# Carafe Trust - v - Guardian Trust Company Ltd and other

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| **Jurisdiction:** | Jersey |
| **Judge:** | Bailiff |
| **Judgment Date:** | 16 May 2005 |
| **Neutral Citation:** | [2005] JRC 63 |
| **Reported In:** | [2005] JRC 63 |
| **Court:** | Royal Court |
| **Date:** | 16 May 2005 |



**Text**

[2005] JRC 63

ROYAL COURT

(Samedi Division)

Before:

M C St J Birt, **Esq., Deputy** Bailiff **and** Jurats de Veulle **and** King

(First Representation)

Re: Carafe Trust

and

Guardian Trust Company Limited
Representor
and
(1) Xavier Emile Gustave Jean-Marie Louveaux

(2) Eveline Denise Juliette Louveaux
(3) Bertrand Francois Jean Philippe Louveaux
(4) Sophie Anne Thierry Louveaux
(5) Jean-Benoit Yves Albert Louveaux
Respondents

(Second Representation)

(1) Xavier Emile Gustave Jean-Marie Louveaux
(2) Eveline Denise Juliette Louveaux
(3) Herald Trustees Limited
Representors
and
Guardian Trust Company Limited
Respondent

**Advocate** L J Springate **for the Representor in the First Representation and the Respondent in the Second Representation**

**Advocate** R J Michel **for the Respondents in the Representation and the Representors in the Second Representation**

**No Authorities**

Bailiff DEPUTY

1 This is a dispute concerning the level of fees charged by a retiring trustee. By the time the trial began, the difference between the parties had narrowed to approximately £32,000 at most. It is a dispute which should have been settled. At various pre-trial hearings the Court strongly encouraged the parties to settle the matter. Given the level of costs which have now been incurred we suspect that both parties will end up substantially out of pocket compared with the position which might have been achieved had there been a sensible compromise at an early stage. Nevertheless the case does raise some issues which may be of general interest where a fee dispute arises in circumstances where a trustee is to retire. We hope therefore that our judgment may offer some assistance for the future.

2 There are two representations before the Court but they raise essentially the same issue and the matter has been treated as one set of proceedings.

**Factual background**

3 The essential background is not really in dispute. Guardian Trust Company Limited

("Guardian") is a company carrying on trustee business in Jersey. On 31 st July 1998 Guardian executed a declaration of trust known as the Carafe Trust ("the Trust"). The Trust is a conventional discretionary trust governed by Jersey law. The settlor was Mr Xavier Louveaux and he and his family were the beneficiaries. The Trust incorporated a wholly owned company called Carafe Investments Limited ("the Company"). The Company was a BVI company managed by Guardian in Jersey.

4 The settlor transferred to the Company two investment portfolios which he had held for some time with a bank in Luxembourg known at one stage as Cregem International Bank but renamed as Dexia-Bil. For convenience we shall refer to it as 'Dexia' or 'the bank'. Prior to the transfer Dexia had been accustomed to manage the portfolio in accordance with the settlor's wishes. He had had a strong influence on the selection of investments for the portfolio.

5 Dexia was appointed discretionary investment manager of the portfolio by the Company. Those authorised to give instructions to Dexia on behalf of the Company were officers of Guardian. The settlor was not among that list. It was initially agreed between Guardian and the settlor that there would be no need for Guardian to keep formal accounts. They would rely upon the valuations prepared by Dexia together with any supplementary information which could be obtained from Dexia.

6 It is clear that, at a fairly early stage, differences arose between Guardian and the settlor. It is not necessary for us to consider the merits of that dispute. On the one hand, the settlor clearly wished to continue to have substantial input on the management of the portfolio and to have direct access to Dexia with a view to their acting in accordance with his wishes. He regarded Guardian as being obstructive and inefficient. Guardian, on the other hand, was anxious to ensure that, as trustee, it had control of the trust assets (through the Company) and accordingly was not willing to allow Dexia to act on the instructions of the settlor. It emphasised that Dexia must act only on its instructions so that it could ensure adequate control of the trust assets. Dexia did not in fact always comply with these instructions and sometimes acted on the instructions of the settlor. As early as August 1999 Mr Louveaux requested that the trusteeship of the Trust be transferred to Herald Trustees Limited ("Herald"), another company carrying on trustee business in Jersey. That request was not pursued at the time but was renewed in March 2000. Thereafter there was contact between Herald and Guardian about a transfer.

7 Guardian came to the conclusion that the information provided by Dexia was insufficient to give it comfort that all the assets were properly accounted for. There were gaps and inconsistencies in the information provided and it was concerned that, given the inclination of Dexia to act on the settlor's instructions, payments might have been made of which it was not aware. It determined therefore that proper accounts must be drawn up before any transfer could take place. Accordingly, in January 2001, it instructed Le Rossignol Scott Warren ("Le Rossignol") to prepare accounts for the period up to 31 st December 2000. This approach was agreed by Herald, which was concerned at taking over the Trust without

satisfactory accounts. It is clear that during 2001, Le Rossignol spent considerable time seeking further information from Dexia and that this was quite a complicated process. In fairness it should be added that matters were not as straightforward as a simple portfolio might suggest. For example, there were accounts in at least eleven different currencies.

8 By September 2001 Le Rossignol had completed the accounts to 31 st December 1999 but the accounts to 31 st December 2000 remained in course of preparation. It is clear from Mr Sharp's evidence (he was the responsible director of Herald) that, by this time, the settlor was losing patience and there had been a complete breakdown in trust and confidence between the settlor and Guardian. Accordingly, by letter dated 5 th October 2001, Herald notified Guardian that it no longer required accounts to be completed up to the end of 2000 but was content to take over the Trust on the basis of the 1999 accounts and the valuations from Dexia thereafter. Herald suggested a deadline of 31 st October 2001 for the transfer of the Trust. We should add that, although there had been various correspondence between Herald and Guardian and their respective lawyers about the terms of a deed of retirement and appointment, the terms of such a deed had essentially been agreed by June 2001.

9 On 31 st October 2001 Advocate Springate of Bedell Cristin (who acted for Guardian) wrote to Advocate Michel at Crills (who acted for Herald) to say that draft accounts to 2000 had now been forwarded by Le Rossignol to Guardian although Le Rossignol were still waiting for certain further information from Dexia before the accounts could be finalised. She noted the fact that Herald had indicated that it was now prepared to proceed without the 2000 accounts. Following chasers from Herald, Advocate Springate wrote to Advocate Michel on 6 th November stating that, subject to the issue of fees being agreed, Guardian would be in a position to transfer the Trust the following week.

10 On 14 th November Guardian instructed Dexia to remit £8,013.25 in payment of Le Rossignol's fees. It did not notify the settlor of this request. On 22 nd November the settlor e-mailed Guardian asking for confirmation of the amounts charged by Guardian so far. He followed that up on 29 th November with a further e-mail, having discovered from Dexia about the request for £8,013.25. He asked for details of what this amount was in respect of and also requested that Guardian inform him in future whenever it sent an invoice to Dexia for payment. Mr Van Neste (who was the director at Guardian with responsibility for the Trust) replied the same day by e-mail informing the settlor that no fees had been charged other than the annual fees. He said that Guardian's time charges were being computed to date and he would let the settlor know what these were as soon as the fee notes had been prepared. He also confirmed that in future he would inform the settlor as to the nature of the payment at the same time a payment instruction was given to Dexia,.

11 Apart from some reminders, matters essentially rested there until 13 th December when the settlor sent an e-mail to the compliance department of Guardian protesting at the delay and demanding that the transfer of the trusteeship take place before the end of the year. He emphasised that he was not prepared to incur any charges for Guardian for 2002. He

expected Guardian to finalise the matter and let him know what its reasonable fees were. On 14 th December Bedell Cristin confirmed to Herald that Le Rossignol had now received the additional information requested from Dexia and would therefore be able to complete the 2000 accounts before the transfer of the trusteeship took place in the week commencing 7 th January 2002. At about the same time (the letter is undated) the compliance officer of Guardian, Mr Johnson, responded to the settlor's e-mail of 13 th December. He dealt at some length with the settlor's complaints but ended by saying that Guardian did not propose to charge its annual trustee or corporate fee in relation to 2002 but that Guardian would charge fees accrued to date and time charges incurred dealing with the transfer of the Trust and the Company. He confirmed that the transfer would take place during the week commencing 7 th January 2002.

12 In evidence Mr Van Neste confirmed that, despite the offer of Herald to take the Trust without the 2000 accounts, he felt that Le Rossignol were so close to finalising the 2000 accounts that it would be preferable to do so before handing the Trust over. He confirmed that the 2000 accounts were finalised by Le Rossignol prior to the end of December 2001.

13 On 11 th January 2002 Guardian was informed by Dexia that the account had been blocked, so that the payment of £8,013 to Le Rossignol had not been made. This produced various exchanges between Guardian, Dexia and the settlor. Dexia asserted that certain further information was required for due diligence purposes whereas Guardian suspected that the settlor had once again managed to block the account as he did not agree to Le Rossignol's fees being paid. The account at Dexia had been blocked by the settlor on previous occasions.

14 In any event, the account was unblocked by early February and the £8,013 paid. On 6 th February, Mr. Van Neste sent an e-mail to the settlor stating that, now that the account was unblocked, he would finalise the time charges and outstanding fees. He said that he would then request Dexia to pay those fees as well as Guardian's legal disbursements in connection with the transfer. On receipt of the funds, the deed of retirement would be executed. The settlor replied that he thought that the £8,013 had covered everything and was not impressed with Guardian's response that this was merely a disbursement for the preparation of the accounts. Further exchanges followed with Mr. Van Neste stating that further fees had been incurred because of the blocking of the account and the consequent delay, and the settlor insisting that the transfer should proceed immediately with no further fees in respect of 2002. On 16 th February Mr. Van Neste e-mailed the settlor to say that instructions to pay the accrued fees would be given on Monday 18 th February, to which the settlor replied insisting that he should know how much these fees were to be.

15 On 18 th February Guardian gave instructions to Dexia to make three payments to its client account, namely £3,586 in respect of fees to Bedell Cristin, £1,565 in respect of further fees to Le Rossignol and £25,601 in respect of its own fees. However, it did not inform the settlor of this request or of the amounts involved. When giving evidence, Mr. Van Neste conceded

that he had done this deliberately. He felt that the relationship between him and the settlor was such that the settlor would have blocked the payment if he had been informed of the request in advance. In fact, by seeking to transfer fees from Dexia to its client account without informing the settlor, Guardian was more likely to bring about a blocking of the fees; and this is just what occurred.

16 On 27 th February, Crills wrote to Bedell Cristin, stating that the settlor had been informed of the payment instructions and objected strongly to them. They asked for detailed breakdowns of the fees now charged as well as all fees charged since inception of the structure. The disbursements in respect of Bedell Cristin and Le Rossignol were in fact paid by Dexia on 7 th March but no payment was made in respect of Guardian's fees, which remained blocked for some time. We have no doubt that this was because the settlor had asked Dexia not to make the payment and, as in the past, Dexia had chosen to give greater weight to the settlor's wishes than to the instructions received from Guardian as the signatories on the account.

17 On 12 th April, Bedell Cristin replied to Crill's letter of 27 th February. That letter annexed a detailed breakdown of the fees claimed by Guardian up to 31 st December 2001. The breakdown had been prepared by Mr. Van Neste and went into very considerable detail of the time spent on particular days on particular work. The letter quoted a figure of £23,649 in respect of time charges from inception to 31 st December 2001. No time charges had in fact been previously billed. The only charges levied previously had been the annual fixed charges. A further letter clarifying certain matters about the fees was sent by Bedell Cristin on 23 rd April.

18 On 25 th April, Crills replied. They asserted that the level of Guardian's time charges were in dispute primarily because Le Rossignol had been brought in to prepare accounts which ought to have been done by Guardian and secondly, that some of the work for which time had been charged was already covered by the annual fixed charges. The legal fees of Bedell Cristin were queried on the basis that some of the work related to Guardian taking advice on its own position.

19 Most importantly, the letter offered a way forward so that the transfer of the Trust to Herald could proceed despite the fee dispute. Crills suggested that the sum of £25,571 (being the sum claimed in the letters of 12 th and 23 rd April) should be placed in an interest-bearing escrow account to be held by Bedell Cristin to the order of the Trust and Guardian; that the Trust be transferred to Herald within seven days of the establishment of the escrow account; and that, if the fee dispute were not resolved by 30 th June 2002, it should be submitted to expert determination. Crills suggested two names as experts.

20 On 8 th May Bedell Cristin wrote a long response. The suggestion of an escrow account was rejected on the grounds that a full breakdown of the fees had been supplied to Crills,

who had also been offered the opportunity of reviewing Guardian's files. The letter stated that the Trust would not be transferred until the fees were paid in full and went on to say that Guardian's services were withdrawn and had been withdrawn since the beginning of the year.

21 We interpose to deal with that comment at this stage. When he gave evidence, Mr. Van Neste conceded that Guardian had not in fact withdrawn its services at any stage, and we accept from the evidence before us that this was so. Mr. Van Neste accepted that the statement was untrue. It had been designed to exert pressure on the settlor to agree the fees. In our judgment, this was a most ill-advised statement. Guardian should not have asserted that it had or was going to withdraw its services and its legal advisers, Bedell Cristin, should never have agreed to the insertion of such a statement in a letter. In a case such as this, where there are assets which remain under the control of the trustee and need to be administered and from which fees can ultimately be drawn, the trustee is under a continuing duty to exercise its duties as trustee to monitor and administer the assets, notwithstanding the existence of a fee dispute.

22 On 17 th May Crills replied expressing their disappointment that the escrow arrangement had not been accepted and taking strong exception to the assertion that trustee services had been withdrawn. They repeated that the core of the dispute related to Guardian's failure to maintain proper accounting books and records and that a large proportion of Le Rossignol's work had been incurred unnecessarily first in identifying deficiencies in the records and then later in reconstructing them. On 22 nd May, Bedell Cristin replied, emphasizing that a very detailed breakdown of fees had been supplied and requesting Crills to identify which items in the breakdown were queried so that they could be considered by Guardian. They defended the decision to refuse the escrow arrangement and re-stated that Guardian was not able to take the fees because the account with Dexia remained blocked.

23 Crills subsequently took up the offer to inspect the files and on 21 st June wrote a long letter making general points concerning the fees and a shorter letter stating that they were not willing to conduct a taxation exercise in relation to the fee breakdown and accordingly they had not dealt with individual time charges. They made an offer of £10,000 in respect of the fees but this was subsequently withdrawn on 8 th July.

24 There was some further correspondence between the parties including a 23 page letter from Bedell Cristin (which it transpires was substantially drafted by Mr. Van Neste) responding to the criticisms contained in the letter of 21 st June. On 30 th August, Crills wrote offering to pay the £25,571 in full, provided that the Trust was transferred in 28 days. Bedell Cristin did not reply until 11 th October. They began by pointing out that there was a further £3,013 due in respect of fees to 31 st December 2001, being fees in relation to the time charges spent on the Trust itself, rather than the Company (in respect of which the earlier fees had been raised). They went on to say that fees had been incurred in 2002.

Adding together time charges on the Company, time charges on the Trust and the fixed annual fees for the Company and Trust, Guardian claimed £33,325.65 in respect of 2002. This was of course the first time that any fees in respect of 2002 had been quantified, although there had been occasional references previously to the fact that fees were being incurred.

25 The consequence of this communication was that Guardian on the one hand and the beneficiaries and Herald on the other each issued a representation. That of the beneficiaries came before the Court on 22 nd November at which time a peremptory order was made requiring Guardian to retire, but its position was protected by ordering the full amount claimed by way of fees to be paid into Court and that £30,000 of this amount be paid to Guardian immediately subject to an undertaking to repay any amount which was ultimately found not to be due. In relation to the 2002 fees, Guardian had divided these into 'legal' and 'non legal'. The latter dealt with ordinary matters of trustee administration; the former dealt with time spent on matters where Bedell Cristin were involved, primarily in connection with Guardian's fees.

26 Various negotiations took place between the parties but they were unable to settle their differences although they came very close at one stage. Eventually, in 2004, the parties agreed to refer the matter to an independent expert, although his report would not be binding. They agreed upon Mr. Nicholas Walker, a partner in the firm of Jackson Fox, Chartered Accountants, who has extensive experience in the administration of trusts and companies in the island.

**Mr. Walker's report**

27 We have had the opportunity of reading Mr. Walker's report and he also gave evidence before us. We were grateful to him for undertaking the exercise and we found him to be an impressive witness. He stated that he had reviewed the correspondence files (although not necessarily reading every letter) and was therefore familiar with the general administration of the Trust and the Company throughout the period. He had met with Mr. Van Neste and Mr. Sharp to receive their comments and had also received detailed written submissions from Bedell Cristin and Crills. He had not reviewed every item in the fee breakdown against the files. He had merely checked matters on a 'test' or 'sample' basis in order to reach his conclusions as to reasonableness and had also of course considered the fees against his general understanding of the level of administration required obtained from the correspondence files. His report was issued on at 5.00 p.m. on 13 th October 2004. He agreed that he had only received the detailed fee breakdown from Guardian in respect of 2002 on 11 th October. This had not given him much time but he felt that he had had sufficient time to consider the 2002 fees and did not feel pressurised. He said that he did not consider it part of his remit to decide whether Guardian's rejection of the proposed escrow arrangements in April 2002 was reasonable. When questioned by the Court, he was reluctant to categorise Guardian's decision as unreasonable but did say that, if he had been the trustee, he would have accepted the offer subject to adjustment of the amount put

into escrow to take account of fees accrued in 2002 until the date of the escrow offer. He also pointed out in his report that, even by then, there had been no firm identification by the beneficiaries and Herald of specific aspects of Guardian's fees which they considered to be excessive. All the fees were questioned.

28 We summarize Mr. Walker's conclusions as follows:–

(i) He concluded that the fixed annual fees were reasonable. However he noted that in December 2001 Guardian had said that it would not charge fixed fees for 2002. He felt that it should honour that commitment even though it had not retired until November 2002.

(ii) As to the time charges up to the end of 2001, he considered that most of them were caused by the inadequacy of the information received from Dexia. Once it was identified that this information was insufficient, it was reasonable for Guardian to instruct Le Rossignol to prepare full accounts. There had not been any duplication of time charged as between Guardian and Le Rossignol. In his opinion the time charges up to 31 st December 2001 in respect of both the Trust and the Company were proper and reasonable.

(iii) As to 2002, he considered that the matter turned into a fee dispute in April. He concluded that the non-legal fees for 2002, which related to the ordinary administration of the trust assets, were proper and reasonable. As to the fees categorised as ‘legal’, he felt that some were properly recoverable but that much time was spent by Guardian on attempting to obtain its fees. He recommended that 60% of the ‘legal’ fees of Guardian should be recoverable. He did not explain the figure of 60% in his report, but, in evidence, he said that it was intended to strip out any profit element. He considered that the profit margin for a trust company in Jersey was between 30% and 40%. He had therefore taken the higher figure in order to ensure that no profit accrued to Guardian in respect of the ‘legal’ work.

(iv) As to the final fees for the period 11 th October to 30 th November 2002, he disallowed the two retirement fees of £1,000 in respect of the Trust and the Company respectively. He allowed the non-legal fees in full save for the sum of £1,800 spent on work concerning whether the settlor had been resident in the United States at certain times. He allowed 60% of the ‘legal’ element of the final bill on the same basis as previously.

(v) As to Bedell Cristin fees, he allowed them in full up to 12 th April (being the date of the last convenient fee note). He disallowed all subsequent fee notes on the basis that, thereafter, Bedell Cristin was advising Guardian in its own interests rather than in the interests of the Trust.

29 Guardian did not agree entirely with Mr. Walker's findings. This is hardly surprising. In particular, it felt that the disallowance of the two termination fees was unfair as, according to

Mr. Van Neste's evidence, it had not charged for any time spent on handing over the assets because it was charging a fixed fee. We have some sympathy for Guardian in this respect. It also felt somewhat aggrieved at the disallowance of time spent considering the settlor's residential position because of the need to consider whether the trustee had an obligation to file a U.S. tax return. Inevitably, there were other matters where it did not agree with Mr. Walker's decision but it was willing, for the sake of compromise, to accept Mr. Walker's report in full and indeed, at the hearing before us, its stance was that we should give judgment for the fees upheld by Mr. Walker.

30 In the light of Mr. Walker's report, Herald and the beneficiaries, whilst again not agreeing entirely with what Mr. Walker had concluded, nevertheless modified their position somewhat from their earlier stance. However there were a number of matters which they felt unable to accept. Essentially, their position before us was as follows:–

(i) They now accepted all the time charges up to and including 2000. They also accepted the vast majority of the time charges up to October 2001 subject to certain minor matters to which we will refer shortly. However they submitted that Guardian should have retired by the end of October 2001 and the fees after that date should therefore be disallowed.

(ii) It followed that no fees should be payable in respect of 2002. Even if their point at (i) was not accepted, Guardian should certainly have retired in January 2002 at the latest. No Bedell Cristin fees for 2002 should be payable.

(iii) If, contrary to their submission, some fees were payable in respect of 2002, none of the ‘legal’ fees of Guardian were payable as they related to the fee dispute where Guardian was acting in its own interests and not those of the beneficiaries.

(iv) On any view, Guardian should have accepted the offer of the escrow arrangement, and should therefore receive no fees thereafter.

(v) Even if some ‘non-legal’ fees were payable throughout 2002 in respect of routine administration, they were excessive and items in respect of certain types of work should be disallowed. Furthermore, some of the items included as ‘non-legal’ were in truth ‘legal’ and should be re-classified.

**Conclusions**

**(i) 2001 fees**

31 Mr. Michel submits that the sum of £1,700.29 should be disallowed. This is essentially on two grounds. First, he submits that Guardian should have retired as trustee by 31 st October 2001 once it had been informed at the beginning of October that Herald no longer required completion of the 2000 accounts by Le Rossignol. Secondly, certain items, which Mr. Sharp took us through, should have been disallowed or not allowed in full. As an example, he suggested that excessive time had been spent reviewing the Dexia valuations.

32 As to the first point, we accept Guardian's case that it was reasonable for it to wish Le Rossignol to complete the 2000 accounts. Such accounts were very close to completion by the end of October 2001 and only a small amount of further information was still required from Dexia. As we know, the accounts were in fact completed by mid December. In our judgment, it was reasonable for Guardian not to have retired before 31 st December 2001. As to the second point, we have considered Mr. Sharp's observations. We agree with Mr. Walker's view that time spent in 2001 was reasonable. We therefore uphold all the fees for 2001.

33 We should add on a point of detail that we agree with Mr. Sharp's comment that it was not acceptable practice for Guardian only to notify anyone of the existence of the invoice to the Trust in the sum of £3,013 (which was in respect of fees up to 31 st December 2001) in October 2002. As he said, this was guaranteed to inflame the settlor and to increase the intensity of the dispute. Nevertheless, the failure to render the invoice promptly does not lead us to say that Guardian should not be paid for work properly done. We would add that some of the problems encountered in this case might have been avoided had Guardian followed normal practice and rendered invoices on a regular and timely basis. One of the difficulties was that the settlor was faced in early 2002 with an invoice covering time spent since the creation of the entities back in 1998.

**(ii) The 2002 fees**

34 In order to determine these we must consider when Guardian ought to have retired as trustee in favour of Herald. By January 2002, all was apparently agreed save for the levying and payment of Guardian's fees and the actual transfer. However, problems arose because Dexia blocked payment of the Le Rossignol fees. When the account was unblocked Guardian then instructed Dexia to pay its time charges to 31 st December 2001. The payment of this was again blocked at the settlor's request. We accept that it was not reasonable to expect Guardian to transfer the trusteeship at a time when it did not have control of the bank account and when it could not obtain payment of its fees. We regard the primary responsibility for the delay between January and April 2002 as lying with the settlor. He had instructed Dexia not to pay Guardian's fees. There was therefore deadlock. As long as he prevented Dexia paying the fees, there was unlikely to be any transfer of the Trust in the absence of adequate security.

35 However, Guardian is not free from blame. In our judgment, it erred in two respects. First, it was unduly slow in preparing the fee notes. The original plan was for the transfer to take place in early January 2002. Mr. Van Neste should therefore have been busy quantifying Guardian's fees so as to render them promptly at that time. We accept that the blocking of the account in January delayed matters but it was unblocked in early February. It took until 18 th February for Guardian to request payment of its fees, and even then it did not have a detailed breakdown to back them up. This was prepared later at the request of the settlor. Guardian's second error was to try and transfer the fees surreptitiously without notifying the

settlor of the level of fees, despite having assured him earlier that it would do so. It is hardly surprising that, given the history of difficulty between them, this inflamed the settlor further. It was, moreover, contrary to general good practice and with the requirements of transparency as expected by the Code of Practice published by the Jersey Financial Services Commission.

36 We hold, therefore, that the blocking of the account by the settlor was the primary cause of the delay in the transfer of the Trust until 25 th April and that Guardian is not to be penalised for not having retired before then. However, matters were transformed on that date. Crills offered to place all the fees demanded by Guardian in an escrow account under the control of Bedell Cristin. There was, therefore, 100% security for Guardian. Mr. Van Neste in his evidence and Mrs. Springate in her submissions tried valiantly to defend Guardian's decision to reject the escrow proposal but they were wholly unsuccessful. We accept that, by 25 th April, further fees had been incurred by Guardian. It would therefore have been reasonable for Guardian to respond to the offer by saying that the escrow proposal was acceptable subject to the amount being increased to reflect the fees claimed until that date. This in effect is what the Court did in November 2002. But no such response was made. The escrow suggestion was simply rejected out of hand.

37 In our judgment, Guardian was very ill advised to act in this manner. A retiring trustee is entitled to be paid its fees before retiring. However, fee disputes often arise. In those circumstances, a trustee is entitled to security for its disputed fees. But it is not entitled to exert improper pressure to agree the fees by withholding the entire trust fund; nor is it entitled to security over the whole trust fund. An escrow arrangement of the nature proposed gives the retiring trustee all the security to which it is entitled. Provided that the sum had been increased to cover the fees to 25 th April 2002, and the fees to be incurred in transferring the Trust and the trust assets, Guardian should have accepted the escrow arrangement. We have no doubt that had Bedell Cristin sent a response along the lines we have suggested, Herald and the settlor would have agreed to increase the escrow amount to cover the additional fees. Indeed we accept Mr. Sharp's evidence that he would have advised payment of such a sum. But Herald and the settlor were never given the opportunity to consider this option because the escrow arrangement was rejected out of hand.

38 We find that Guardian acted unreasonably in rejecting the escrow proposal. Allowing a period of a few days to put the arrangements in place, we find that Guardian should have retired as trustee by 30 th April 2002. We will consider the reasonableness of the 2002 fee notes in the light of that finding.

**(a) 'Legal fees'**

39 Guardian divided its fees in 2002 into 'legal' and 'non legal'. We were told that fees were categorised as 'legal' where they reflected time spent on matters where Bedell Cristin were

involved. This was mainly in connection with the fee dispute. The ‘non legal fees’ were for ordinary administration.

40 Time spent on defending a trustee's position against its beneficiaries is not recoverable out of the trust fund. Such time is spent looking after the trustee's own interest rather than those of the beneficiaries. The matter can be simply tested by considering what would have happened if Guardian had resigned on 30 th April, as it should have. It could not then have charged any time spent thereafter in justifying its fees because it was no longer trustee. Of course, it might have obtained an order for costs in the event of successfully suing for its fees, but, in accordance with normal taxation principles, that would have covered Bedell Cristin's legal fees but it would not have covered time spent by Guardian itself. Thus, on Mrs. Springate's analysis, by wrongly staying on as trustee after 30 th April, Guardian should be able to recover time spent in pursuing its fee claim out of the trust fund whereas, if it had correctly resigned on 30 th April, it would not have been able to do so. This is not an attractive proposition.

41 We appreciate that we are differing from Mr Walker, who would have allowed 60% of these fees. But in our judgment, he failed to have regard to the principle which we have described in the preceding paragraph. We therefore disallow the ‘legal’ fees, whether incurred before or after 30 th April, on the basis that these were fees spent on pursuing Guardian's own interests rather than the interests of the Trust and the beneficiaries. This is however subject to consideration (see below) of whether some matters included in the ‘legal’ invoices were in truth matters of ordinary administration.

**(b) Non legal fees**

42 Mr. Sharp identified a number of entries in the detailed fee breakdowns where matters were charged as ‘non legal’ which were clearly in fact ‘legal’ as relating to the fee dispute. During the course of the hearing these were agreed in the sum of £1,364.58 in respect of the first invoice (1 st Jan — 11 th October 2002) and £656.43 in respect of the second invoice (11 October — 30 th November).

43 It was also contended by Mr Sharp that a number of entries showed an unreasonable amount of time spent. These fell into five categories. First, there was the review of the Dexia information. As in 2001, he felt that excessive time had been spent on this. Secondly, some of the narrative was not sufficiently clear to determine whether it was reasonable. Thirdly, time was spent on the blocked account with Dexia. For example, Mr. Van Neste had called in to see Dexia in Luxembourg in order to seek to free the account. There had also been correspondence on the topic. Mr. Sharp felt that Guardian was acting primarily in its own interests in seeking to free the account so as to obtain payment of its fees rather than in the interests of the beneficiaries. Fourthly, there was time spent on considering an appointment of a new investment manager because of Dexia's poor performance. However, this had not been finalised by the time the transfer of the Trust took place and accordingly Mr. Sharp felt

that it would be unreasonable to allow Guardian to charge for all its time spent in this respect. Fifthly, time had been spent on arranging a loan for the settlor. Again this had not been seen through to completion by the time of the transfer and for the same reason Mr. Sharp felt that not all the time should be allowed.

44 We have carefully considered Mr. Sharp's observations. But we are satisfied, as was Mr. Walker, that time spent in administering the Trust and the Company in 2002 was reasonable. Accordingly, subject to the point to which we come in a moment, we make no deduction from the 'non legal' fees claimed apart from the two sums previously referred to which were incorrectly classified as 'non legal' rather than 'legal'.

45 But the fact remains that, as from 1 st May 2002, Guardian should not have been trustee of the Trust or administrator of the Company. It should have retired by then. Should it therefore receive any fees for work done after that date? As against that, the trust property had to be administered. If Guardian had not done it, Herald would have done it. On the basis of our finding that the level of fees was reasonable, the Trust suffered no extra expense. It merely paid Guardian rather than Herald for looking after the Trust and the Company during this period.

46 In these circumstances, we think it would be wrong to disallow the fees altogether, notwithstanding that Guardian should no longer have been trustee after 30 th April. That would be to confer a windfall benefit upon the beneficiaries in the form of free administration of the assets for seven months. Conversely, although to allow the fees in full would not cost the Trust anything extra, it would mean that Guardian benefited from its decision unreasonably not to retire by 30 th April to the extent of the profit element of its fees during that period.

47 We think that the fair solution is to allow Guardian to cover its costs in respect of its administration of the Trust and the Company during this period, but not to make any profit. To the extent that this confers a modest windfall benefit on the Trust, we think that that is necessary in order to ensure that Guardian does not benefit from having wrongly failed to retire by 30 th April.

48 To that extent, we disagree with Mr. Walker, who would have allowed the non legal fees in full. This arises out of our finding, which he did not consider, that Guardian should have retired as trustee by 30 th April 2002. We do however accept Mr. Walker's evidence as to profit levels and accordingly, like him, we propose to allow 60% of Guardian's non legal fees. This is intended to cover their costs but ensure that no profit is made in respect of this work.

**Bedell Cristin fees.**

49 It follows from our conclusion on when Guardian should have resigned that it is not entitled to reimbursement of any legal fees for Bedell Cristin incurred in connection with the fee dispute. Mr. Walker disallowed all fees after 12 th April and we would endorse that as being the nearest practical point to 30 th April. We are conscious that there may be some time in Bedell Cristin's fees prior to that date which related to fees but, taking a broad view, we consider this is likely to be offset by time spent by Bedell Cristin after 30 th April 2002 where it was proper for Guardian to consult Bedell Cristin, e.g. the terms of the deed of retirement, the blocking of the account by Dexia, the change in investment manager and the loan to the settlor. Taking the matter in the round, we therefore adhere to Mr. Walker's view and we allow all Bedell Cristin fees up to and including 12 th April and disallow all those thereafter.

**The calculation in detail**

50 We have set out our decision as to the principles to be applied to the various invoices. However, detailed calculations need to be carried out in order to work out exactly what is due. Some of these were carried out during the course of the hearing and we gratefully adopt those figures. However, we have had to carry out other calculations in the light of our decision. It is possible that in doing so we have made errors. We will therefore be willing to hear any submissions on our calculations. However, where we have exercised our judgment (e.g. deciding on the number of units categorised as ‘legal’ which we would re-categorise as ‘non-legal’) we are not willing to hear further submissions. The costs of this case are already wholly out of proportion to the amount at stake and we do not wish to encourage the parties to run up further legal fees for the sake of making submissions which could have only a minor effect on the final outcome, even if they were to be accepted by the Court.

51 We turn therefore to the figures. During the course of the hearing, the parties agreed that, after allowing for certain agreed matters, Guardian was entitled to £20,091.83 (in addition to the £30,000 which it has already received), if the Court were to endorse Mr. Walker's report in full. (See the document headed ‘Re-revised Schedule D’ prepared by Mr. Sharp and produced during the hearing). It is therefore convenient to take this as a starting point, (as did the parties), and calculate the effect of the Court's findings upon that figure.

52 In our judgment, the following deductions have to be made from that figure to reflect our disallowance, in principle, of all the ‘legal’ fees for 2002:–

Deducting this sum from £20,091.83 means that, so far, the amount due to Guardian is reduced to £3,878.16.

| | | |
|---|---|---|
| (i) | £11,452.00 | being the remaining 60% of the ‘legal’ element of the first invoice in 2002, Mr. Walker having already deducted 40% |
| (ii) | £1,364.58 | being the agreed amount in the ‘non legal’ category of the first invoice |

| | | |
|---|---|---|
| (ii) | £1,364.58 | which should be re-categorized as 'legal' and therefore disallowed |
| (iii) | £1,740.66 | being the remaining 60% of the 'legal' element of the second invoice |
| (iv) | £1,656.43 | being the agreed amount in the 'non legal' category of the second invoice which should be re-categorised as 'legal' and therefore disallowed |

**TOTAL £16,213.67**

53 The 'non legal' fees in the first invoice amount to £9,000. (See page 316 (xxxxiv) of Guardian's bundle). From this, £1,364.58 has already been removed to the 'legal' category. The balance therefore comes to £7,635.42. We consider that the disbursements of all the various invoices should be allowed in full.

54 The principle we must apply is that 100% of the 'non legal' fees up to 30 th April are allowable whereas, after that date, only 60% is allowable. We have been through the detailed fee breakdown. We calculate that the time spent on 'non legal' matters prior to 30 th April is 63 units of category A, 30 units of category B, and 48 units of category C. Applying the rates set out in the breakdown, this amounts to £1,911.30. It follows that £5,724.12 relates to 'non legal' work carried out after 30 th April. 40% of this is £2,289.65. That is the sum which we must disallow in respect of the 'non legal' work of this first invoice. Deducting that sum from the figure of £3,878.16 referred to in para 52 above, results in an amount of £1,588.51 as being due.

55 The 'non legal' fees included in the second invoice were originally £3,960.83 (see page 316 (lxvii) of Guardian's bundle). Of this, £1,656.43 has been transferred to the 'legal' category, leaving £2,314.40. 40% of this amounts to £925.76. Deducting that sum from £1,588.51 leaves £662.75 due to Guardian.

56 There are certain further matters to be addressed:–

(i) Mr. Walker deducted £1,800 in respect of time spent on the settlor's residential position. Mr. Sharp went through the breakdown and calculated that there was a further modest amount which had been spent on that sum. We are not entirely entirely convinced that it was right for Mr. Walker to deduct this amount and in the circumstances we do not propose to make any further deduction in respect of this very modest amount.

(ii) The account for the Trust (as opposed to the Company) for 2002 was £1,677.25. Of this, only £811.67 consisted of fees. According to the detailed breakdown all but three units were carried out before 30 th April. 40% of 3 units is really *de minimis* and in the circumstances we allow this amount in full and make no further deduction.

(iii) Going through the 2002 breakdown, we have identified matters where work has been classified as ‘legal’ when it did not relate to the fee dispute. This is consistent with Mr. Van Neste's explanation in evidence that he tended to put under that category all work concerning the lawyers. We have taken a figure of 60 units of a category A fee earner as relating to matters such as the blocking of the account by Dexia, the change of the investment manager, the loan to the settlor and the terms of the deed of retirement. It is not possible to be exact because the narrative against some of these entries indicate that fee dispute matters were also included. However, we have taken a conservative view (looked at from Guardian's perspective) in reaching a figure of 60 units. In our judgment, it is not reasonable for Guardian to be deprived of these sums merely because it put them under the heading ‘legal’. The correct test is whether this was time spent on looking after Guardian's own interests or on matters which were connected with the proper administration of the Trust. We have already held that these four categories of matter were concerned with the proper administration of the Trust. An A category fee earner was charged at £23.33 per unit. Accordingly, we consider that the sum of £1,400 included in the ‘legal’ category should be treated as falling in the ‘non legal’ category. Applying the principle described above, we therefore allow 60% of this sum i.e. £840.

57 The result is that, according to our calculations, Guardian is entitled to the sum of £1,502.75 (£662.75 + £840.00) in addition to the £30,000 it received at the time of its retirement. We therefore give judgment in that sum.

**Postscript**

58 We think that both sides in this case committed errors of judgment which contributed to the problems which arose. Although we have dealt with most of these during the course of this judgment, we think it might be helpful to list them briefly at this stage in case lessons can be learned for the future.

59 So far as Guardian is concerned:–

(i) As stated in para 33 it erred in submitting a substantial fee note for the period 1998 to 2001 as late as January 2002, particularly as it had given no clear warning that this was the case. Good practice requires regular and timely billing so that all sides know where they stand.

(ii) As stated in para 35 Guardian was too slow in preparing its fees once agreement in principle for the transfer of the trusteeship had been reached. There is inevitably some tension when a trusteeship is being transferred and it is incumbent upon retiring trustees to calculate their fees promptly so that this period of tension is kept to a minimum.

(iii) As stated in the same paragraph, Guardian should not have tried to obtain its fees surreptitously no matter what the provocation. A trustee must be open and transparent in relation to fees.

(iv) As stated in para 21 it was wrong to say that services had been withdrawn. It would have been equally wrong to have threatened to withdraw services.

(v) There was a wholly unacceptable delay in producing a breakdown of the 2002 fees. These fees were notified to the settlor and Herald in late 2002; yet a detailed breakdown was only produced on 11 th October 2004 for the purposes of Mr Walker's report.

(vi) For the reasons set out in paras 36 and 37 Guardian should have accepted the proposed escrow arrangement. Where a trustee is retiring but there is a dispute about fees, the trustee is entitled to arrangements which will ensure that it receives any fees ultimately to be found to be due but it is not entitled to greater protection than is necessary. An escrow arrangement of the type proposed in this case will usually give a retiring trustee the required level of security.

60 As to the beneficiaries and Herald:–

(i) They were wrong to have refused to particularise exactly which elements of the fees they objected to, particularly bearing in mind that they had been provided with a very detailed breakdown. It was not until, pursuant to an Order of this Court, they filed a Statement of Case in November 2004 that, for the first time, they made clear which elements of the fees they were objecting to and which they were not. That was a highly unsatisfactory method of proceeding. It is hardly surprising that, faced with such obduracy and lack of detail, the dispute escalated, because there could be no sensible dialogue which might have led to an early compromise.

(ii) The action of the settlor in procuring the blocking of the account was unhelpful and led to the incurring of extra and unnecessary time and expense.

61 The dispute was originally about the fees up to 31 st December 2001. On that aspect the objections of the beneficiaries and Herald have been found to be unjustified both in the opinion of Mr Walker and by this Court. Guardian has been wholly successful in this respect. Ironically, however, because of the way that the dispute was handled by both sides, substantial fees and costs were run up in 2002 and these eventually formed a further substantial area of dispute between the parties.