Judgment 11/2003

Virani v Guernsey International Trustees Limited et al – Court of Appeal (Civil Appeal 312) 4th December, 2002

Trusts (Guernsey) Law, 1989 – power of the Protector to remove trustees – applications for declaration that trustees had been removed and for order to transfer assets – application by trustees for security and indemnities – appeal from (i) interlocutory order as to costs and (ii) stay of proceedings

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 4th day of December, 2002 before Miss Elizabeth Gloster, Q.C., presiding, Jonathan Philip Chadwick Sumption, Q. C., and The Hon Michael Jacob Beloff, Q. C.

MRS. PRAPHULBALA N. VIRANI

Appellant

V.

GUERNSEY INTERNATIONAL TRUSTEES LIMITED

First Respondent

and

TIM BENNETT

Second Respondent

In the matter of the appeal by the Appellant from the decision of the Royal Court made on 5th October, 2001;

THE COURT, having heard Mr. Nizarali R. Virani husband of the Appellant, and Advocate P. J. G. Atkinson, for the respective parties, thereon, ALLOWED the appeal on 20th September, 2002 and RESERVED its reasons;

AND THE COURT this day ISSUED JUDGMENT in the terms attached hereto and

1. SET ASIDE the order made by the Royal Court on 5th October, 2001 and SUBSTITUTED therefore the following order:-

(1) The Respondents do as soon as practicable, and in any event not later than 10th January 2003, transfer title to all the assets of the Arrow Trust, the Golden Trust and the Lynwood Settlement Trust ("the three trusts") to Cannon Trust Company Limited ("Cannon"), subject to Cannon acknowledging by appropriate instrument that it holds the respective trust property of each trust subject to a charge in favour of the Respondents to secure payment to them of :

(a) such sums (if any) in respect of the Respondents' proper legal and other costs, which have not been paid at the date of transfer, as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs. Virani may agree;

(b) such sums (if any) in respect of the Respondents' proper fees and remuneration, as trustees of the three trusts, which have not been paid at the date of transfer, as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs. Virani may agree;

(c) such sums (if any) in respect of the Respondents' properly incurred liabilities (in addition to those at (1) (a) and (b) above), as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs. Virani may agree;

(2) If there is any dispute about the terms of such transfer the parties are to apply to the Royal Court for resolution of the dispute;

(3) There is to be a substantive hearing at the first reasonably practicable opportunity, and in any event not later than 31st March 2003, before the Royal Court to determine the following matters:

(a) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Respondents' proper legal and other costs, which have not been paid at the date of transfer;

(b) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Respondents' proper fees and remuneration, which have not been paid at the date of transfer;

(c) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Trustees' properly incurred liabilities (in addition to those at (3)(a) above);

(d) such other matters as the Royal Court considers it appropriate to determine in relation to the administration of the three trusts and/or the transfer of the trust property ;

(4) it is hereby declared that the Respondents were removed as trustees of the three trusts by the exercise of Mrs. Virani's power of removal as protector as set out in Ozannes' letter dated 10th October 2000, but such declaration is expressly without prejudice to any arguments that the Respondents may seek to make that they should nonetheless have their costs of and incidental to their application dated 12th October 2000 and any subsequent proceedings (other than the costs provided for in this order) out of the trust property of one or more of the three trusts and/or from Mr. and Mrs. Virani, and also without prejudice to any issues as to the quantum of their liabilities, costs or remuneration.

2. AWARDED costs to the Appellant on the indemnity basis, both as respects this present appeal and as respects the hearing before the Lieutenant Bailiff on 25th and 29th June, 2001 and 5th October, 2001; and

3. DIRECTED that the application made by the Appellant, by letters dated 22nd November, 2002, for a wasted costs order against Collas Day, be heard by the Royal Court, if possible at the same time as the substantive hearing referred to in paragraph 1 (3) above.

S. M. D. ROSS
Deputy Registrar of the Court of Appeal

4th December, 2002

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

BETWEEN:

MRS. PRAPHULBALA N. VIRANI

Appellant

v.

GUERNSEY INTERNATIONAL TRUSTEES LIMITED

First Respondent

-and-

TIM BENNETT

Second Respondent

BEFORE

MISS ELIZABETH GLOSTER Q.C. (PRESIDING)
JONATHAN PHILIP CHADWICK SUMPTION ESQ. Q.C.
THE HON. MICHAEL BELOFF Q.C.

JUDGMENT

GLOSTER Q.C. J.A.

1. This is an appeal by Mrs. Praphulbala Virani (whom I shall refer to as the Appellant or Mrs.Virani) from an Order made by the Royal Court sitting as ordinary court (Hancox, Lieutenant Bailiff) on 5th October 2001, the Lieutenant Bailiff having given leave to appeal.

2. Mrs. Virani, who was in court throughout, appeared in person, but was represented by her husband, Mr. Nizarali Virani ("Mr. Virani"). The Respondents, Guernsey International Trustees Limited ("GIT") and Mr. Timothy Bennett ("Mr. Bennett") (together "the Respondents") were represented by Advocate Atkinson of Messrs Collas Day.

3. The Order dated 5th October 2001 provided as follows:

> "WHEREAS ON THE 9th day of February, 2001, the Bailiff ordered that skeleton arguments be exchanged between the parties in connection with the following applications:-
>
> (a) paragraph 1 of Mrs. Praphulbala Virani's application dated the 11th day of October, 2000 and tabled on the 20th day of October, 2000;
>
> (b) paragraph 2 of Mrs. Praphulbala Virani's application dated the 11th day of October, 2000 and tabled on the 20th day of October, 2000;
>
> (c) paragraph 2 of Mrs. Praphulbala Virani's application dated the 8th day of February, 2001 and tabled on the 9th day of February 2001;
>
> (d) the application of Guernsey International Trustees and Tim Bennett dated the 12th day of October, 2000 and tabled on the 20th day of October, 2000;
>
> AND WHEREAS ON THE 25TH AND 29TH June, 2001, the Lieutenant Bailiff heard argument on the above matters;
>
> AND WHEREAS on the 4th day of October, 2001, on the application of Nizarali Rajbali Virani, on behalf of Praphulbala Virani and the consent of Advocate P.J.G. Atkinson Counsel for Guernsey International Trustees and Tim Bennett, ORDERED that the said skeleton argument be disregarded:
>
> The Lieutenant Bailiff this day ORDERED:
>
> (1) THE APPLICANT to pay all the recoverable costs in respect of the said hearings of the 25th and 29th June, 2001 to the Respondents herein;
>
> (2) THAT the said costs be taxed and paid forthwith;
>
> (3) THAT all outstanding application by STAYED pending the payment in full by the Applicant to the Respondent of the said costs;
>
> (4) GRANTED to the Applicant leave to appeal against the said Orders."

Procedural Background

4. For the purposes of this Judgment, it is necessary to set out something of the background to, and procedural history of, this litigation, which has been protracted.

5. Mr and Mrs Virani divide their time between Epsom, England and Kenya. This case is concerned with three Virani family trusts which were established with the professional assistance of Mr. Bennett, at a time when he was associated with a prior trustee company to

GIT. At all material times, he was a Director of GIT and he is apparently a solicitor. All three trusts are governed by Guernsey law. The first is the Arrow Trust, which was established by deed dated 29th March 1996; the second is the Golden Trust, which was established by deed dated 9th May 1997; and the third is the Lynwood Settlement Trust, which was established by deed dated 24th May 1997. In respect of each of the three trusts, Mrs. Virani is and was all material times the Protector. In such capacity, she has powers to appoint and remove trustees. Thus Clause 11 of the Arrow Trust provides:-

> "11. **Appointment/Removal of Trustees**
>
> The Protector shall have power to remove/dismiss you as trustee and appoint your successor (or any additional trustee(s)), who must by deed agree to be bound by the terms of this agreement. Trustees may also resign at any time on written notice to the Protector."

Clauses 13 and 15.4 of the Golden Trust and the Lynwood Settlement Trust respectively provide:-

> "13. The power of appointing new or additional Trustees and of removing Trustees shall be vested in the Protector for the time being hereof …
>
> 15.4 The Protector shall not be regarded as a fiduciary, and her giving or withholding consent shall not be able to challenged in any Court."

6. Mr. Virani was the settlor of the Arrow Trust which appears to be the most active trust. It has, as its principal assets, shares in property companies which, in turn, appear to hold respectively a further property. The trust funds of the Arrow Trust are held on discretionary trust for the designated beneficiaries of the Arrow Trust, namely Mr. and Mrs. Virani and their three adult children, with default trusts over in favour of grandchildren and great-grandchildren in the event that the designated beneficiaries are not alive and ultimate default provisions in favour of charity. It is the Arrow Trust apparently which has the most valuable assets.

7. The Golden Trust has, as its principal assets, companies with liabilities. Its settlor was Mrs. Virani. Its assets are likewise held on discretionary trusts for its designated beneficiaries, namely Mrs. Virani and her adult children, with default trusts over in favour of the surviving descendants of the settlor.

8. The Lynwood Settlement Trust assets comprise Mrs. Virani's home at 4b Lynwood Avenue, Epsom, Surrey. Mrs. Virani was the settlor of the Lynwood Settlement Trust and she is designated as the principal beneficiary. The other designated beneficiaries are her three adult

children. Like the Golden Trust, the trust assets are held on discretionary trust for the designated beneficiaries but, until any appointment, the income of the trust fund is to be paid to Mrs. Virani as principal beneficiary. Like the Golden Trust, there are default provisions in favour of descendants of Mrs. Virani.

9. Substantial bank borrowings were obtained by the trusts, apparently to finance property acquisitions or for other purposes. According to Mr Virani, the combined borrowings do not exceed 15% of the capital value of the combined assets, but it was not relevant for the purposes of this appeal for the Court to be informed about the detail of these borrowings and we were not referred to any evidence in relation thereto. Suffice it to say, that there appear to have been difficulties about the ability of the trusts to service the loans out of the available income of the trust assets.

10. During 2000, the relationship between the Virani family, on the one hand, and GIT and Mr. Bennett, on the other, appears to have seriously deteriorated. According to Mrs. Virani's case, this was because of the family's dissatisfaction with the manner in which the Respondents were administering the assets and income of the trust. The Respondents' side of the story appears to be that there were difficulties in obtaining sufficient monies from the income of those assets to service the loans and that this led to dissention. But these factual matters are not matters upon which we were addressed and we cannot resolve them on this appeal.

11. By letter dated 11th September 2000, Mrs. Virani wrote to GIT in the following terms:-

> "THE ARROW TRUST
> SUNNY ACRES PROPERTY HOLDINGS LIMITED
> SILVER STAR INVESTMENTS LIMITED
>
> I refer to the above which is currently under your administration. I wish to transfer the administration of all my affairs from yourselves to Cannon Trust Company Limited in Guernsey.
>
> Kindly accept this letter as my formal request for you and/or your nominees to RESIGN as Trustees, Directors, Secretaries, Administrators and nominee Shareholders, as appropriate, of the above in favour of Cannon Trust Company Limited, or their nominees, of P.O. Box 393, St. Peter Port, Guernsey. Mr. Richard van Vilet has been made aware of my request and it would be appreciated if you would make contact with him or one of this associated, Jeff Corbet or Jenny Warry. Their telephone contact is 01481 726141.
>
> I would be grateful if this transfer could be effected as soon as possible so as to avoid any disruption in the administration of my affairs. I am prepared to settle further funds into the trust for onward loan to the companies to meet the pending mortgage payments. I

> would further expect your full cooperation in this transfer period to ensure that the properties are let as soon as possible, and bearing this in mind, you are new requested to ensure that the keys are in possession of Country Wide Estates in Esher, telephone No. 01372 466110 urgently, as they are the Companies (above) letting agents."

12. A further letter was sent by Mrs. Virani to the Respondents on 15th September 2000. This was sent in response to a letter dated 14th September 2000 addressed to both Mr. and Mrs. Virani, in which the Respondents had queried her instructions and, in particular, whether the decision she had taken had been her own, independent of that of her husband. (We have not seen this letter.) In her letter dated 15th September 2000, Mrs. Virani wrote as follows:-

> "Accordingly, in order to dispel any further doubt or confusion and considering my decisions are independent, I wish to set on record the following.
>
> 1. It is my express wish that both Guernsey International Trustees Limited and Mr. Tim Bennett resign as co-Trustees of the Arrow Trust in favour of Cannon Trust Company Limited of Cannon House, Route Isabelle, St. Peter Port, Guernsey, GY1 1YY. Cannon Trust Company Limited have already been made aware of my wishes and are awaiting sight of a copy of the Trust Deed together with your Draft Deed of Retirement and Appointment of New Trustee.
>
> 2. It is my express wish that Guernsey International Trustees Limited, their nominees and/or subsidiaries resign as Directors, Secretaries, Administrators and Shareholders of both Sunny Acres Property Holdings Limited and Silver Star Investments Limited (as appropriate) in favour of Cannon Trust Company Limited, their nominees and/or subsidiaries, of Cannon House, Route Isabelle, St. Peter Port, Guernsey, GY1 1YY. Cannon Trust Company Limited have already been made aware of my wishes and are anticipating you contacting them for the relevant details.
>
> 3. Whilst not wishing to fetter the current Trustees in the exercise of their obligations and duties to the beneficiaries under the Arrow Trust and the Directors in their statutory duties in relation to the two above mentioned companies, it is my express wish that, during the changeover period, no attempt is made to market any assets held by either the Trust or in the two companies in an effort to effect their disposal without my express approval. Furthermore, it is my express wish that Country Wide Estate Agents in Esher be appointed agents to both the above companies in replacement of Mountford Residential in order to allow them to manage the properties and find suitable tenants as appropriate."

13. The Respondents, by letter dated 25th September 2002, signed inter alia on behalf of Mr. Bennett, replied as follows:-

> "THE ARROW TRUST

> We refer to recent correspondence and in particular your faxed letter of 19th September 2000.
>
> Trustees' Application to Court:
> We do not believe that we are in a position to resign, as you have requested, without seeking the directions of the court, in view of everything that has happened over the last few months.
>
> You will be given a copy of our application to the court once it has been drafted by our lawyers. You will then be able to decide whether you wish to take legal advice or be heard by the court as to any matter contained in the Application.
>
> Information:
> As a Beneficiary S22(1) of the Trusts (Guernsey) Law 1989 states that you are entitled to "full and accurate information as to the state and amount of the Trust property". This will be made available to you in due course.
>
> As Protector, the Trust deed does not specify whether or not you are entitled to any information or documents concerning the Trust. We are presently seeking advice as to what documents should be made available to you and whether any conditions should be imposed on their supply to you.
>
> Please confirm your whereabouts for the next 28 days so that any documents can be sent to you.
>
> Yours sincerely
> For and on behalf of
> *Guernsey International Trustees Limited*"

14. There appears (although, again, we have not had sight of the full correspondence) to have been further correspondence between the parties in the period from 25th September to 9th October 2000, in the course of which Mrs. Virani stated or re-stated her wish that the Respondents should resign as trustees of all three trusts. On 10th October 2000, a further letter, apparently drafted by Ozannes, her advocates, was sent by her to the Respondents under the heading of all three trusts. In this letter she stated as follows:-

> "**Re. 1. The Arrow Trust 2. The Linwood [sic] Trust 3. The Golden Trust**
>
> I refer to my letter of 11th and two letters of 29th September 2000 in respect of the above mentioned trusts. I have made clear that Cannon Trust Company Limited of Cannon House, Route Isabelle, St. Peter Port, Guernsey are willing to take over the trusteeship. I now for the avoidance of any doubt hereby inform you that under the powers invested in me in the respective trust instruments you are forthwith removed as trustees of the above mentioned trusts.

> I have taken advice on my letters and have been referred to section 16(4)(c) of the Trust (Guernsey) Law, 1989. The effect of this letter is to confirm that by virtue of my previous letters you have ceased to be trustees of the above mentioned trusts. I refer also to Section 39(i)(a) of the Trust Law and direct that you take all immediate steps to duly surrender the Trust Property to the new trustee."

15. On 11th October 2000, Mrs. Virani issued an application in the Royal Court for the following relief in relation to all three trusts; first, a declaration that on 10th October 2000 or on such other date as the Court might nominate, the Respondents ceased to be trustees of the trusts; second, an order that the Respondents should transfer the trust assets of the trusts or such of them as the case may be to Cannon Trust Company Limited (Cannon"); third, an order that the Respondents did not obstruct any attempt by Cannon to cause three of the trusts' properties to be forthwith let on such tenancies as Cannon should consider appropriate; and finally for further and other relief.

16. On 12th October 2000, by way of riposte, the Respondents, in their capacity as trustees of the Arrow Trust, (and only in that capacity) applied to the Royal Court under section 62 of the Trusts (Guernsey) Law 1989 in the following terms:

> "For directions ….as to how the trustees should act in the affairs of the Trust
>
> "(i) Whether in all the circumstances the Protector should be removed from office by the Court under its powers under section 62(i)(a)(iii); or
>
> (ii) as to whether in all the circumstances of the case the trustees should resign in favour of the new trustees as requested by the Protector;
>
> (iii) generally,
>
> the whole in the circumstances as set out in this application and the affidavit of Tim Bennett as co-trustee of the Trust.
>
> Further under section 63(1)(a) of the Trust Law for orders in respect of:
>
> (i) The administration of the trust in respect of the sale or retention of assets held in the trust fund of the Trust;
>
> and further for an order under section 65 of the Trust Law that the costs and expenses of the Trustees of and incidental to this application be paid by the Protector or be paid from the trust fund on any other manner or by such person as the Court shall think fit."

17. There was a further claim for costs. The application was supported by an affidavit of Mr. Bennett, to which we have not been referred and which was not in the papers before this Court.

Hearing before the Bailiff on 20th October 2000

18. Both applications came on for hearing before the Bailiff on 20th October 2000. We have the transcript of that hearing. At that hearing, the Bailiff appears, not surprisingly, given the terms of the letter dated 10th October, to have taken the view that the Respondents' 12th October 2000 application did not need to proceed at all on the basis that, in relation to all three trusts, the Protector had exercised powers under the relevant trust to remove the trustees. At page 5 of the transcript he appears to have accepted the submission by Advocate Robilliard, on behalf of Mrs Virani, that

> "If you read ..clause [16(4)(c)] of the Trust Law [1989]., with Clause 11 of the Deed of Settlement,… the letter of 10th October was an effective removal of the Trustee, subject only to the rights of the Trustee under section 39 of the Law to seek reasonable security for possible liabilities, and that's not contested, Sir, that the Trustee is entitled to, let us term it, the normal indemnity".

To which the Bailiff replied "Yes, that must follow." Then at page 8 of the transcript he said that in his view the Respondents

> "had been told that they had been removed, but that removal does not become effective until such time as the necessary document transferring the trust assets to the new trustees has been completed".

19. Then, at page 8 of the transcript, the Bailiff said two things of importance. First, he said:-

> "I think the matter should be adjourned that I can then give directions as to further argument. I mean if Mr. Bennett wants to have the whole of the trust assets deposited in the equivalent [inaudible] to protect him from any claim, it may be an unreasonable indemnity he is seeking, that will be a matter for the Court to decide as to the reasonableness of any indemnity terms." (See page 8 of the transcript.)

Further, at page 9 of the transcript, the Bailiff made it clear that, irrespective of the difficulties between the Virani family and the Respondents:-

> "..these have not been easy clients of Mr Bennett and [GIT] to deal with, if what Mr Bennett and [GIT] say is correct. If one had minor beneficiaries or other circumstances it might be a matter of concern, but at the end of the day clients are entitled to have who they like as

> trustees of these discretionary trusts and it's very hard, particularly when there is nothing to indicate that Cannon will not do whatever they're supposed to do under the Trusts Law. I don't think there is very much mileage in what Mr. Bennett is claiming on this, if he is going to be removed, and I think Mr. Ferbrache [the then Advocate for the Respondents] has conceded that, really, you can't take that point. Whether it was reasonable to bring it or not is a matter I have to form no view on."

In other words, the Bailiff was making it clear that Mrs. Virani either had, or was entitled to remove the Trustees and what remained to be sorted out, either by agreement, or by the Court's determination, was simply the question of the terms of any indemnity or security to be provided to the Respondents.. Then, and importantly, Advocate Ferbrache, on behalf of the Respondents went on to say:-

> "Yes, sir. I mean our stance is entirely neutral, confined to that issue of the effective date [of resignation] and I think you dealt with it, the effective date is when the trustees, if they want to resign, they can."

The Bailiff went on to say:-

> "And they ought to be able to do this within a matter of days, transfer the assets and then the properties but if there is going to be any delay, then I think that Mr. Bennett and Guernsey International Trustees could make arrangements for the trust assets in the form of the companies that own the properties to be put in different management."

The Bailiff then adjourned both matters on the understanding that the parties were to attempt to agree the necessary documentation transferring the trust assets to the new trustees and the terms of the appropriate indemnities or security to be given to the Respondents. He concluded by adjourning on the understanding "that a draft trust deed would be prepared and" with Advocate Robilliard for the Viranis having the opportunity to come back and bring the matter before the Bailiff on 24 hours' notice to the Court. Unfortunately, no order appears to have been drawn up reflecting the Bailiff's ruling on 20th October

20. In my judgment, if, by his statement that the Respondents "had been told that they had been removed, but that removal does not become effective until such time as the necessary document transferring the trust assets to the new trustees has been completed", the Bailiff was suggesting that the Respondents had not, as at the date of the hearing before him, already been effectively removed as trustees of the three trusts, then he would have been wrong as a matter of law. Section 16 sub-section (4) of the Trust Law makes it clear that:-

> "A trustee ceases to be a trustee *immediately* upon -
>
> (c) … the exercise of a power under, a provision in the terms of the trust under or by which he is removed from, or otherwise ceases to hold, his office." [Emphasis added].

21. In my judgment, it is perfectly clear that, upon the exercise of a power of removal, pursuant to express powers contained in a trust instrument, such as those in the present case, a trustee is removed from his office immediately, without affecting, of course, his rights under section 39 of the Trust Law 1989 not to surrender the trust property until he has been provided with "reasonable security for liabilities".. Indeed section 39 assumes by its language ("where a trustee resigns or is removed") that the trustee had indeed been removed, albeit that he has not yet transferred the trust property and, until he does so, remains under fiduciary duties as though he were a trustee in relation thereto.

22. Moreover, although, in relation to the Arrow trust, there was no provision such as there was in the other two trusts, to the effect that the Protector was not to be regarded as a fiduciary, and that, accordingly, the exercise of the Protector's power of removal could theoretically have been challenged by the trustees or beneficiaries of the Arrow Trust, on the basis that such exercise had been for a corrupt purpose, or otherwise a fraud on a power (see e.g. In Re Skeats' Settlement [1889] 42 Ch. D 522), it was clear in my view from the passage that I have already quoted from page 9 of the transcript, that the Bailiff did not regard anything contained in Mr Bennett's affidavit as entitling the Respondents to challenge the exercise of Mrs Virani's power of removal on such grounds. On the contrary, from the terms of the Bailiff's ruling, it would appear that he regarded Mrs. Virani, as Protector, as having validly exercising her powers of removal and that he did not accept the suggestion that the exercise was not of her own free will or a fraud on her power of removal. There is nothing in the case of Von Knieriem v. Bermuda Trust Company Limited v and Grosvenor Trust Company Limited (1994), a decision of the Supreme Court of Bermuda, which gives the Respondents any support for an argument that he would have been wrong in so concluding.

23. However, when the Bailiff said "that removal does not become effective until such time as the necessary document transferring the trust assets to the new trustees has been completed", he was not, I think, suggesting that he thought that Mrs Virani had not validly exercised her power of removal, or that the removal had not been effective, but rather that, until such time as the trust property had been transferred to the new trustees, and the outgoing trustees had been provided with "reasonable security for liabilities (existing future, contingent or otherwise)" pursuant to section 39(1), the actual transfer of the assets to the new trustees could not take effect. As I have already said in paragraph 20 above, if he was suggesting

(which I do not think he was) that the removal did not take effect as a valid removal until such time, then he would have been wrong in law. Once the Protector had exercised her powers to remove the Respondents as trustees, they had no further right to act as trustees, they were no longer entitled to charge the fees provided for by the trust instruments and they were under a duty to transfer the assets as soon as reasonably possible, subject to their rights under section 39. Until they did so, they continued to owe fiduciary duties as though they were trustees in relation to their dealings with the trust property.

24. I read the Bailiff's ruling as, in effect, him taking the practical, and eminently sensible, view that there was no remaining dispute about whether the trustees had in fact been removed but that all remained in issue was the terms of the indemnity that was to be provided to the outgoing trustees, namely the Respondents under section 39(1)(b). He clearly and reasonably anticipated that, within a few days, the documentation providing for the transfer and the provision of reasonable security could be resolved.

25. Unfortunately, this expectation was not to be fulfilled. Accordingly, we agree with Mr. Virani's submission that it was clear from the outcome of the 20th October 2000 hearing that the Court was proceeding on the basis, as indeed were the parties, that the power to remove the trustees had been exercised by the Protector, or, at the least, that the Respondents were content to resign, and what remained was for the Respondents to comply with their obligations under 16(5) of the Trust Law, namely "a person who ceases to be a trustee under this section shall do everything necessary to vest the trust property in the new or continuing trustees" and for agreement to be reached under section 39(1)(b) as to the reasonable security for liabilities with which the Respondent was to be provided.

Subsequent procedural histrory

26. It appears that on or about 6th November, 2000 Ozannes, advocates then acting for Mrs. Virani, sent to the Respondents' advocates, Collas Day, draft deeds of retirement and appointment of new trustees which contained provisions for the new trustees, Cannon, agreeing to indemnify the Respondents as retiring trustees "against all claims, demands, actions, proceedings, liabilities, costs or expenses including liability for taxes or duties other than and except only those arising from any fraud negligence or breach of trust to which the retiring trustees or any of their officers was a party or privy and provided that the liability of the new trustees hereunder shall not extend beyond the Trust Fund of the trust in their possession or under their control from time to time" with provisions providing that in the event that any new trustees were subsequently appointed there should be continuing indemnity provisions.

27. Indemnities in those terms were rejected by Collas Day in a letter dated 16th November 2000. Again we have not seen all correspondence but it is clear from Collas Day's letter dated 16th November 2000 that they were taking the view that the draft deeds did not contain appropriate releases in relation to the Respondent as outgoing trustees. Collas Day stated

> "In the circumstances we enclose draft Deed of Retirement and Appointment in respect of each trust for your comment. We do so on the basis that our clients would be prepared to enter into such a Deed of Retirement and Appointment if, and only if, each beneficiary were to provide a suitable indemnity and release as indicated in previous correspondence."

The letter ended up by Messrs. Collas Day stating as follows:

> "As we have indicated on previous occasions and also again in this letter, our client would only agree to transfer the Trust Fund and enter into an appropriate Deed of Retirement and Appointment with the New Trustees if
>
> (i) a suitable Deed of Release and Indemnity was provided by each of the beneficiaries. If there is any reason given that you represent them all, that this cannot be achieved,
>
> (ii) the issue of the Trustee's lien is resolved satisfactorily."

28. They also stated that they would exercise a lien over the trust property until such time as their fees costs and expenses were satisfactorily discharged. The draft Deed of Retirement and Appointment provided by Collas Day contain the following surprising features. The recitals in the deeds refused to acknowledge that the Protector had already, by not later than 10th October 2000, removed the Respondents as trustees. Recital 2 merely stated that "the protector for the time being under the settlement has evinced an intention to remove the outgoing trustees and appoint the new trustees to be the trustees of the trust". This was wholly inappropriate in circumstances where the Bailiff clearly regarded the protector as having exercised the power to remove the trustees albeit that the transfer of the trust property to Cannon could not take place until the indemnity provisions had been agreed.

29. In my judgment the reference in the recital 2 to the fact that suggesting that Mrs. Virani's protector had not removed the outgoing trustees was wholly inappropriate. Likewise the reference in recital 3 of the draft to the concerns raised by the Respondents as to the independence of the protector was wholly inappropriate in circumstances where certainly the Bailiff would have been given the impression at the hearing on 20th October 2000 that there was no life remaining in the Respondents' application dated 12th October 2000. Furthermore the draft deed provided by Collas Day, apart from containing a wholly inappropriate acknowledgement by the outgoing trustees that the trusts of the settlement had been

"administered in the best interests of the beneficiaries entitled pursuant to the Trust" required a wholesale release from the beneficiaries and also contained provisions releasing the outgoing trustees from all claims "except any actions arising from fraud, wilful misconduct or gross negligence" and agreeing to an indemnity other than in respect of such claims.

30. This went far further than the indemnity to which the Respondents were entitled under the terms of the trust deeds. Thus clause 12 of the Arrow Trust made it clear that the indemnity provisions did not apply "in the event of [the trustees'] adjudicated breach of trust, gross negligence or fraud." Likewise the provisions of the Golden and the Linwood Trust do not suggest that a trustee thereunder is absolved from liability in respect of breach of trust. Clause 9.1 merely says "every discretion or power conferred on the trustee shall be absolute and uncontrolled in the absence of their own fraud or gross negligence the trustees shall not be held liable for any loss or damage occurring as a result of their concurring or refusing or failing to concur in any exercise of any such discretion or power."

31. In my judgment that does not exonerate a trustee for liability for breach of trust and indeed exception 34(7) of the Trust Law confirms this by stating that "nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct or gross negligence." Moreover, it is clear from the Ozannes' letter dated 24th November 2000 that Mrs. Virani is going to be relying on the decision of West v. Lazard Brothers & Co (Jersey) Limited (1993) that, because of an alleged failure by Mr. Bennett to provide a copy of the trust instrument, Mr. Virani and the beneficiaries will be arguing that the Respondents' liability for any breach of trust is strict and that they are therefore unable to rely on any clause which purports to limit their liability. We do not attempt to resolve the issues as to whether such a contention would be well-founded. It is clear however that there was certainly no agreement between the parties that Mrs. Virani and the beneficiaries were prepared to give a blanket release of all claims as against the Respondents.

32. There was also clearly a disagreement about fees and the extent to which the fees submitted by the Respondents were justifiable under the terms of the trusts or legitimately incurred.

Hearing before the Bailiff on 6th December 2000

33. Because of Mrs. Virani's concern over the delay in the transfer of the assets to Cannon, an application was made by Mrs. Virani dated 15th November 2000 for further directions in relation to the immediate transfer of the assets of the three trusts to Cannon pending the resolution of the relevant deeds of transfer. That matter came before the Court on 6th December 2000 when the parties agreed that the trust assets were to be transferred as soon as

possible to Cannon as managers or administrators of the trusts, although the Respondents were to continue to hold the shares in the company so as to maintain control over the trust assets. It was also agreed that before the question of what indemnities should be provided to the Respondents as outgoing trustees could be addressed, proper trust accounts had to be produced. The Court was told by Advocate Robilliard for Mrs. Virani in the presence of Advocate Allen from Collas Day for the Respondents that trust accounts had not been produced to date but that the Respondents were in a position to produce the accounts because they had the raw data which now had to be worked down into accounts.

34. The Court was told that it was only on the basis of the presentation of proper accounts that the question of indemnities could be considered by Mrs. Virani and that that would be addressed once the accounts were ready. It was agreed by the Respondents that the accounts would be ready by the last working day of 2000 and Advocate Allen for the Respondents stated "We accept the concerns of Mr. Virani after the breakdown of the relationship between him and the trustees and are quite happy for the trustees to appoint Cannon as managers while the matter of indemnities is discussed, and a proper orderly transfer of the trusteeship can be done".

35. Advocate Allen also confirmed that it was hoped that the trust properties could be transferred to Cannon by the end of the week. It was unfortunate that no order was made by the Court at the hearing on 6th December to reflect the actual order made. Again, the whole basis upon which that application was before the Court was that Mrs. Virani had validly exercised her powers of removal and that all that had to be sorted out was the terms of the indemnity and the transfer.

Hearings before the Bailiff on 22nd December 2000, and 3rd and 4th January 2001

36. Further delay appear to have occurred with the result that Mrs. Virani made a further application on 22nd December 2000 for the immediate transfer of the assets of the three trusts to Cannons. Mrs. Virani sought costs on an indemnity basis, no doubt to reflect her increased irritation at the delay to the transfer. The application dated 22nd December 2000 came on before the Bailiff for hearing on 29th December 2000 and subsequently on 3rd and 4th January 2001. The order made on 4 January 2001 by consent provided as follows:-

> "1. (a) that there be lodged at the Greffe the sum of £5,500 as security for the proper fees of the First Respondent in the preparation of the accounts of the trust subject to these applications.
>
> (b) Upon the said sums being lodged with the Greffe the Respondent shall deliver up to the Applicant copies of the said accounts.

> (c) that within 14 days of the said sum being lodged the Respondents shall be at liberty to apply for the said sum of £5,500 or such part thereof as the Court shall order, to be paid over to them on account of their fees for preparing the said accounts and for acting as Trustees.
>
> (d) That the payment of the said sum of £5,500 and the subsequent release of the whole or any part thereof shall not prejudice any subsequent claim by the Applicant or her husband N.R. Virani, the settlor, that the Respondents were not entitled thereto.
>
> 2. That subject thereto that matters be adjourned generally with liberty to restore."

37. However, it is quite clear from the transcripts of these hearings and a draft minute that was apparently prepared setting out the issues which were considered and "progressed" in the course of these hearings (but was subsequently never finalised) that a wider series of issues had been considered in the course of the hearings on 29th December, 3rd January and 4th January 2001. First of all, it appears that the Trustees were seeking to put a three month limit on the arrangement whereby administration of the trust assets would be carried out by Cannon. The Bailiff took the view, quite rightly, that that would have been wholly unsatisfactory if there had been an automatic three month cut off point with the present trustees restored to control of the assets against the wishes of the Viranis. It is worth quoting what the Bailiff said on 29th December 2000 at to the attitude of the trustees on this occasion:

> "I must say that it seems to me that there has been an awful lot of prevarication in this case, Mr. Atkinson, and I have been seeing that for a few weeks now. As far as I can see the Viranis are all people of full age, they wish to have new Trustees. There has been a breakdown between Guernsey International Trust and Mr. Bennett. There was a whole lot of work done by your firm in connection with various applications to the Court, which should not have really ever come to Court, which would be in some form of Beddoes Application if they ever did come to Court, whether they would have had any proper basis I do not know. The important thing from the Viranis' point of view seems to be that they wanted to get their assets in these Trusts away from Guernsey International Trustees Limited as they have lost confidence. Now it seems to me whether Cannon or Guernsey International Trustees Limited hold the shares is not of great materiality except that if the Viranis have concerns as to if Guernsey International Trustees hold the shares they will commit some breach of trust with them, because there isn't a great deal of trust between the Viranis and Guernsey International Trustees. Then it would be appropriate for the Court to put these shares in some safe haven perhaps in the form of Collas Day or something like that, so that one can make sure that Mr. Bennett and Guernsey International Trustees do not do anything with these shares.
>
> So that seems to be a very much side issue. I am not deciding it at this stage but three months is a new concept. I don't quite understand why we are being asked to put an Order of three months. Miss Roland what do you say about three months?

38. Moreover, it was perfectly clear from the discussion on the 29th December 2000 that subject to the question of "the resolution of indemnities to be given to the outgoing Trustees", Advocate Atkinson for the Respondents accepted that there was "no prospect of the Respondents redeeming the trusteeship on a meaningful basis because the relationship between the settlor and his family and the Trustees has broken down". Furthermore, Advocate Atkinson recognised that either the question of indemnities would be sorted out by agreement or that the Court would order that "the Trusteeship should be transferred subject to appropriate indemnities being given", see page 8 of Transcript.

39. However, and surprisingly, Advocate Atkinson for the Respondents appeared at the hearings to persist in a date being fixed for the hearing of the Respondents' substantive application dated 12th October 2000, namely the issue whether the protector should be removed from office. As the Bailiff pointed out at the bottom of page 10 of the Transcript

> "At the moment the Trustees are accepting that they should resign, so what benefit is this application going to have in further prolonging this application."

40. Advocate Atkinson replied

> "We have identified sir that the Trustees would only resign if appropriate indemnities were given and that may at some stage have to be reviewed by the Court. That is the point, it brings us back to that point sir."
>
> The Bailiff: "I don't understand why this application was lodged by Guernsey International Trustees. It seems to me to be a matter for the Viranis to bring and indeed Mrs. Virani did bring an application to the Court. We have got that substantive application before us."

41. So again the Bailiff clearly recognised that there was no utility, and indeed no mileage left in the Respondents' application. On 3rd January 2001, Advocate Atkinson for the Trustees was specifically asked by the Bailiff whether the application dated 12th October 2000 which the Bailiff referred to as the application by the Trustees "to remove Mrs. Virani as protector" was still being pursued. Advocate Atkinson on instructions said "It is to be pursued as originally tabled". This caused some surprise to the Bailiff because as he pointed out on the same page

> "Why I am trying to see just where we are on this application because as I understood it, both parties were agreed that whatever the situation the Trustees were going to resign. The relationship with the Viranis had broken down, they were going to resign and I cannot at

> this stage see, unless it is the argument and it certainly wasn't in October, unless it is the argument that the Trustees have not been properly invited to resign that that application has any merits in it, you know, to go ahead at this stage."

42. Advocate Atkinson, on behalf of the Respondents, appeared to be pressing for some sort of review of all the circumstances of the case including the circumstances in which the Trustee had been asked to resign if the terms surrounding the indemnity and the appointment of the new Trustees could not be agreed.

43. There was thus considerable discussion about various matters over the course of these lengthy hearings on 29th December and 3rd and 4th January 2001. The Bailiff reiterated time and time again that there appeared to be little substance in the Respondents' application to remove the protector or indeed any need to resolve Mrs. Virani's application dated 11th October 2000 for a declaration that the Respondents had ceased to be trustees, given the fact that, from the first hearing, the Collas Day advocates on behalf of the Respondents had never demurred from the point that the relationship had broken down and that therefore they had to retire and be replaced. Moreover it was absolutely clear from various passages in the Transcript that the Bailiff took the view that the critical issue was what reasonable security the Respondents should be receiving in respect of their liabilities before surrendering the trust assets pursuant to Section 39(1)(b) of the Trust Law; see, for example, page 4 of the Transcript dated 3rd January 2001.

44. As the Bailiff recognised, this gave rise to the further issue as to whether the costs incurred by the Respondents in making their applications had been properly incurred. The Bailiff made it quite clear that whether or not the Respondents would have any entitlement to recover those fees would depend on the question of the propriety of that litigation and whether it was necessary. It is worthy of comment that at page 31 of the Transcript dated 3rd January 2001 the Bailiff said

> "I have reached the conclusion that this trustee is doing everything he can to drag his feet. It is an unfortunate impression to get but that is the impression I have got on this case. It has been unfortunately handled on behalf of the Trustee and now he is saying I want £5,500 up front before I release accounts showing my trusteeship. I am not over sympathetic to that request …"

45. There was then yet a subsequent hearing on 4th January 2001, where again the Bailiff expressed his repeated concern as to what was the utility in the Trustees proceeding with their application dated 12th October 2000. The Bailiff said at page 14

> "I don't want to pass any judgment on the Trustees at the moment because, as I say, they haven't had the opportunity - but I have to say, and put Mr. Atkinson on notice, that I think you're going to do it - that this issue of removal of the protector I find a very difficult application to see, even on - giving Mr. Bennett credit for everything he says - that the propriety of that continuing at the present time I find difficult, but again it may be that that affidavit was not full enough at the time, there may be other issues that Mr. Bennett will wish to depose to in support of those applications, although strictly it should have been deposed to at the time it was filed."

46. Again at page 23 of his transcript, the Bailiff asked for Advocate Atkinson's comments on the propriety of the application to remove the protector continuing in the light of the decision to change the trustees. Advocate Atkinson again appeared to have adopted the position that, subject to satisfactory indemnities and arrangements being made with regard to their fees, "he was sure that Guernsey International Trustees would wish to resign". In any event the actual order made by the Court on 4th January 2001, as I have already said, adjourned the matter generally and required the sum of £5,500 to be lodged for the Respondents costs of doing the accounts.

Hearing before the Bailiff on 9th February 2001

47. The next thing which occurred procedurally was an application by Mrs. Virani made on 8th February 2001 for the following relief

> "HEREBY APPLIES TO THE COURT under sections 63(1)(a)(i), (ii) and (iv) and 65 of the Trusts (Guernsey) Law. 1989 as amended ("the Trust Law") for further directions and without prejudice to the generality thereof for the following orders:-
>
> (1) to issue an Act of Court with regard to (1) of the Applicant's Application of 20th October 2000 ("the October Applications").
>
> (2) to determine 2 of the Orders prayed for in the October Application and to further order that for the purpose of Section 39(1)(b) of the Trust Law the indemnities forwarded to the Respondents on the 6th day of November 2000 and the 5th day of February 2001 constitute reasonable security;
>
> (3) to declare that the Application brought by the Respondents dated the 12th day of October were unwarranted and an abuse of process;
>
> (4) the production of accounts as it should consider just and/or expedient.
>
> (5) that all expenditure incurred by the Trustees with regard to the October Applications and/or Respondents Application of

20 October 2000 and all other matters directly or indirectly relating thereto are not justified trust expenses.

(6) that the Respondent pay to the Applicant costs on an indemnity basis, or such other basis as it considers just.

(7) otherwise as it considers just or expedient."

This application was supported by affidavits from Mr. and Mrs. Virani and from Advocate Robilliard on behalf of the Viranis.

48. This application was heard before the Bailiff on 9th February 2001. Advocate Robilliard made it clear that there had been no agreement in relation to the indemnities or the security and that indeed the parties were very very far apart and that the Respondents were pursuing a claim for over £50,000 in relation to their costs and their legal costs.

49. Advocate Robilliard pointed out that although, under the terms of the Order made by consent on 4th January 2001, the Applicants were required to lodge at the Greffe the sum of £5,500 as security for the proper fees of GIT and the preparation of the accounts of the trusts, in fact the position was that draft accounts or accounting records of the trust had been prepared last summer which showed that the Respondents had received over £19,000 in fees. Accordingly, Advocate Robilliard submitted (a) that accounts had already been prepared, which fact the Court had not been told on the previous occasion, and (b) that the trustees had already been paid for them. This, it was submitted, undermined the whole basis of the order of 4th January 2001, (viz. that it was not right that the trustees should be obliged to produce accounts without having been paid to do so). Again there seems to have been an interminable discussion with the transcript running to 48 pages. During the course of this, the Bailiff again repeated that he didn't think it was going to be fruitful to deal with the Respondents, application to remove the protector "because at that stage [i.e. October 2000] it was common ground between the parties that this trustee had resigned".

50. In fact the position was, of course, that the power had been exercised by Mrs. Virani to remove the Trustees. Be that as it may, at the conclusion of the hearing on 9th February 2001 the Bailiff made the following order:

(1) That the Skeleton Arguments be exchanged between the parties in regard to points of law arising in connection with the following applications:-

(a) paragraph 1 of Mrs. Praphulbala Virani's application dated the 11th October , 2000 and tabled on the 20th day of October, 2000;

(b) paragraph 2 of Mrs. Praphulbala Virani's application dated the 11th October , 2000 and tabled on the 20th day of October, 2000;

(c) paragraph 2 of Mrs. Praphulbala Virani's application dated the 8th February, 2000 and tabled on the 9th day of February, 2000;

(d) the applications of Guernsey International Trustees and Tim Bennett dated the 12th day of October 2000, and tabled on the 20th day of October 2000.

(2) That Counsel for Mrs. Praphulbala Virani is to have three weeks to lodge Skeleton Arguments in this matter.

(3) That Counsel for Guernsey International Trustees Ltd and Tim Bennett is to have thee weeks to respond thereto; and

(4) The BAILIFF adjourned all other matters sine die with liberty to restore.

51. Neither Mrs. nor Mr. Virani were present at this hearing on 9th February 2001 from the transcript (which the Viranis did not see until September 2001) it appears that:

(1) the Bailiff clearly recognised that the critical issue was what security the Respondents should be provided with of the assets purport to Section 39 in relation to current and future claims (see eg. page 37 of the transcript), and the amount of the costs to which the Trustees would be entitled;

(2) but that, although he had previously thought that it was common ground that the Respondents had "resigned" (see page 43 of the transcript), he was now apparently accepting Advocate Atkinson's submission for the Respondents that there would have to be a full scale determination on the merits of the Respondents' application dated 12th October 2000 and Mrs. Virani's application for a declaration dated 11th October 2000, before the indemnity, security and costs issues could be resolved (see ibid and pages 44 to 48). No doubt for this reason he ordered the service of skeletons.

Hearing before the Lieutenant Bailiff on 25th and 29th June and 4th October 2001

52. There were then further interlocutory applications which are not relevant to mention for the purposes of this judgment but which may need to be looked at in the context of the inquiry as to the quantum of the costs to which the Respondents may be entitled. Subsequently, however, there was a two day hearing before Lieutenant Bailiff Hancox on 25 June and 19th June 2001 where there was extensive discussion about the various applications but which did not result in the making of any order. By this stage, Mrs. Virani had ceased to be represented by Advocate Robilliard of Ozannes and now appeared in person, with Mr. Virani making submissions on her behalf. Pursuant to the Bailiff's order made on 9th February 2001, both

the the Respondents and Mrs. Virani had lodged skeleton arguments, the latter's having been prepared and submitted by Ozannes before they ceased acting. Shortly stated, the position taken by Mr. Virani for Mrs. Virani in the two days of hearings was that, whether or not the Respondents had been removed was a clear issue of law dependent upon Section 16(4)(c) of the Trust Law and the express powers of removal in the trust deeds; that there was no need to have a determination of, or full skeleton arguments dealing with the merits or otherwise of, the Respondents' application to remove the Protector or Mrs. Virani's application for a declaration because the Respondents had effectively accepted at the earlier hearing on 20th October 2000 that they had to go as trustees, as had the Bailiff. Conversely, the position adopted by Mr. Atkinson, on behalf of the Respondents, shortly stated appears to have been that there remained to be determined at a full scale hearing on the evidence the "first and fundamental question whether the circumstances of this case are such that the trustees should [emphasis added] stand aside" (see page 15 of the transcript of the hearing on 29th June, commencing at 12.03pm) and that, accordingly, no preliminary points of law should be decided at all at that stage. He also appeared to be submitting that because, when Mrs Virani, in his words, "purported" to remove the Trustees on 11th October she had not produced any deed from a successor trustee under which the successor agreed to be bound by the terms of the trust deed, there had been no valid exercise of the power of removal.. He also argued that the Court should not listen to any argument from Mrs Virani, as she had not lodged with the Court the sum of £5,500, ordered to be so lodged by the Bailiff's order of 4th January 2001.

53. The hearing on 29th June 2001 was resumed on 4th October 2001. In the meantime, Mrs Virani, by an application dated 1st October 2001, had sought to "rescind" or "expunge" the order made on 9th February 2001, providing for the exchange of skeleton arguments. It will be remembered that this order had been made at a hearing where neither Mr nor Mrs Virani had been present. Since the hearing in June 2001, Mr and Mrs Virani had had the opportunity of reading the transcript of the February hearing, which they had not had previously. The Viranis' grounds for this application were, in effect, that, given the Trustees' recognition at the hearing in October 2000, and the Court's approach on that date, namely, that in all the circumstances the Respondents had to go as trustees, and that all that remained to be sorted out was the terms of any indemnity, security and the extent of their allowable fees and costs, there was absolutely no point in having a full-blown evidentiary hearing determining the issues raised by the declaratory relief sought in the first paragraph of Mrs Virani's application dated 11th October 2000 (viz. had she removed them as trustees on 10th October or some other date) nor the issues raised in the Respondents' application dated 12th October 2000 (viz. whether Mrs Virani should be removed as Protector and whether or not the Trustees should resign). The Viranis also complained that their previous advocate, Mr. Robilliard, had agreed to the order in relation to skeleton arguments without their instructions. Stripped of incidental

complaints as to various matters relating to the conduct of the proceedings by all advocates concerned, and other matters, the thrust of the Viranis' complaint was that the attempt to restart and re-litigate all these issues, and prolong the handing over of the trust assets, was in the circumstances a dragging of feet and an abuse of process on the part of the Respondents; they had been clearly been removed by Mrs Virani pursuant to the exercise of her powers as protector under the relevant provision of the trusts, and this was recognised by section 16(4)(c) of the Trusts Law; and, moreover, in any event the Bailiff and the Respondents recognised that, subject to appropriate provision as to indemnities, security, costs etc. there was no basis upon which the Respondents could remain in office given the Viranis' loss of confidence in them. So, by paragraphs 2 and 3 of her application dated 1st October 2001, Mrs Virani in effect sought to have what the Viranis considered to be the remaining outstanding issues resolved.

54. At the start of the hearing on 4th October 2001 (see page 9 of the transcript), Mr Atkinson, on behalf of the Respondents, indicated that he did not oppose the Viranis' application that the order dated 9th February 2001 for the exchange of skeleton arguments should be rescinded. However, that concession was clearly not based on the reasons put forward by Mrs Virani as set out in her application as outlined above. Both before the Lieutenant Bailiff and before this court, Mr Robinson has insisted in maintaining the position that the substantive issues raised by the Respondents' application dated 12th October 2000 remain to be determined by the Royal Court (viz. whether the Protector should be removed and whether the Respondents should resign). Likewise it would or should have been clear to Mr Atkinson, in the light of the express terms of paragraph 1(e) of Mrs Virani's application and what Mr Virani said at the hearing, that she was maintaining the position that she had validly removed the Respondents under her express power of removal, and was in no sense abandoning that contention, but was merely contending that there was no need to have a full scale trial of the issues raised in Mrs Virani's application dated 11th October 2000 or of those raised in the Respondents' application dated 12th October 2000.

55. There then followed on both 4th and 5th October 2001 interminable discussion between the court and Mr Virani relating to various issues, none of which resulted in any, or attempted, determination by the Lieutenant Bailiff of the real outstanding issues between the parties, namely what indemnities, if any, were the Respondents entitled to; should they have any security provided out of the trust property, for their liabilities, fees or costs, and, if so, how much; what, in all the circumstances, was the proper amount of the Respondents' expenditure, fees and costs; how should the assets of the trusts be transferred as soon as possible to the new trustees whilst preserving any rights of the Respondents to security out of the trust property. Nor did the Lieutenant Bailiff give any directions as to how these matters should be

resolved. Mr Virani complained about numerous matters, not all of which were relevant to the applications then before the Court, which principally related to the administration of the trusts, and which may well need to be considered in the subsequent directions hearing which I propose. He emphasised the stress that the proceedings were causing to his wife, himself and his family. From the transcript it appears that he became quite distressed during the course of the hearing.

56. At the end of the hearing on 5th October, following an application made by Mr Atkinson, the Lieutenant Bailiff made the order which I have set out in paragraph 1 above, namely that Mrs Virani should pay all the Respondents' recoverable costs of the hearings on the 25th and 29th June 2001; that they should be taxed and paid forthwith and that, until they were paid, all outstanding applications were stayed.

Reasons why the order of 5th October 2001 cannot stand

57. In my judgment, the exercise of the Lieutenant Bailiff's discretion in relation to the costs of the hearings on the 25th and 29th June 2001 was clearly wrong. He of course faced some difficulty, in coming new into the case, which not only had a lengthy and complicated procedural history, but also had a litigant in person on one side, who had not been present at all hearings, and could not necessarily make clear to the Court what were the issues that had to be resolved. But the case cried out, and, indeed, cries out for pro-active case management. What, in my judgment should have been apparent to the Lieutenant Bailiff was that the broad thrust of Mr and Mrs Virani's complaints, as identified in their application dated 1st October 2001, were justified; that the Respondents were indeed stringing things along; that there was no justification in their insistence before the Royal Court, and, indeed repeated before this Court, that there should be some full-scale evidentiary determination of the substantive issues raised in Mrs Virani's application dated 11th October 2000 or of those raised in the Respondents' application dated 12th October 2000; that there was no entitlement on their part under the terms of the trust deed to indemnities that went beyond the provisions of those deeds or the Trust Law, let alone any right on their part to insist that the beneficiaries should personally give indemnities to the Respondents against further suit. Moreover, in my judgment, the Respondents and Mr Atkinson were at fault, in the approach which they adopted in the course of the proceedings before the Lieutenant Bailiff and provided him with no assistance as to the sensible way forward. I regard it as unpalatably opportunistic for the Respondents, by Mr Atkinson, on the one hand, to have said that they were not opposing Mrs Virani's application for an order rescinding the Bailiff's order for the exchange of skeleton arguments, in circumstances where it was obvious that Mrs Virani was seeking such an order because she (rightly) considered that there was no need for a full scale trial in the light of

what occurred on 20 October 2000, and, on the other hand, to persist in their application that the Protector should be removed and directions given as to whether they should resign. I also regard it as unacceptable that Mr Atkinson, upon behalf of the Respondents, should have suggested to the Court (see page 13 of the transcript of the hearing on the 4th October 2001 at 2.55pm), wrongly, that Mrs Virani had abandoned her contention of law that she had validly exercised her powers as protector to remove the Respondents in October 2001. It was manifestly clear, both from the reasons given for the application dated 1st October 2001, and from what Mr Virani said at the hearing, that Mrs Virani had done no such thing. As has been said previously in this Court, where one party is a litigant in person, it is incumbent upon the advocate appearing for the opposing party to be scrupulously fair and transparent in its dealings both with the Court and with the litigant in person, to ensure that the Court is fully informed as to all the relevant facts and to the real issues that arise for determination. I do not consider that in this case the Lieutenant Bailiff received the assistance to which he was entitled.

58. What should the Lieutenant Bailiff have done in all the circumstances on 29th June or 5th October 2001? In my judgment the answer is clear. He should have made an order for directions in the terms, or substantially in the terms, set out in paragraph 62 below. Indeed, in my judgment, such an order should have been made by the Bailiff as long ago as 9th February 2001, by which time it was manifestly clear to all concerned that the Virani family had totally lost confidence in the Respondents and that the Respondents, irrespective of whether they had been validly removed or not, were prepared to go, subject to provision being made for suitable indemnities, costs and security. I emphasise, however, that the Respondents were never entitled to more than the law and the provisions of the trust deeds conferred on them.

59. As I have already said, on the basis of the information that this Court had had provided to it, it is very difficult, if not impossible, to see on what basis the Respondents could properly have contended that they had not been removed as trustees in October 2000 as a result of the exercise of Mrs Virani's power of removal, as protector. Nor was Mr Atkinson, at the hearing of the appeal, able to give any rational explanation as to why the exercise of the power of removal had not been effective to achieve its objective. The Trustees' suggestion that Mrs Virani was acting under the influence of her husband, or was acting in breach of the interests of the beneficiaries, was wholly unsupported by any evidence which we have seen. Indeed the affidavits of the Viranis' children made it absolutely clear that they supported the exercise of their mother's power as Protector to remove the Trustees. In any event, in my view, and, again, on the information available to us, there was no justification whatsoever for their continued insistence after the hearing on 20th October 2000 that they wanted to litigate the matter and remain as trustees. Even if, contrary to my view, they had not been removed, the

option of resignation was clearly open to them pursuant to section 16 of the Trust Law and the Protector's clearly expressed wish to appoint Cannon as trustees in their place. On the basis of the information that this Court has seen, the Respondents' purported concerns and continued insistence to obtain the directions of the Court appear fanciful and self-serving. I am driven to the prima facie conclusion that the only reason for the Respondents' continued intransigence was a tactical device to ensure (a) that they secured the Viranis' agreement to payment of their fees and expenses, in the full amount claimed, without any debate as to whether such fees and expenses were justified; and (b) that they obtained a complete indemnity, and waiver and covenant not to sue, from the beneficiaries as to any causes of action which the latter might have against the Respondents in relation to alleged maladministration of the trust funds. There can be no doubt in my mind that that was and is not a legitimate tactic for trustees to adopt. The indemnity provided for under the trust deeds (which obviated the need for any further express indemnity) was limited; it did not extend to claims based on "adjudicated breach of trust, gross negligence or fraud"; see e.g. clause 12 of the Arrow Trust. The Respondents had no justification in holding out for anything that went beyond this.

60. However I am conscious that this Court has not seen all the affidavit evidence filed in these proceedings, in particular the affidavit of Mr Bennett. For that reason, the declaration that I propose to make that Mrs Virani has validly removed the Respondents as trustees of the Arrow Trust is expressly without prejudice to any arguments that the Respondents may seek to make that they should nonetheless have their costs of and incidental to their application dated 12th October 2000 and any subsequent proceedings (other than the costs provided for in this order) out of the trust property of the Arrow Trust and/or from Mr and Mrs Virani, (although I should make it clear that I am saying nothing about the chances of success of any such application) and also without prejudice to any issues as to the quantum of their liabilities, costs or remuneration. There has been no challenge by the Respondents by means of the institution of proceedings to Mrs Virani's removal of them as trustees of the Golden Trust and the Lynwood Settlement Trust. However Mr Atkinson appeared to be challenging such removal at various stages in the hearings below. Accordingly the declaration that I propose to make that Mrs Virani has validly removed the Respondents as trustees of the Golden Trust and the Lynwood Settlement Trust will likewise be made expressly without prejudice to any arguments that the Respondents may seek to make that they should nonetheless have their costs of and incidental to their application dated 12th October 2000 and any subsequent proceedings (other than the costs provided for in this order) out of the trust property of those two trusts.

61. I should make it clear, however, that whatever the legal uncertainty, if any, that either the Court or the Respondents might have entertained as to whether the Respondents had been removed as trustees, it was overwhelmingly obvious, in the light of the discussion at the hearing before the Bailiff on 20th October 2000 that the Respondents ought in all the circumstances themselves to have resigned as trustees, either after the hearing on 20th October 2000 or shortly thereafter, albeit without prejudice to their contentions as to their entitlement under section 39 or in relation to the quantum of their liabilities, remuneration or costs.

The order that should have been made

62. There was thus absolutely no need for there to have been any full-scale trial as to the issues that were the subject of the skeleton arguments. The order that the Lieutenant Bailiff should have made, and, accordingly, the order that, in my judgment, this Court, in substitute for the exercise of the Lieutenant Bailiff's discretion, should make, is the following:

(1) The Respondents do as soon as practicable, and in any event not later than 10th January 2003, transfer title to all the assets of the three trusts to Cannon, subject to Cannon acknowledging by appropriate instrument that it holds the respective trust property of each trust subject to a charge in favour of the Respondents to secure payment to them of :

(a) such sums (if any) in respect of the Respondents' proper legal and other costs, which have not been paid at the date of transfer, as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs Virani may agree;

(b) such sums (if any) in respect of the Respondents' proper fees and remuneration, as trustees of the three trusts, which have not been paid at the date of transfer, as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs Virani may agree;

(Mr Virani submitted that these did not come within the definition of "liabilities" in section 39 of the Trust Law; this may or may not be right, (and I do not need to decide the point), but the provisions of the trust deeds give clear power to the Respondents to charge such fees on, and collect such fees from, the trust property;)

(c) such sums (if any) in respect of the Respondents' properly incurred liabilities (in addition to those at 62(1) (a) and (b) above), as the Royal Court may hereafter at the hearing to be held pursuant to the order at sub-paragraph (3) below determine, or the Respondents and Mrs Virani may agree;

(2) If there is any dispute about the terms of such transfer the parties are to apply to the Royal Court for resolution of the dispute;

(3) There is to be a substantive hearing at the first reasonably practicable opportunity, and in any event not later than 31st March 2003, before the Royal Court to determine the following matters:

(a) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Respondents' proper legal and other costs, which have not been paid at the date of transfer;

(b) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Respondents' proper fees and remuneration, which have not been paid at the date of transfer;

(c) the quantum of such sums (if any) to which the Respondents are entitled in respect of the Trustees' properly incurred liabilities (in addition to those at (3)(a) above);

(d) such other matters as the Royal Court considers it appropriate to determine in relation to the administration of the three trusts and/or the transfer of the trust property ;

(4) it is hereby declared that the Respondents were removed as trustees of the three trusts by the exercise of Mrs Virani's power of removal as protector as set out in Ozannes' letter dated 10th October 2000, but such declaration is expressly without prejudice to any arguments that the Respondents may seek to make that they should nonetheless have their costs of and incidental to their application dated 12th October 2000 and any subsequent proceedings (other than the costs provided for in this order) out of the trust property of one or more of the three trusts and/or from Mr and Mrs Virani, and also without prejudice to any issues as to the quantum of their liabilities, costs or remuneration.

63. Mrs Virani is also entitled to her costs of and incidental to this appeal, and of the hearing before the Lieutenant Bailiff on 25th and 29th June 2001 and 5th October 2001. She has requested that such costs should be paid on the indemnity basis. In my judgment, in the light of what I regard as the unjustified stance taken by the Respondents in the course of these proceedings, she is entitled to her costs on that basis, and I would so order.

64. Since this judgment has been prepared, Mrs Virani has, by letters dated 22nd November 2002, applied for a wasted costs order against Collas Day. I would direct that this application (which will have to be made on proper notice to Collas Day, specifying the hearings in respect of which the order is sought) is to be made to the Royal Court, and should, if possible,

be heard at the same time at the substantive hearing to which I refer in sub-paragraph 62(3) above.

SUMPTION Q.C. J.A.

65. I agree.

BELOFF Q.C. J.A.

65. I agree.

GLOSTER Q.C. J.A

66. Accordingly there will be an order in the terms of paragraphs 62, 63 and 64 above.

