

## Church Street Trustees Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	15 January 2021
<b>Neutral Citation:</b>	[2021] JRC 41
<b>Date:</b>	15 January 2021
<b>Court:</b>	Royal Court

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### Text

[2021] JRC 41

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, Esq., Bailiff, and Jurats Olsen and Austin-Vautier

In the Matter of the Re-Amended Representation of Church Street Trustees Limited

And in the Matter of the X Trust

Between  
Church Street Trustees Limited  
Substitute Representor

and

A  
First Respondent

and

B

Second Respondent

and

C

Third Respondent

and

D

Fourth Respondent

and

F

Fifth Respondent

and

Giulio Sgaria

Sixth Respondent

and

Titris SA

Seventh Respondent

and

Nerina Cucchiaro

Eighth Respondent

**Advocate D. R. Wilson for the Substitute Representor.**

**Advocate R. D. J. Holden for the Second and Third Respondents.**

**Advocate D. Evans for the Fourth Respondent.**

**Advocates M.P. and J-M. G. Renouf for the Seventh and Eighth Respondents.**

## **Authorities**

Trusts (Jersey) Law 1984.

Lewin on Trusts (20th Edition).

*Landau v Anburn Trustees* [\[2007\] JRC 084](#).

*Hollington v Hewthorn & Co* [\[1943\] KB 587](#)

Trust — application by the Seventh and Eighth Respondents for payment of fees

Bailiff

## THE

- 1 On 14<sup>th</sup> and 15<sup>th</sup> October 2020, we sat to hear an application by Titris SA (“the Seventh Respondent”) and Nerina Cucchiaro (“the Eighth Respondent”) for the payment of their fees while acting as Trustee of the X Trust (“the Trust”) from the Trust Fund. We reserved Judgment and on 9<sup>th</sup> November 2020, at the request of the Seventh and Eighth Respondents, we issued our decision in this case with fuller reasons to follow.
- 2 It is not in our view necessary to set out the full background to this application. Matters relating to the Trust have occupied the Courts and have been the subject of ongoing disputes for a significant period. Much of the background has been referred to in the judgments and the decisions of the Court on those earlier occasions in connection with applications for directions, we do not need to set them out again.
- 3 This is in effect the last stage of this dispute. The Seventh Respondent is claiming its costs incurred during two periods firstly, when it was the Trustee of the Trust from its appointment to 30<sup>th</sup> September, 2014, when the Trust came to an end, on its terms (“the First Period”), and secondly, during the period after the Trust came to an end when the Seventh Respondent remained functioning as a Trustee until 26<sup>th</sup> October, 2015 (the “Second Period”). Thereafter, the Seventh Respondent ceased to act as a Trustee and the Eighth Respondent in effect took over as Trustee. She, the Eighth Respondent, claims her fees for acting as a Trustee on the same basis as does the Seventh Respondent until 14<sup>th</sup> December 2018 (the “Third Period”).
- 4 It was the case, therefore, that for at least the Second and Third periods, the Seventh and Eighth Respondents were acting as bare trustee or “*trustee de son tort*.”
- 5 Prior to the Seventh Trustee taking over as trustee of the Trust, the Trustee had been ING Trust Luxemburg SA (“ING”), and it appears that ING had been paid at a rate of 0.15% of the net asset value of the Trust for its services as trustee. The Seventh and Eighth Respondents sought payment on the same basis.
- 6 At the outset of the hearing, matters of procedural concern were raised by the Seventh and

Eighth Respondents. This was to the effect that whereas the Seventh and Eighth Respondents had conformed to the previous directions of the Court, in preparation for the hearing before us, the other Respondents had not done so. In particular they had neither filed any affidavit evidence in support of the position that they were taking nor indeed had they applied to cross-examine the deponents of two other affidavits, namely those of Mr H and Mr J, former protectors of the Trust, whose affidavits had been tendered on behalf of the Seventh and Eighth Respondents. No satisfactory explanation was offered to the Court for these apparent failures. The consequence of this situation was that there was limited evidential underpinning for the allegations and the factual challenges made to the case for the Seventh and Eighth Respondents or any case argued for by the other Respondents. The only live evidence before us was that of the Eighth Respondent, Nerina Cucchiaro, who appeared before us by video link. The Court's concerns as a result of the procedural position were reflected in a short *ex tempore* Judgment and matters proceeded.

## The Law

7 The Trusts (Jersey) Law 1984 at Article 26 states:

***“(1) Unless authorized by —***

***(a) the terms of the trust;***

***(b) the consent in writing of all of the beneficiaries; or***

***(c) any order of the court ,***

***a trustee shall not be entitled to remuneration for his or her services .***

***...***

***(2) A trustee may reimburse himself or herself out of the trust for or pay out of the trust all expenses and liabilities reasonably incurred in connection with the trust***

## First Period

8 The trust instrument setting up the Trust was originally drafted in Italian. Although we have three slightly differing translations before us, Clause 22.2 of the Trust Deed provides that:

***“the consideration payable to the trustee will be agreed by the latter and the protectors jointly.”***

9 It is clear therefore, that it was expected that the Trustees of the Trust would have remuneration and the Trustees and the Protectors would agree that remuneration between them.

- 10 The evidentiary position relating to the existence of an agreement between the Protectors and any trustee from time to time is somewhat unsatisfactory. A number of documents relating to the Trust were seized by the Italian Judicial Authority and, we are advised, much of it remains missing.
- 11 However, we have before us the Affidavit of Mr H of 10<sup>th</sup> September, 2020, the Eleventh Affidavit of the Eighth Respondent and the Affidavit of Mr J of 28<sup>th</sup> September 2020, and all refer to an unsigned copy of a Resolution of the Seventh Respondent dated 5<sup>th</sup> May 2005, which suggests that the Protectors have given their explicit consent with regard to charging.
- 12 Payment of fees also appear in the accounts of the Trust. A number of them were provided to the Protectors, and it is to be inferred that the charging of fees that appears in the various accounts must have at least been agreed by the Protectors from time to time. Affidavit evidence before us also indicates that the accounts were provided to beneficiaries and we have no evidence before us that the Beneficiaries had complained about fees.
- 13 The original professional Trustee of the Trust, ING, as we have said charged its fees at 0.15% of net asset value from the date of its engagement on 2<sup>nd</sup> August, 2002 until its resignation in favour of the Seventh Respondent. That Company was part of the ING Banking Group and it seems likely that it would not be charging if its fees had not been approved or on a basis that was in some manner deemed improper. We are further informed by affidavit evidence that personnel from ING moved to the Seventh Respondent, so there appeared to be some continuity of personnel when the Seventh Respondent took over.

## **Second and Third Periods**

- 14 In the light of the evidence before us, and that of Mr H and Mr J, it appears to us that the Seventh Respondent was entitled to charge on the same basis that ING charged, namely at 0.15% of net asset value. This would apply to the First Period.
- 15 After that period, 1<sup>st</sup> October, 2014 – 26<sup>th</sup> October, 2015, the Seventh Respondent continued to hold the assets as there was no agreement among the Beneficiaries as to who the assets should revert to and the Seventh Respondent needed to apply to the Court for directions which it did.
- 16 After 26<sup>th</sup> October, 2015, namely from 27<sup>th</sup> October, 2015 to about 14<sup>th</sup> December 2018, there was an appointment of the Eighth Respondent as Trustee who was at that time in any event the principal officer of the Seventh Respondent. Pursuant to an order made on 14<sup>th</sup> December, 2018, the Eighth Respondent's tenure came to an end when this Court appointed the Representor as Trustee "in the place of Ms Cucchiaro."

17 The Second Period therefore, occurred after the Trust had formally come to an end in its terms but at a time when it was impossible for the Seventh Respondent to divest itself of the assets. Accordingly, it needed to function as a Trustee and deal with those assets.

18 Lewin on Trusts (20<sup>th</sup> Edition) at paragraph 20–060 states:

***“In our view, a trustee's right to remuneration under a charging clause in the usual form, or under Section 29 of the Trustee Act 1925, does not end when the interests under the trust vest absolutely but continues until the trust assets have been distributed by him as trustee for the beneficiaries who are absolutely entitled, or if earlier, until expiry of a reasonable time for the trustee to effect distribution, taking account of outstanding or future liabilities for which retention by the trustee is reasonably required by the trustee to protect his rights of indemnity.*** But if the trustee voluntarily retires from office, is removed from office under an express power of removal, or otherwise ceases to hold office in accordance with the terms of the trust, it is doubtful whether he has any right to remuneration in respect of any period after he ceases to hold office, even while he continues to hold trust assets which do not automatically vest in the new or continuing trustees. An unreasonable refusal of a trustee to retire pending settlement of expenses or fees claimed by him may also have a prejudicial effect on his right to remuneration.”

19 We think that reflects the Law in Jersey. Although the Trust had come to an end, the Seventh Respondent could not hand over the assets and accordingly, unless there are reasons to the contrary, the Seventh Respondent's entitlement to fees in our view continued. We see no reason why those fees should not be calculated and paid on the same basis as in the First Period. Although the Trust had on its terms come to an end the Seventh Respondent had to continue through no fault of its own.

20 With regard to the Third Period Lewin at 20–051 states:

***“The court's inherent jurisdiction extends not only to a case where the application is made upon the appointment of the Trustee, but also to the case where remuneration is sought for work which is already been done.*** That is so, not only in a case where the trustee's services are required for the future and recompense for past work is needed in order to retain services of the trustee, but also in a case where there is no continuing need to retain his services. This is consistent with the power to award remuneration being based on the court's jurisdiction to secure the good administration of trusts.”

21 A number of case examples were placed before us, but we do not think that any of them go much further than the principles set out above. The fact that neither the Seventh nor the Eighth Respondents were professional trustees, because neither of them was licensed in

Jersey, does not in our view alter the position. An example of this Court authorising retrospective remuneration for a trustee that was not a professional trustee (being unlicensed in Jersey) is to be found in *Landau v Anburn Trustees* [\[2007\] JRC 084](#).

- 22 As we have indicated above, the only live evidence before us was the cross-examination of the Eighth Respondent. During the cross-examination she was subject to attacks as to the various stances and decisions she had taken in connection with the Trust, a suggestion was made that she was not acting for the benefit of the Beneficiaries the possibility that she had criminal convictions was put to her (upon which she made no comment on the advice of her Italian lawyers) and generally, she was attacked as to the accuracy of her understanding of the Trust assets and her stewardship in general.
- 23 We viewed the allegations made against the Eighth Respondent regarding supposed previous convictions as unhelpful. There was, firstly, no positive evidence before this Court relating to any such convictions – merely the suggestion made by Counsel for the Second and Third Respondents. Secondly, even if there were such convictions there is no evidence that they related to the functioning of the Eighth Respondent as Trustee. In any event, we accepted the submission made on her behalf that convictions were they to be evidenced would not be relevant as the principles in the well-known case of [Hollington v Hewthorn & Co \[1943\] KB 587](#) continue to apply to foreign convictions and therefore they are not admissible to the truth of what may be found within them.
- 24 Neither were we convinced by the suggestion that the Eighth Respondent may not have been properly appointed as a trustee. The fact is that both the Seventh and Eighth Respondents after the Trust expired on its terms, functioned as trustees, and there was no evidence that they did so in other than in good faith. Even if legitimate criticisms could be raised about the nature and sufficiency of their application to the Court for directions this would not in our judgment, disentitle either the Seventh or the Eighth Respondent to the payment of their fees. If the Trust had been caused loss by their act or default, then of course it may be open to the Beneficiaries/new trustees to commence proceedings for recovery of any such sums.
- 25 There was also some suggestion that certain documents may have been recently fabricated or are in some way other than accurate. Again, we found those suggestions to be unhelpful because there was simply no evidentiary underpinning to support any allegations of wrongdoing. That lack was a matter for the other parties who, as we have indicated at the beginning of this Judgment, did not file affidavits nor apply to cross-examine Mr H or Mr J. They were in effect, attacking the Eighth Respondent by innuendo and making what would be serious allegations without providing an evidentiary underpinning. They were effectively asking the Court to proceed on the basis of unsubstantiated suspicions.
- 26 No claims had been brought against either the Seventh or Eighth Respondent alleging breach of trust, for compensation or otherwise and it would in our judgment have been open to any other parties to do so before now. We cannot proceed on the basis that there is any



appropriate foundation to such allegations. Unless such is clearly the case, there must be some foundation on the face of the evidentiary record before us. There is no sufficient foundation.

- 27 We accept that the evidence of the Eighth Respondent was at the time difficult to understand because she had to function through an interpreter and over a remote video link. It is not clear to us that she always understood the nuances of the questions. She was at some disadvantage, however, in the cross-examination, because the issues put to her had not been raised in any pleadings or any other respect and she was left with having to answer sometimes quite detailed questions relating to documents without any, or any sufficient warning. This approach was described by her Counsel as “an ambush” and we have some sympathy with that description.
- 28 What did not appear to be in dispute, was that during the tenure of the Eighth Respondent a benefit of some €33m for the Trust had been secured by her.
- 29 Whatever the failings may or may not have been in the Eighth Respondent's trusteeship – and we have no basis for identifying any such failings with any measure of certainty if at all – it is clear that the Trust needed to have the services of a trustee and the Eighth Respondent, being a director and former director of the Seventh Respondent had as far as we are aware the appropriate expertise.

## Conclusion

- 30 In conclusion, and with regard to the First Period, it seems to us to be clear that the Trust Deed permits the charging of fees as claimed by the Trustees and agreed to by the Protectors. Accordingly, there is a valid charging provision.
- 31 The best evidence before us (although much of the documentation appears to have been lost during a number of investigations in Italy and in Luxembourg), namely draft and unsigned minutes identifying the basis of charging for previous years together with the affidavits of Mr H and Mr J, both sometime Protectors of the Trust, is to the effect that, as far as they were concerned the proper procedure for the agreement of fees had been gone through, and that the fees were as claimed by the Seventh Respondent. Indeed, no Beneficiary has ever objected to those fees in the past.
- 32 We observe that both Mr J's and Mr H's affidavits were challenged on the basis that we could not be certain on the face of them that they had been sworn. We reject such a challenge. *Prima facie*, they were both deposed before a notary, and no evidence was placed before us, claiming that such did not amount to the swearing of the affidavit and most significantly, none of the parties has asked the Court to require the deponents to be cross-examined. The other parties had, therefore, in our judgment, foregone any opportunity to challenge the accuracy and truthfulness of the affidavits and we accept them



at face value, as they were not internally inconsistent or obviously wrong. That is not to say that the Court felt that it had no choice but to accept the affidavits; but rather that it felt that it had no reason not to accept them.

- 33 Accordingly, regarding the First Period, we direct that the Seventh Respondent was entitled to its fees in connection with its trusteeship on the same basis as ING Trust had been paid thitherto, namely at 0.15% of the net asset value of the Trust.
- 34 Turning to the Second Period, we see no basis for refusing to allow the Seventh Respondent to continue to claim its fees. It was hardly the fault of the Seventh Respondent that it was left holding the assets, and it was important with a view to securing the good administration of the Trust to have a professional trustee with some knowledge of matters in place. We also think it appropriate to exercise our inherent jurisdiction to order costs in this way.
- 35 We see no reason for varying the basis of charge and accordingly we make the same order regarding the Second Period.
- 36 Turning to the Third Period, in our view, a similar logic obtains. We cannot consider the matter based on vague criticism, innuendo or challenges during cross-examination. On the evidentiary position as it appears to us, the Eighth Respondent was, as a former director of the Seventh Respondent, a competent person to take over the trusteeship and she is entitled to her fees on the same basis. Accordingly, we exercise our discretion and order the payment of those fees in that way.
- 37 For those reasons, we made the decision that we set out on 9<sup>th</sup> November, 2020.
- 38 We should add that we do not see any basis for disputing the calculation of the fees put in evidence before us.
- 39 Accordingly, in our judgment the correct calculation of fees is as follows:-
- (i) Period 1 — €2,426,315.48
  - (ii) Period 2 — €458,471.08
  - (iii) Period 3 — €1,149,077.00.
- 40 We make those Orders because the amounts were not materially challenged before us. However, we have not carried out a calculation exercise ourselves and to the extent that any of the parties think that the calculation based on 0.15% of net asset value should result in different sums payable then we will sit to give further directions of that issue to be

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resolved.