

Judgment 16 / 2004

**In re H. Sossen 1969 Settlement and
Rothschild Trust Guernsey Ltd as
Applicant – Royal Court (Civil action file
830) – 28 May, 2004**

Trusts (Guernsey) Law, 1989 – trust deed omitted to provide for remuneration for a successor trustee – settler, since deceased, executed an indemnity in favour of the applicant as successor trustee – jurisdiction of the Royal Court on application to approve past remuneration and to verify the trust deed – factors to be taken into account – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 28th day of May, 2004 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; sitting alone.

ROTHSCHILD TRUST GUERNSEY LIMITED Applicant

IN THE MATTER OF THE H SOSSEN 1969 SETTLEMENT

WHEREAS on 18th May, 2004 the Deputy Bailiff considered an application in the terms attached hereto pursuant to Section 30(1)(c), 52(1) and 63(1) of the Trust (Guernsey) Law, 1989 and heard thereon Advocates St. Robilliard and N.J. Barnes, Counsel for the Applicant and for the minor great grandchildren of the late H. Sossen, respectively and whereas the Deputy Bailiff Granted the said application. The Deputy Bailiff this day handed down reasons for the said judgment in the terms attached hereto, and ORDERED that the cost of the said application, including the reasonable fees of Advocates Robilliard and Barnes should be paid out of the Trust Fund.

S.M.D. ROSS
Her Majesty's Deputy Greffier

ROTHSCHILD TRUST COMPANY GUERNSEY LIMITED
(“the Applicant”)

IN THE MATTER OF A SETTLEMENT (“THE SETTLEMENT”) MADE ON THE
18TH DAY OF SEPTEMBER 1969.

BETWEEN HARRY SOSSSEN AND NM ROTHSCHILD & SONS (C.I.) LIMITED AND
OTHERS.

The Applicant whose registered office is at St Peter’s House in the parish of Saint Peter Port and whose address for service is 1 Le Marchant Street in the parish of Saint Peter Port **APPLIES TO THE COURT** pursuant to sections 30 (1)(c), 52(1) and 63(1) of the Trusts (Guernsey) Law, 1989, as amended and under all other powers enabling it to **ORDER THAT**

- (i) such other person or persons be served with notice of this Application as the Court thinks fit;
- (ii) the remuneration set out in paragraph 5 and Exhibit DNA 4 of the affidavit of David Norman Allison amounting to £177,079.00 (one hundred and seventy-seven thousand and seventy-nine pounds) and further costs of £20,243.87 (twenty thousand, two hundred and forty three pounds and eighty seven pence) in favour of the Applicant from the Trust Fund of the Settlement is authorised;
- (iii) in substitution for paragraph 17 of the Settlement but without prejudice to any appointment and act of NM Rothschild & Sons (C.I.) Limited there be from the date hereof substituted the following:-
“(17)(i) any corporate trustee may be appointed as a trustee hereof and such corporate trustee shall be so employed or act in accordance with its stated scale of fees in force from time to time;

(ii) any trustee being a lawyer, accountant or other person engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts hereof including acts which a trustee could have done personally;

(iii) the Trustee may employ associates of the Trustee to perform any function or perform any services (including acting as agents, advisors or bankers or any company or body of who shares or securities form part of the Trust Fund) and otherwise transact them as if they were unrelated to the Trustee;

(iv) the costs of this Application shall be paid from the Trust Fund of the Settlement.

(v) and to make such other Directions as it thinks fit”.

Dated this 14th day of May 2004

Advocate St John A Robilliard

IN THE ROYAL COURT OF GUERNSEY

(Ordinary Division)

ROTHSCHILD TRUST GUERNSEY LIMITED

(The Applicant)

IN THE MATTER OF THE H. SOSSEN 1969 SETTLEMENT

Judgement of Geoffrey Robert Rowland, Deputy Bailiff

Advocate St. J. A. Robilliard for the Applicant

Advocate Barnes for the minor great grandchildren of the late H. Sossen

Hearing date: 18th May, 2004

Judgement handed down: 28th May 2004

Cases, Legislation and Texts referred to in this judgement:

Cases: Duke of Norfolk Settlement Trusts Perth (Earl) and Another v Fitzalan – Howard and Others (1982) Ch 61
Foster v Spencer (1996) All ER 672
Perroti v Watson (2001 – unreported)

Legislation: The Trusts (Guernsey) Law, 1989, as amended

Texts: Gallienne Traité de la Renonciation Par Loi Outrée et de la Garantie

1. On 18th May 2004 I granted the Application and indicated that I would produce a judgement as soon thereafter as possible.

BACKGROUND

2. On 18th September 1969 the late Harry Sossen (Mr. Sossen) created a settlement (“the Settlement”) with NM Rothschild & Sons (CI) Limited (“the Original Trustee”) and two named individuals acting as trustees. The beneficiaries were Mr Sossen, his descendants, brother, sister and sister-in-law and their descendants and any spouse, widow or widower of any of these. Clause 16 of the Settlement provided that new or additional trustees could be appointed (see also Clause 1[A]), however, under Clause 17 only the Original Trustee expressly had the right to remuneration for its services and the rate of remuneration would change if the Original Trustee published revised terms and conditions. As the deed expressly contemplated that there might be

successor trustees it must be likely that the omission to provide for remuneration for a successor trustee can be put down to an unfortunate drafting error.

3. On the 30th November 1971, following a re-organisation within N M Rothschild, the Original Trustee resigned and was replaced by the Applicant (then known as Rothschild Executor & Trustee Company (CI) Limited) and named individuals. The Applicant has remained the trustee to this day, albeit it has undergone a number of name changes since 1971. No application was made to the Court at that time seeking the approval of the Court for the successor trustee to be remunerated. The Trusts (Guernsey) Law was not enacted until 1989 and in those days applications to the Royal Court on trust matters were rare and Guernsey jurisprudence in trust matters was very thin.
4. It may be that in 1971 those involved with the Settlement did not note that the right to remuneration applied only to the Original Trustee and not to a successor trustee. It is not known what legal advice, if any, was given at the time.
5. What is clear is that on 30th November 1973 Mr Sossen executed an indemnity in favour of the Applicant relating to remuneration. The indemnity covered the Applicant for any monies that it had taken or would take from the trust fund in payment of its fees.
6. Mr Sossen died on the 10th October 1992.
7. It would appear that remuneration was paid out of the Trust Fund to the Applicant up to the date of his death and with his knowledge and approval. Since then remuneration has been paid to the Applicant with the tacit approval of beneficiaries of the Settlement.
8. In recent times the possibility arose of a transfer of the trusteeship to a company outside the Rothschild group of companies. It became clear that the issue of the absence of a remuneration provision in the Settlement deed for the benefit of successor trustees to the Original Trust and the consequences thereof would inevitably need to be addressed.
9. Thus this Application has been brought in order:-

1. to approve the remuneration that the Applicant has taken from the Trust fund over those years with the approval of Mr. Sossen during his lifetime and thereafter without objection from any beneficiary;
2. to replace the current Clause 17 of the Settlement deed with a new one which provides that any trustee may be remunerated.

There are no disputed factual issues to be resolved but there are legal issues relating to the jurisdiction of the Court to make the orders sought and it was common ground that I should therefore deal with the matter sitting alone.

10. When this case first came before me in Interlocutory Court I noted that affidavits had been obtained from Mr. Sossen's widow and from his two daughters. I required that affidavits should be obtained from his two adult grandchildren. It was also appropriate that enquiries should also be made of his four grandchildren who are presently minors. I concurred with the suggestion of Mr. Robilliard that an Advocate independent of his firm should be appointed to make enquiries of the minor descendants and generally to represent their interests. In light of the provisions of the Letter of Wishes I did not deem it necessary to hear from any other potential beneficiaries. I did not consider that they would have different legal arguments to put forward and in all the circumstances I did not consider it appropriate to increase the legal costs which would be incurred in making this application to the Court.
11. Hence in support of the Application, affidavits have been filed from Mr Sossen's widow, two daughters, his adult grandson and adult grand-daughter. Mr Barnes has made such enquiries as he thought fit of the other living descendants of Mr Sossen, each of whom are minors and he has indicated his support to the Application. Put shortly the widow of Mr. Sossen does not object and there is no objection from any of his descendants.

Mr. Robilliard's submissions

12. The Application is brought under the Trusts (Guernsey) Law, 1989 as amended ("The Law").

The following provisions are material:

- (i) Section 30 (1) (c) of the Law states: -
 - "Unless authorised by –
 - (c) an Order of the Court, a trustee is not entitled to remuneration for his services".

Although this provision is expressed in negative terms, the Court has the power to authorise trustee remuneration. The Law does not prohibit the Court from awarding remuneration retrospectively in an appropriate case.

(ii) Section 52 (1) of the Law states:-

“the court on the application of any person mentioned in Section 63 (2) on behalf of:- [there then follows in (a) – (d) a list of minors, unborn persons and persons who may in the future benefit under the trust] -

may, subject to subsection (2) approve any arrangement, which varies or revokes the terms of a trust or enlarges or modifies the powers of management or administration of any trustees, whether or not there is another person with a beneficial interest who is capable of consenting to the arrangement.”

Section 52 (2) of the Law states:-

“The court shall not approve an arrangement on behalf of a person mentioned in subsection (a), (b) or (c) unless the arrangement appears to be for his benefit.

The power can include a power to substitute a remuneration clause in an appropriate case.

(iii) Section 63 (1) states:-

“On the application of any person mentioned in subsection (2), the court may:-

(a) make an order in respect of:-

(ii) a trustee, including..... the appointment, remuneration or conduct of a trustee.....”.

Under subsection (2) the Law provides that a trustee may bring an Application under subsection (1).

The Court has the power under the Law to approve any arrangement therein revoking the terms of the trust or enlarging or modifying the powers of management or administration of the trustee where the arrangement appears to be for the benefit of categories of persons specified in that subsection and including minors and unborn persons.

13. The Applicant's remuneration that has already been taken is covered by an indemnity albeit one given by Mr. Sossen whose estate will no doubt have been wound up long ago. It is not known how the indemnity was dealt with when Mr. Sossen's estate was wound up nor who were the beneficiaries.
14. The Settlement deed provided expressly that the Original Trustee should be able to charge and contemplated that there may be successor trustees (see above). The indemnity which Mr. Sossen signed in 1973, some 4 years after the creation of the Settlement shows that he recognised that it was appropriate for the Applicant as the successor trustee to be remunerated.
15. In Guernsey and in other jurisdictions, professional trustees ordinarily undertake business only on the basis of reasonable remuneration usually on the basis of their standard terms and conditions which incorporate remuneration clauses. It would be wholly exceptional case for a professional trustee not to be remunerated and in such a case there would inevitably be features peculiar to that case. There would appear to have been no special relationship in this case. This case has the hallmark of a normal professional arms length business relationship as the remuneration clause for the benefit of the Original Trustee indicates.
16. Mr Robilliard emphasised that there was recognition in Customary Law that those who manage the properties of others are entitled to remuneration. He cited Gallienne *Traité de la Renonciation par la loi outré et de la Garantie* (p. 244):

“Les gages de procureurs sont dix livres tournois par an, en outré ce qu'ils ont le droit d'exiger pour “commission et peines extraordinaires.” (vide *amerci*, 23 Juin, 1781. *De Havilland et Le Marchant*.”)
17. It was, he contended, clear that in those days, the position in Guernsey was more liberal than that in England. The Royal Court had, in special circumstances, an inherent jurisdiction to award remuneration to those in analogous positions to a Trustee and it followed that it also had an inherent jurisdiction in relation to the remuneration of a trustee in order to ensure that trusts should be well administered.

18. The current approach of English law is instructive. It begins with the Duke of Norfolk Settlement Trusts Perth (Earl) and Another v Fitzalan – Howard and Others (1982) Ch 61.

19. Fox LJ at p79 stated that the Court has an inherent jurisdiction to do this based on the good administration of trusts. On the foundation of that jurisdiction Fox LJ said this:- (emphasis provided)

“I appreciate that the ambit of the Court’s inherent jurisdiction in any sphere may, for historical reasons, be irrational and that logical extensions are not necessarily permissible. But I think that it is the basis of the jurisdiction that one has to consider. The basis, in my view, in relation to a trustee’s remuneration is the good administration of trusts... I conclude that the Court has an inherent jurisdiction to authorise the payment of remuneration of trustees and that that jurisdiction extends to increasing the remuneration authorised by the trust instrument. In exercising that jurisdiction, the Court has to balance two influences, which are to some extent in conflict. The first is that the office of trustee is, as such, gratuitous; the Court will accordingly be careful to protect the interests of the beneficiaries against claims by the trustees. The second is that it is of great importance to the beneficiaries that the Trust should be well administered. If therefore the Court concludes, having regard to the nature of the trust, to the experience and skill of a particular trustee and to the amounts which he seeks to charge when compared with what other trustees might require to be paid for their services and to all the other circumstances of the case, that it would be in the interests of the beneficiaries to increase the remuneration, then the Court may properly do so”.

20. The inherent jurisdiction acknowledged by Fox LJ is not to be limited by case law but by a careful examination of the facts in a particular case taking into account the interests of the beneficiaries and the importance of ensuring that the trust should be well administered. If remuneration is to be paid then the rate of remuneration should be appropriate to the circumstances of the case.

21. In Foster v Spencer (1996) All ER 672. Judge Paul Baker QC was dealing with an application for past and future remuneration. At p 680 he stated that one should not narrow the meaning of the decision of the Court of Appeal in the Duke of Norfolk decision and that the Court in that case did have in mind earlier cases allowing remuneration for services rendered in the past.

22. In Perroti v Watson Neuburger J in 2001 dealt with a personal representative of a will which contained no professional charging clause. Mr. Watson, a solicitor, had succeeded another partner who had been appointed as attorney/administrator of the will in place of the non professionally qualified executor named in the will. The reason that there was no charging clause was that the solicitor/attorney/administrator had failed to include one to cover that eventuality. It was that solicitor who was seeking approval of the Court to past remuneration.
23. Having quoted what Fox LJ said in the Duke of Norfolk's case and having also noted the view expressed by Judge Paul Baker QC in Foster v Spencer, Neuburger J stated that more work had been done than could have been expected. He was satisfied that he had jurisdiction to grant the relief which was sought. The trustee thought he could charge and this was to be regarded as a “relatively understandable error”. A lot of work had actually been done and Neuburger J concluded that to deprive him of any charge would be harsh. He concluded that he should exercise that jurisdiction in favour of Mr. Watson but did not assess his remuneration in the total sum claimed.
24. In conclusion Mr Robilliard submitted that there is no good reason why the Royal Court should not exercise its inherent and statutory jurisdiction in a case such as this. The Law does not preclude the Court from doing so. The application is supported by the persons who provided affidavits and was not opposed by Mr Barnes representing the interests of the minor descendants of Mr. Sossen.

CONCLUSIONS

25. I have concluded that the Court has power to approve remuneration including past remuneration under Section 30 (1) (c) of the Trust Law. The Court also has jurisdiction to do so under its inherent power. The Court's jurisdiction whether grounded under the Law or its inherent power can and should only be exercised in appropriate cases after a full consideration of the facts.
26. It may be that the Applicant and Mr. Sossen in 1973, many years prior to enactment of the Law, were wrongly advised. Alternatively they may have been correctly advised but did not wish to test the inherent jurisdiction of the Royal Court because it would entail incurring expense. Instead they contrived a solution which at the time was acceptable to them both and which was relatively inexpensive. That solution has been deemed acceptable and proved convenient for over 30 years, a period when the trusteeship remained within the Rothschild group of companies. The prospect of the

trusteeship being transferred outside the group has necessarily provoked the application to the Court.

27. The next question I have to answer is whether I should exercise that jurisdiction in favour of the Applicant. I take into account the following factors none of which were in dispute:-

1. That the Settlement deed as originally drafted expressly provided that the Original Trustee, a professional company carrying on the business of providing trusteeship services, would be charging for its services and that the Original Trustee's remuneration could be varied by its unilateral act. The Original Trustee did charge remuneration between 1969 and 1971. The Settlor was a party to a document that recognised in 1973 that the Appellant should be remunerated from the date that the Applicant became a successor trustee. Remuneration has therefore been charged by the Applicant since 1971.
2. The Settlement Deed provided for there to be successor trustees but was silent as to whether they should be remunerated.
3. The Applicant is seeking to gain approval in order to forestall any future allegation of breach of trust and so as to facilitate the appointment of a successor trustee.
4. This application is supported by those Beneficiaries who are contemplated in the Letters of Wishes as being the persons likely to benefit and there is no reason to believe that future descendants of Mr. Sossen would hold a different view of the law nor would other persons in the class of Beneficiaries.

28. I have to consider whether to exercise my discretion retrospectively to approve the remuneration charged by the Applicant since its appointment on 30th November 1971. In light of those factors I conclude that it is appropriate to so exercise my discretion. Noting that the total remuneration claimed retrospectively is also not disputed I see no reason to reduce it in any way.

29. With regard to the proposed amendment to Clause 17, of the Settlement Deed it is a benefit to all Beneficiaries that any professional trustee with the relevant skill and expertise can undertake the trusteeship. Not to approve it would mean that a new Trustee would have to apply to the Court perhaps at regular intervals. It is so exceedingly unlikely that any professional trust company would agree to take on the

trust under such conditions. I remind myself of what Fox LJ said in the Duke of Norfolk decision:-

“it is of great importance that the Trust should be well administered”.

It is in my view most important that the H. Sossen 1969 Settlement should be administered by a professional trustee and I am satisfied that any such trustee will require to be properly remunerated.

30. The replacement clause 17 which the Applicant seeks is in a relatively standard uncontentious form. If substituted for the current remuneration clause it should facilitate the appointment in due course of a successor trustee upon the retirement of the Applicant. I therefore also grant that part of the application.

COSTS OF THE APPLICATION

31. Finally I order that the costs of the application, including the reasonable fees of Mr. Robilliard and Mr. Barnes should be paid out of the Trust Fund.