of which Andrew Crichton ("Mr Crichton") is the trustee, and of the Essel Trust, of which Caversham Trustees Limited ("Caversham") is the trustee. Originally, Caversham was the trustee of both trusts, but Mr Crichton, who was until 31 st August 2007 a director and principal of Caversham, was appointed as the trustee of the Bruce Trust in order to hold certain assets which could only be held by an individual person. We will refer to Mr Crichton and Caversham jointly as "the Caversham Trustees" and to the Bruce and Essel Trusts jointly as "the trusts".

3 The original relationship was between Mr Van Dalfsen and Mr Crichton but that relationship broke down completely in 2003, caused in part by a dispute over fees. Mr Van Dalfsen was also expressing concerns over the way certain underlying companies had been administered and was making accusations of impropriety and it is clear therefore that the relationship between Mr Van Dalfsen and the Caversham Trustees generally had ceased to be workable. In May 2003, Mr James Andrew Ramsden ("Mr Ramsden"), a fellow director of Mr Crichton took over conduct of the relationship between the Caversham Trustees and Mr Van Dalfsen.

4 On 12th June 2003, Mr Van Dalfsen wrote to Mr Crichton saying that it would be more convenient for the trusts to be administered from Monaco, where he had recently taken up residence, and that Mr Crichton had authority to supply his solicitor in Monaco, namely Carolyn Parkes ("Miss Parkes") of Moores Rowland, Monaco, with an outline of the trusts and their assets and to liaise with and release any documentation requested by her.

5 The Caversham Trustees accepted that it was appropriate for them to resign as trustees and that the transfer of administration was instigated at that point. For the purpose of this judgment we will take the 1st July 2003 as the date upon which the transfer process commenced and we will refer to this as the "Commencement Transfer Date". As we shall see later, it was subsequently agreed that rather than resign as trustees, the assets of the trusts should be appointed out to a new trust established on behalf of Mr Van Dalfsen through Moores Rowland. It has taken until May 2006 for the assets of the Essel Trust to be

transferred and until July 2007 for the assets of the Bruce Trust to be transferred to the new trust, subject to security by way of an escrow account in relation to fees, an inordinately and unacceptably long time by any standards, during which the trusts were effectively paralysed.

6 There are two representations before the Court. The first representation was brought by Mr Van Dalfsen on 18th May 2006 in respect of the Essel Trust and the second representation was brought by him on 16th February 2007 in relation to the Bruce Trust. In both representations, the principal complaint was that the transfer of the assets has become so protracted that the Caversham Trustees should be ordered to complete the transfers without further delay. As mentioned above, the transfer of the assets has now been completed, leaving the issue of the losses, if any, arising from any delay in the transfer of the assets outstanding. We were told that in order either to settle or determine this issue, it was considered that it would be helpful to determine the dates by which the assets of the trusts should have been transferred and accordingly at a directions hearing on 25th May 2007, the Court directed that there should be "a further hearing for the assessment of the date(s) by which the Trustee should in each case have completed the transfers of the Bruce Trust assets and the Essel Trust assets". It is that issue which this Court sat to determine and in respect of which we now issue our judgment.

7 Mr Scholefield, for Mr Van Dalfsen, argued that the transfer of the assets should have been completed by 31st December 2003, six months from the Commencement Transfer Date. Mr Robertson, for the Caversham Trustees, accepts that the actual time taken to transfer the assets was too long and that they should have been transferred by 31 st December 2005, two and a half years from the Commencement Transfer Date. Our task therefore was to consider the affidavits filed by both Mr Van Dalfsen and Mr Ramsden and the correspondence between the parties and their advisers to ascertain whether in our view the assets or some of them should have been transferred by the Caversham Trustees before the date conceded by them, namely 31st December 2005, and if so, what that earlier date should be. Neither party adduced expert evidence to assist the Court. Rather than setting out the history of the extensive dealings between the parties and their advisers during this period in chronological form, we intend to take the heads of complaint put forward by Mr Scholefield. Before we do so, we set out what we understand the duties of the Caversham Trustees to have been in this case.

The Caversham Trustees' Duties

8 The Caversham Trustees conceded at the outset, very properly in our view, that in the circumstances that had arisen, they were to be equated to an outgoing trustee under a duty to surrender the trust property, subject to their right to require reasonable security for liabilities, whether existing, future, contingent or otherwise before surrendering trust property (Article 34 of the Trusts (Jersey) Law 1984). They also accepted that they were under a duty to cooperate fully and actively in the transfer of the assets, citing the judgment of Birt, Deputy Bailiff, in *Ogier Trustee (Jersey) Limited v C.I. Law Trustees Limited*

[2006] JRC 158, a case involving the duties of an outgoing trustee on the transfer of a trusteeship, where the Deputy Bailiff said at paragraph 7:–

> " ***On the transfer of a trusteeship the outgoing trustee is under a duty to cooperate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee"***.

In that case the outgoing trustee had already resigned and the new trustee was anxious to establish exactly what assets were owned by the trust and to get those assets under its control.

9 The key point in determining the Caversham Trustees' duties is that they had accepted in June 2003 that it was in the interests of the beneficiaries of the trusts that they should retire as trustees and transfer administration to a new trustee. Subject only to retaining reasonable security in relation to their fees, their duty was to give effect to this as soon as reasonably possible. The fact that by agreement the mechanism for this process was changed from that of a retirement and appointment of trustees to the appointment out of the assets to a new trust makes no difference in substance to their duties in this respect.

10 In our view as from the Commencement Transfer Date, the Caversham Trustees were under a duty to pursue pro-actively the transfer of the assets by:–

The duty to transfer the assets is subject to the Caversham Trustees' right to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise. We acknowledge that a transfer is a two-way process and is dependent therefore upon the co-operation of the new trustee.

(i) Instructing lawyers in Jersey to draft the formal documents by which the assets would be appointed to the new trust and any indemnities to be given;

(ii) marshalling and preparing the assets so that they were ready to be transferred;

(iii) ascertaining the identity of the entities to whom the assets were to be transferred

(iv) where necessary obtaining advice on the steps required to effect and the tax implications, if any, of and cost to be incurred in the actual conveyance or transfer of the assets in the jurisdictions in which they were sited;

(v) setting out a timetable for the transfer of the assets;

(vi) providing information to the new trustee to enable it properly to accept the assets;

(vii) carrying out due diligence on the new trustee;

(viii) providing explanations to questions reasonably raised by the new trustee in

relation to the assets.

11 We now turn to the individual heads of complaint put forward by Mr Scholefield.

Indemnity

12 Following Mr Van Dalfsen's letter to Mr Crichton of 23rd June 2003, Mr Ramsden sent Miss Parkes by fax dated the 1st July 2003 a draft deed of retirement and appointment of trustees in respect of the trusts.

13 The draft was drawn up in accordance with Caversham's standard form in use at that time, save that Mr Ramsden had arranged for a colleague within Caversham (who was not legally qualified) to draft additional wording to be inserted into the indemnity provision. This was done without the benefit of legal advice whether internal or external. We set out below the relevant part of the indemnity for the Bruce Trust which extended both to Mr Crichton (the Retiring Trustee) and Caversham (the Original Trustee) and we have underlined the words that were added:-

> " *Without prejudice to the release from liability provided by Article 30(ii) of the Trusts (Jersey) Law 1984, as amended, the New Trustee hereby covenants with the Retiring Trustee (for themselves and for the benefit of the Original Trustee and the officers and employees of both the Retiring Trustee and the Original Trustee and of any associates of both the Retiring Trustee and the Original Trustee and of any and all companies incorporated in any part of the world whose shares form part of the Trust Fund and which shall hereafter be referred to as "Trust Companies") to keep them fully and effectively indemnified against etc…."*

There were consequential changes to reflect this additional wording. It can be seen that by this additional wording Caversham were seeking to extend their standard indemnity to cover officers and employees of any associates (a potentially very broad class of persons not defined) and of all companies whose shares formed part of the trust fund.

14 This was not acceptable to Miss Parkes who responded on 1st August 2003 suggesting a much narrower form of wording under which the trustees (only) would have been indemnified effectively against taxes, which in turn was unacceptable to Mr Ramsden.

15 Miss Parkes requested sight of and was given Caversham's standard indemnity and on 9th September 2003 sent a further form of the indemnity, which was broadly similar to Caversham's standard form and to one which Moores Rowland had used recently, and which was broadly similar to the one finally agreed. It extended to the directors, officers and employees of the trustees but not of associates or other companies in which the trustee had invested. Her draft also provided for the indemnity to expire after six years.

16 Mr Ramsden was prepared to accept the limitation of six years but not this otherwise standard form of indemnity. He took advice from Advocate Boxall, and wrote on 6th October 2003 saying that he had received advice that the original indemnities being sought by Caversham were reasonable and withdrawing the offer to accept a time limitation. This put the parties back to the position of the first draft he had submitted. This impasse caused Moores Rowland to seek advice from Advocate Marc Guillaume (Mr Guillaume) of Mourant, who wrote on 1st December 2003 to Mr Ramsden commenting in some detail on the terms of the draft indemnity. Mr Ramsden in turn instructed Warwick Ainger (Mr Ainger) of Applebys, who responded by e-mail on 26th January 2004. Mr Ainger justified the extension of the indemnity to officers and employees of the trustees on the provisions of Article 52 of the Trusts (Jersey) Law 1984 (now repealed) making directors of a corporate trustee liable for breach of trust and on the definition of “director” for the purposes of that article. This was accepted by Mr Guillaume. Mr Ainger justified the extension of the indemnity to officers and employees of associates and companies in which the trustee had invested on the basis that such officers or employees usually act as the nominee of the trustees and would do as instructed by them. They should, therefore, he argued, be entitled to the same indemnity as that afforded to the trustees themselves. Mr Guillaume was not persuaded by these arguments, pointing out that the role of directors of a company was different to that of trustees. They have a duty to the company and its shareholders rather than simply to act as the agents of the trustees. He said there was no legal basis for an indemnity to be required from the incoming trustee for such individuals acting in their capacity as directors of underlying companies and none would be given.

17 Whilst there were other matters under discussion between Mr Ainger and Mr Guillaume in relation to the indemnities, we agree with Mr Guillaume when he said in his letter of 27 th February 2004 that the main point at issue remained the proposed extension of the indemnity in favour of officers and employees of associates or companies in which the trustee had invested. In that letter he gave notice that, unless this point was conceded, he had been instructed to make an application to the Court and a complaint to the Jersey Financial Services Commission for failure to comply with paragraph 2.5 of the Trust Company Business Codes of Practice. Mr Ainger responded on 3rd March 2004 saying that he was obtaining Counsel's opinion. On 16th March 2004, he conceded the point. Thus from the issuing of the first draft of the indemnity on 1st July 2003, to its agreement on 16 th March 2004, some 8 $^{1}/_{2}$ months had elapsed.

18 Mr Robertson argued that whilst there had been delays on both sides, this was a commercial negotiation over indemnities where both sides engaged legal advisers and concessions were ultimately made on each side over the terms of the indemnities to be provided.

19 The right to seek security by way of indemnity is a right of the trustee. The extension of that security to officers and employees of the trustee is not unreasonable in our view as is evidenced both by its inclusion within the standard form used by Caversham and the form previously used by Moores Rowland. It had some justification in law as accepted by Mr

Guillaume and the Court can, we think, also take judicial notice of the fact that it is not unusual for such indemnities to be extended to officers and employees of the trustee.

20 However, the right to seek security by way of indemnity is not a right which in general can reasonably be extended to officers and employees of “associates” of the trustee or companies in which the trustee may have invested the trust fund. We agree with Mr Guillaume that on the facts of this case and on the basis of the evidence before us there was no legal or other basis for the indemnities to be extended to such individuals and it was this extension which caused Moores Rowland to seek legal advice in Jersey and which was the catalyst for the threat of legal action made by Mr Guillaume on 27th February 2004. It was its concession which enabled the indemnity to be resolved.

21 We are critical of the conduct of Caversham in amending their standard provisions without first taking legal advice, particularly in the circumstances of this case. Bar this unreasonable extension to the indemnity, the negotiations over the indemnity would, in our view, have taken no longer than three months from the time that the first draft was provided by Mr Ramsden on 1st July 2003 namely to 30th September 2003.

Due diligence

22 On 21st July 2003, Mr Ramsden asked Miss Parkes to confirm the name and address of the new trustee of each trust, which she did by inserting the names of the two companies in the draft which she returned on 1st August 2003, namely Orange Overseas Limited and Violet Global Limited, both of P.O.Box 434, Road Town, Tortola, BVI. Nothing was done by Caversham and its advisers with the names so revealed until March 2004 when Mr Ramsden asked Mr Ainger to check whether these companies were regulated in the BVI. He did this to ensure that he had a note on his file to that effect because his assumption all along had been that he was dealing with a Moores Rowland trust company, an impression we accept was confirmed by Mr Guillaume's letter of 1st December 2003, when he said his firm had been instructed in connection with the transfer of the trusts to “Moores Rowland”. It transpired that these companies (whose names contained nothing indicating that they carried on trust company businesses) were, as Mr Scholefield described it, “poor relations” of Moores Rowland in that although they were owned by Moores Rowland, they had no assets, no personal directors, no insurance cover and were not regulated. Mr Ainger not unreasonably pointed out that this raised issues as to the suitability of the proposed new trustees and rendered their obligations under the indemnities of little value.

23 In his response of 29th April 2004, Mr Guillaume stated that Moores Rowland did have a more conventional in-house trust company which could fulfil the role but his understanding was that Moores Rowland were initially reluctant to do this because they were not comfortable with the current form of the trusts. He suggested that the way to bridge the impasse was for Moores Rowland to supply a form of trust with which they were comfortable and for the trustees to exercise their powers of appointment of the assets of the Bruce and Essel Trusts respectively to that new trust. The form of indemnity which had

been agreed would then be used in the separate deeds of appointment. This was agreed and the Violet Trust was established on 30th June 2004 with Belvedere Investments Limited as trustee, a Moores Rowland company regulated in the BVI and insured.

24 It thus took Caversham some 7 months from being told the identity of the new trustees to carry out any due diligence on them and in our view this delay was unreasonable. It should have asked the relevant questions at the outset, and if it had, the issue would have been resolved well within the 3 months that we have allowed for the indemnities to be agreed.

Transfer of Assets

25 It would be helpful here to summarise the material assets held in respect of each of the trusts. Mr Crichton as trustee of the Bruce Trust held directly in his name the following assets:-

(i) Two properties in Belgium together with rental income held by the property agents;

(ii) The benefit of a loan due by Mr Van Dalfsen;

(iii) Cash

(iv) Horses and as a consequence of ownership of such horses, the right to breeder premiums and what is described as a France Gallop Account into which the breeder premiums and any winnings from racing were paid.

26 The assets held by Caversham as trustee of the Essel Trust comprised an investment holding company, Essel Investments Inc. That company in turn had the following assets:-

(i) Two properties in Belgium;

(ii) Shipping investments, principally in what were known as the “Trader Club” companies;

(iii) The benefit of a loan due by a Dutch company known as Marcosti BV (“Marcosti”);

(iv) The benefit of a loan due by Mr Van Dalfsen;

(v) The benefit of a loan due by a company known as SSI Holdings Limited;

(vi) Cash

27 Mr Scholefield submitted that in addition to the delays caused by the indemnity and lack of due diligence, the transfers of the assets were further delayed as a result of:-

(i) the dispute over fees;

(ii) the apparent policy of Caversham to deal with matters consecutively;

(iii) the condition of some of the underlying assets.

28 The position of the Caversham Trustees was that it was not possible for them to have begun the process of actually transferring assets until the wording of the indemnities had been agreed, until the transfer mechanism had been determined and details provided as to the person or entity to which the trust assets were to be transferred. As the indemnity and transfer mechanisms were not agreed until July 2004, nothing could be done to transfer assets prior to that date and it was not until July 2005 that Mr Guillaume made it clear to whom the trust assets were to be transferred. Even then the affairs of the trust were not straightforward. Furthermore, during this period detailed requests for information were being made by Mr Van Dalfsen and his advisers, which diverted the resources of Caversham and delayed the transfers.

Fees

29 In our view the dispute over fees lies at the heart of the delays in the transfer of the trusts' assets.

30 On 17th September 2003, Mr Crichton e-mailed Mr Van Dalfsen in the following terms:-

> " *I would also advise that the question of my Firm's fees must be resolved prior to the transfer of the trusteeships taking place"*.

On 1st April 2004, Mr Ainger e-mailed Mr Guillaume in the following terms:-

> " *The retiring trustee will require its fees and expenses to be settled before handing over trusteeship…….*"

It was not until Mr Ainger's e-mail of 22nd February 2005 (approximately one year and eight months from the Commencement Transfer Date), written in response to a robust e-mail from Advocate Jonathan Speck, that the Caversham Trustees confirmed that they were willing to cease to have an involvement in the trusts and to transfer the assets in one go, so as to save costs and documentation, once they knew to whom the assets of the Bruce Trust were to be transferred. Notwithstanding this, they made it clear that they were not prepared to relinquish control over all of the assets of the trusts until provision had been made for their costs.

31 In the case of *In the matter of the Carafe Trust* [2005] JLR 159, the Court held that it was improper for a trustee to seek security over the entirety of a trust fund until its disputed fees were paid. In that case, the Court found that the trustee should have retired when the beneficiary offered to pay into escrow the full amount of the disputed fees which gave the

trustee all the security to which it was entitled. Although its decision was handed down on 16th May 2005, it confirms what should have been clear to Caversham and its advisers that the right to security is a right to “reasonable” security and that in seeking to retain control over the entirety of the trust funds the Caversham Trustees were exerting improper pressure.

32 As early as 1st September 2003, Mr Van Dalfsen e-mailed Mr Crichton suggesting that the fee dispute should be sorted out through Court or through an independent person but not frustrate the hand-over. On 8th April 2004, Mr Guillaume e-mailed Mr Ainger and in relation to the issue of fees suggested that Caversham propose a sum which would cover what they calculated to be the fees due to them and that this sum be placed into an account under the joint control of Caversham and the new trustees. This would, he said, give more than adequate security to Caversham that monies were available to discharge any fees that were found to be due and allow the transfer of the other assets to Mr Van Dalfsen's preferred service providers. However, Caversham were not prepared to countenance any arrangement whereby Mr Van Dalfsen either directly or through his representatives would be in a position to tie up the disputed fees for a prolonged period and without an exit mechanism in the event that the fee position could not be agreed within a reasonable time frame. In an email of the 31st March 2006 Mr Ainger proposed that the fees issue be referred to an independent expert whose decision would be binding and whose costs would be shared equally between the parties.

33 *Carafe* does not establish a general principle that escrow arrangements should be accepted by trustees in all cases involving disputes over fees. What constitutes reasonable security in such disputes will depend upon the facts of each case. Escrow arrangements would not ordinarily apply, for example, in fee disputes between beneficiaries and trustees who remain in office. Even though the position of the Caversham Trustees here was in reality that of retiring trustees, we do not regard their stance in relation to the escrow arrangements put forward on behalf of Mr Van Dalfsen, which did not include a mechanism for finally determining the issue, as unreasonable. What was unreasonable was their attempt to retain the whole of the trust fund pending payment of their fees. Even after they retreated from this unreasonable stance in February 2005, they continued to exert pressure on Mr Van Dalfsen to settle the fees issue by the slow pace in which the assets were transferred.

Dealing with matters consecutively

34 In our view, there is substance in this criticism. The Caversham Trustees knew in June 2003 that they had to resign as trustees and transfer the assets. It seems to us that in any transfer of this kind the various steps required should be advanced together not consecutively. This did not happen. The Caversham Trustees, through Mr Ramsden, provided Moores Rowland with basic information as to the trusts' assets but otherwise addressed first and exclusively the issue of the indemnity and, at the end of that process, due diligence on the proposed new trustees, and this on the basis that nothing else could

be done until the indemnity had been agreed and due diligence completed. Accordingly nothing else appears to have been done in particular to address the matters listed in paragraph 10 (ii) to (vi) above. We disagree with this approach, which had the direct consequence of delaying the whole process. This was not a situation in which, if the terms of the indemnity had not been agreed, the Caversham Trustees could have continued in office. Any disagreement over the terms of the indemnity would ultimately have to have been resolved by the court, but in the meantime, in the interest of the beneficiaries, the Caversham Trustees should have been addressing these other matters.

35 It is true that between August 2004 and June 2005, Mr Ainger was awaiting from Mr Guillaume instructions as to the identity of the transferees of the assets of the Bruce Trust and certainly it can be said that Mr Guillaume did not provide or confirm the identity of the transferees of all the assets of the trusts until June 2005 (apart from the horses upon which we comment later). However our reading of the evidence indicates that it was not until the latter part of 2005 (over two years from the Commencement Transfer Date) that the Caversham Trustees began to take advice and grapple with the actual transfers. We take the transfer of the following assets by way of illustration:-

(i) **Transfer of the Belgian properties in the Bruce Trust**. In our view, Mr Crichton should have sought advice from lawyers in Belgium at the outset as to the steps required to convey these properties, the tax implications, if any, and the costs and stamp duty likely to be involved. As it transpired, Mr Ramsden did not write to Belgian lawyers until 19th December 2005, two and half years after the Commencement Transfer Date. He informed them that Mr Crichton had two Belgian properties registered in his personal name in his capacity as sole trustee of the trust and intended to transfer the properties to a new registered owner, although there would be no change in the ultimate beneficial ownership. He asked whether they were able to assist with the transfer of the properties and what the likely costs would be. These questions should have been asked in June or July 2003. The lawyers responded on 28th December 2005 asking for copy documentation to enable them to give an idea of their fees. Mr Ramsden did not respond until 12th May 2006, four and a half months later.

It is the case that on 26th July 2005, Mr Guillaume had e-mailed Mr Ainger indicating that the transfer of the titles would be undertaken by the Belgian accountants previously retained by Caversham and saying that the new trustee would make the arrangements and would be in touch with Caversham directly. Notwithstanding this, Mr Ramsden wrote to the accountants on 17th August 2005, receiving no response. He did not follow up his letter until 27th February 2006, some six months later. Advice from accountants would not appear to have been given to Mr Ramsden in relation to the transfers until 23rd February 2007, some three years eight months from the Commencement Transfer Date. They advised incidentally that a conveyance of Belgian properties would normally take four to six weeks to complete.

Notwithstanding the intervention of Mr Guillaume in July 2005, the onus was on Mr Crichton to have this advice put in place from the outset. The very slow pace and the

lack of urgency demonstrated by Mr Ramsden's correspondence in our view exemplifies the general approach of the Caversham Trustees to the transfer of the assets of the trusts and is supportive of Mr Van Dalfsen's complaint that their conduct was influenced by their desire to settle the issue of fees.

(ii) **Breeder Premiums and France Gallop Account**. France Gallop is the French organisation which controls horse racing in France, and which distributes prize money and breeder premiums. The France Gallop Account was in the name of Mr Crichton personally and was non interest bearing. In our view, the first step Mr Crichton should have taken in June or July 2003 was to obtain advice as to whether and how the rights to the breeder premiums and the France Gallop Account could be transferred. From our understanding of the evidence, Mr Crichton did not seek advice on these matters through Mr Ramsden until July 2005, two years after the Commencement Transfer Date. The delay cannot be justified because Mr Ainger had not been informed of the identity of the proposed transferee. Mr Crichton should have ascertained the position in relation to the transfer of these assets at the outset.

It is a matter of some note that when the France Gallop Account was eventually transferred in 2007, it had a balance of some €250,000. Mr Crichton was perfectly able as trustee to withdraw these funds at will so as to place them on interest bearing deposit but did not do so, with the result that they earned no interest for the best part of four years.

36 **Marcosti**. Marcosti was the jewel in the crown. This company, through Lynford Pty Limited, ultimately owned valuable land in Australia. The shares in Marcosti were held and administered by a corporate trust and fiduciary services company in the Netherlands, owned by a Frank Taylor (“Mr Taylor”) as nominee for Essel Investments Inc., the holding vehicle for the Essels Trust.

There was alarm on the part of Mr Van Dalfsen and his advisers in relation to this jewel in the crown for two reasons:-

Mr Ramsden explained in his third affidavit that due to changes in the relevant tax regimes it became necessary for Marcosti itself to be owned by a Dutch resident (Mr Taylor) as opposed to Essel Investments Inc. in order to ensure that the fiscal integrity of the structure remained. The shares were accordingly transferred by way of sale out of the name of Essel Investments Inc. into Park International Trust Services BV which, notwithstanding the transaction being effected by sale, did hold the shares as nominee for Essel Investments Inc. He also confirmed that Marcosti had been used for third party loans but this had been to its benefit and had been done with the knowledge of Mr Van Dalfsen. In support of that, he produced a note of a meeting held on 25th June 1998 between Mr Crichton and Mr Van Dalfsen where it had been discussed. It is the case that Mr Ramsden put Miss Parkes in direct contact with Mr Taylor and certainly Mr Van Dalfsen visited him.

However in view of the importance of this asset and the apparently unusual nature of these transactions, it was incumbent upon Caversham to provide a full explanation to the new trustee at the outset. Simply putting the new trustee in touch with Mr Taylor and relying on

the assumed knowledge of Mr Van Dalfsen was not sufficient. A full explanation was not provided by Caversham through Mr Ainger until July 2005, some two years after the Commencement Transfer Date.

(i) In his fax of 21st July 2003 to Miss Parkes setting out the assets of Essel Investments Inc., Mr Ramsden referred to the loan due by but not the shares in Marcosti. It was feared that control of this asset had been sold out of the structure to Park International Trust Services BV owned by Mr Taylor.

(ii) It appeared that Marcosti itself had been used for the receiving and making of loans by parties unconnected with the Essel Trust or Mr Van Dalfsen.

37 We are not going to set out here the history in relation to the transfer of all of the assets as we find from our examination of the voluminous evidence that the Caversham Trustees did deal with the matter consecutively.

Condition of underlying assets

38 We did not find Mr Scholefield's submissions as to the condition of the underlying assets had any material effect on the transfers beyond those mentioned above. He made it clear that he was not alleging (in these proceedings) maladministration constituting a breach of trust and we therefore had to assume that the assets had been administered in accordance with the duties of the Caversham Trustees. In relation to the horses within the Bruce Trust it is the case that it became apparent in July 2005, as a result of information provided by Mr Van Dalfsen, who managed the horses in France, that in fact Mr Crichton no longer owned any horses as trustee and there was therefore nothing to transfer. In relation to the Essel Trust there was nothing on the face of it to prevent an immediate transfer of Essel Investment Inc, which as the investment holding vehicle, would have brought all of the underlying assets of the Essel trust with it. This was not pressed by Mr Guillaume in the period from August 2004 to June 2005 because, we have assumed, of the concerns related above.

Conclusion

39 When dealing with voluntary transfers between parties, albeit in the context of trusts, there is no way of arriving at an objectively correct date by which any particular asset should have been transferred. The parties have clearly taken a view as to the date that they submit should apply and we can only make our best assessment having considered the evidence put forward and our view of the conduct of the parties.

40 In our view, for the reasons stated above, the Caversham Trustees are largely responsible for the unacceptable length of time it took to transfer these assets. They did take an unreasonable stance over the indemnity and delayed unreasonably in carrying out due

diligence on the proposed new trustees. Their initial stance in claiming security over the whole of the trust funds for their fees was improper but even when they retreated from this position, their desire to settle the issue of fees continued to influence their conduct. Furthermore they added to the delay by dealing with the steps they had to undertake consecutively.

41 In circumstances such as these where a trustee's continuance as trustee is detrimental to the execution of the trust, that trustee should press for the appointment of or appointment out to a new trustee, failing which it should apply to the Court for directions to bring that about. Such an application will ensure that the interests of the beneficiaries are protected and also will protect the trustee from the kind of criticisms now being made of the Caversham Trustees. In this case it was the beneficiary who ultimately invoked the jurisdiction of the Court three to four years after the date that the Caversham Trustees accept the transfers became necessary.

42 As against that, we accept that Mr Van Dalfsen and/or the new trustee were slow in instructing Mr Guillaume to respond to Mr Ainger's request to be provided with the identity of the transferees (a request that should have been made at the outset) and this can therefore be said to have contributed to the delay. We also accept that Caversham's resources were diverted in dealing with very substantial requests for information about the past history of the trust and its various investments and although a professional trustee ought to be able to deal with such requests whilst at the same time discharging its duty in relation to the transfer of current assets, we accept that in the real world, this may have contributed to the delay.

43 Our task is to assess the date by which the transfers should have been completed by the Caversham Trustees. In order to do this we have to assess, as Mr Scholefield submitted, how long the process would have taken on the hypothetical basis that the Caversham Trustees had conducted themselves in accordance with their duties and on our assessment of how the new trustee would have conducted itself if they had done so. The Caversham Trustees were entitled to retain assets as security for the fees due and it is clear that the cash held by them was sufficient for this purpose (now held in escrow) but the issue of fees should not have delayed the transfer of the remaining assets. Whilst we think these transfers could have been effected by the end of 2003 (a period of six months), we think it right, taking into account the circumstances outlined above, to allow a further three months. We find it difficult to distinguish between the two trusts in terms of timing and we therefore conclude that the assets of both the Bruce Trust and the Essel Trust should have been completed by the Caversham Trustees by 31st March 2004, nine months after the Commencement Transfer Date.