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JOHN ALFRED LANDAU

v

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- 1. ANBURN TRUSTEES LTD**
- 2. ALAN PHILLIP LANDAU**
- 3. CORALIE LANDAU**
- 4. ROBIN LANDAU**

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Jersey Royal Court (Samedi Division)
 MC St J Birt, Esq, Deputy Bailiff
 Jurat de Veulle
 Jurat King

Neutral citation: [2007] JRC 084

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Hearing: 9 February 2007
 Judgment: 18 April 2007

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Revocable trust; trustee unlicensed to carry on trust business; entitlement to remuneration; entitlement to indemnity for legal expenses; general supervisory role of the court; assessment of remuneration and legal expenses

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The representor (the settlor) established a revocable trust (the trust) on 14 June 1990 by settling the entire share capital of Castlehaven Investment Corporation (Castlehaven) and a collection of stamps and books on trusts for the benefit of himself, his second wife and two sons by his first marriage, who were the second to fourth respondents. Castlehaven, a company registered in Panama, owned a property in England called Abney Thatch in which the settlor and his wife resided. In May 1996 the first respondent (the trustee) was appointed as trustee, a role which was performed principally through its director, Peter Olsen. However, following the extension of the *Financial Services (Jersey) Law 1998* to cover the activities of trust companies, as a result of which a company had to be registered if it was lawfully to carry on trust business, the trustee ceased to be authorised to carry on trust business on 31 December 2003. Consequently, the settlor agreed that the trusteeship should be transferred to Herald Trust Company Ltd (Herald), which had engaged Mr Olsen as a director, but this was never carried out owing to an oversight.

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It was not noticed until 18 March 2005, shortly after Mr Olsen left Herald and became a director of ASL Financial & Commercial Services Ltd (ASL), that the trusteeship had not been transferred from the trustee. When this was brought to the attention of the settlor, he first wrote requesting a deed to be executed effecting the retirement of the trustee and its replacement by Herald. A day later he then wrote to both Herald and Mr Olsen at ASL giving notice of his wish to revoke the trust pursuant to the power conferred by clause 5. Mr Olsen replied expressing concerns about the proposed revocation, and recommended that ASL rather than Herald be appointed as the new trustee. The settlor did, in fact, sign

a deed of appointment, but it was not completed because he refused to accept ASL's terms of business.

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Eventually, the settlor wrote to the trustee on 19 November 2005 to revoke the trust and give instructions as to how its assets were to be dealt with. The trustee, through Mr Olsen, sought legal advice as to whether the power of revocation had been effectively exercised. On 30 March 2006 the settlor issued a representation seeking:

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- (a) an order that the revocation was valid and effective; and
- (b) a declaration that the trustee was not entitled to remuneration because it was not licensed to carry on trust business nor to an indemnity in respect of legal expenses and the level of its remuneration ought to be reduced as both were unreasonably incurred and excessive.

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As between the beneficiaries, the matter became contentious between two of them from 24 April 2006 (later settled) and, at a hearing before the Court on 9 February 2007, all of them agreed to the settlor's revocation of the trust being held to be effective, with the consequence that thereafter the trustee was holding the trust assets as nominee for the settlor. That left the question of the trustee's remuneration and indemnity.

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Held

1. The trustee could not claim any remuneration under clause 4(e) of the trust because this was limited to a trust company authorised to undertake trust business, but the Court had power by order to authorise the remuneration of the trustee under *Art 26(1)(c) of the Trust (Jersey) Law 1984*. The supervisory jurisdiction of the Court was not narrower than that possessed by the Chancery Division of the High Court in England and the power to authorise remuneration included increasing or varying the amount provided for in the trust deed, and was not confined to those cases where there was no provision for remuneration in the trust deed. Whilst this power of the Court was to be exercised sparingly, there was no doubt that it should be exercised on the facts of this case to authorise the trustee to be remunerated for the period from 1 March 2005. The settlor clearly intended to pay a professional trustee and, though it was Mr Olsen's fault that the trusteeship was not transferred to Herald, that failure should not lead to a decision that the trustee be disallowed to charge for the time spent by Mr Olsen and others, provided that such time was not spent unreasonably. This should be equal to the hourly rate charged by Herald or ASL, whichever was the lesser, such rate being that in effect at the time the work was carried out, not at any subsequently increased rate (para [22]).
2. Both under customary law and by virtue of *Art 26(2) of the Trust (Jersey) Law 1984* a trustee was entitled to be indemnified out of the trust fund in respect of all expenses (including legal fees) reasonably incurred. Subject to a minimum threshold, the Court could invoke its supervisory jurisdiction, for example, by considering the reasonableness of the remuneration or legal fees sought to be paid out of the trust

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A fund on an application by the beneficiaries. In such a case, the Court would almost certainly delegate to the Greffier the task of exercising its supervisory jurisdiction over the reasonableness of the detailed sums claimed and, in so doing, he would not be acting as a taxation officer, merely assessing whether the amount in question was reasonably incurred. In this case, the beneficiaries had crossed the necessary threshold and raised sufficient grounds to give the Court real concern as to whether the amounts sought by the trustee in respect of remuneration and by way of indemnity for legal costs were unreasonably incurred. The legal fees charged by Sinels amounted to £75,000 and the trustee's own fees extended to £32,000, whereas the trust assets were only about £1m. Examples of alleged improper fees, inappropriate work and excessive charging provided additional support for this concern. As regards the duty to act neutrally from 24 April 2006, the Court had concerns as to whether the trustee and its legal advisers fully understood and appreciated what was involved, as the tone and content of some of the correspondence from Sinels, and the submissions that had been made, were not consistent with the position of a neutral trustee in a contest between beneficiaries. Accordingly, (subject to (3) below) this was an appropriate case to order an assessment of the trustee's remuneration and the legal fees in respect of which it sought an indemnity (para [33]). For this purpose, the Greffier should have regard to the following guidance:

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- an assessment was not a taxation;
 - having regard to what was charged by other leading firms, the hourly rate allowed should be Sinels' standard charge-out rate for the relevant fee-earner;
 - one had to focus on two aspects, first, whether a particular matter was one upon which it was reasonable to spend time, and secondly, whether the degree of time spent on a particular matter was reasonable;
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- the test was not whether the fees were incurred at the right level – it was whether they were reasonably incurred or, put another way, they could only be disallowed if they were unreasonably incurred; and
 - having regard to the general rule that a trustee acting reasonably was entitled to a full indemnity out of the trust fund, if in doubt whether the costs were reasonably incurred or of a reasonable amount, that doubt should be resolved in favour of the trustee (para [34]).
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3. The settlor and his wife had requested the trustee, through the directors of Castlehaven, to market the property Abney Thatch. The trustee refused to do so without the directions of the Court, which were given following an application at a hearing on 18 January 2007. It was claimed that the trustee had acted unreasonably in requiring the directions of the Court and the arguments that had been put forward as to why the property should not be marketed came very close to falling outside the band of what was reasonable. In the event, the Court was only just persuaded that, having regard to the importance of ensuring that trustees are able to seek directions where it is reasonable to do so and to put forward suggestions

about what is the appropriate course, it would not be right to deprive the trustee of its costs relating to that hearing (para [41]).

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Cases referred to

Alhamrani v Alhamrani [2007] JRC 012

Alhamrani v Russa Management Ltd [2007] WTLR 1317, [2006] JLR 176; [2007] JRC 053

Re Duke of Norfolk Settlement Trust [1982] Ch 61

Re Esteem Settlement and the No 52 Trust (Unreported, JRC, 15 January 2001)

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Statutes referred to

Financial Services (Jersey) Law 1998

Trusts (Jersey) Law 1984, Art 26(1)

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JUDGMENT

THE DEPUTY BAILIFF:

[1] This application raises questions in connection with the remuneration of a trustee and the trustee's right to indemnity in respect of legal expenses.

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The factual background

[2] The background can be shortly stated. The representor (the settlor) is the settlor of a revocable trust (the trust) governed by the law of Jersey and established on 14 June 1990. The trust is in somewhat unusual form but suffice it to say that there are four beneficiaries, namely the settlor, his second wife Coralie, and his two sons by his first marriage, Alan and Robin. All are of age. We hope we will be forgiven if, for convenience, we refer to some of the parties by their first name.

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[3] Anburn Trustees Ltd (Anburn or the trustee) was appointed trustee of the trust in May 1996. Mr Peter Olsen was the relevant director of Anburn with responsibility for the trust and he was the point of contact throughout the relevant period. Anburn ceased to be licensed to carry on trust company business under the *Financial Services (Jersey) Law 1998* on 31 December 2003. It was agreed between the settlor and Mr Olsen that the trusteeship of the trust should be transferred to Herald Trust Company Ltd (Herald), by whom Mr Olsen had become employed and of which company he was also a director.

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[4] Unfortunately, by administrative oversight, the trusteeship was never in fact transferred to Herald although such limited administration as there was continued to be carried out by Mr Olsen out of Herald's office and indeed Herald apparently submitted fees for acting as trustee. In February 2005 Mr Olsen left Herald and joined ASL Financial & Commercial Services Ltd (ASL) of which he became a director. On 18 March 2005 Herald delivered the files and records of the trust to Mr Olsen at ASL in his capacity as director of Anburn, because it had been realised for the first time that the relevant paperwork to transfer the trust from Anburn to Herald had never been completed.

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[5] Once this was brought to the attention of the settlor, he wrote on 17 May 2005 indicating that he would like the papers to be sent back to Herald and for a deed to

A be executed effecting the retirement of Anburn and its replacement by Herald. The next day, on 18 May, he addressed a letter to both Herald and Mr Olsen at ASL giving notice that he wished to revoke the trust pursuant to the power conferred upon him by clause 5 of the trust. On 23 May Mr Olsen replied indicating that he had concerns about the revocation for the reasons touched upon in the letter. He also recommended that ASL rather than Herald should be appointed as the new trustee.

B In due course the settlor executed an undated deed of appointment appointing ASL as trustee of the trust but this was not executed because in November the settlor refused to sign ASL's terms of business. By then there was disagreement between the settlor and Mr Olsen as to the purported revocation and on 19 November 2005 the settlor wrote a further letter addressed to Anburn purporting to revoke the trust and giving instructions as to how the trust assets were to be dealt with.

C [6] At all material times the trust has held only two assets. The first consists of the entire share capital of Castlehaven Investment Corporation (Castlehaven), a Panamanian company which in turn owns a property in England called Abney Thatch in which the settlor and Coralie reside. The second asset consists of a collection of stamps and books although some of these have recently been sold, so that the trust now holds the cash proceeds.

D [7] Anburn, through Mr Olsen, continued to be uneasy about whether the settlor had effectively exercised the power of revocation and took legal advice. However, application by Anburn to seek the directions of the Court was anticipated by the settlor issuing a representation on 30 March 2006 seeking an order that the revocation by the settlor was valid and effective. The representation also sought a declaration that Anburn was not entitled to any remuneration because it was not licensed by the JFSC to provide trustee services.

E [8] Anburn filed an answer pleading, *inter alia*, that it was not satisfied that the purported revocation was valid because of concerns about whether the settlor was acting under the undue influence or dominion of Coralie and whether he fully appreciated the consequences of a revocation.

F [9] The representation had originally sought an order that the matter be treated as a *cause de brièveté*. However, at a hearing on 24 April 2006, the Court ruled that it should not be so treated, convened Alan to the proceedings and gave various directions for the progress of the matter. At the hearing the bailiff indicated that, in view of Alan's involvement, Anburn should now take a back seat.

G [10] Alan duly filed an answer on 8 May challenging the revocation on similar grounds to those foreshadowed in the answer of Anburn. Accordingly battle had been joined between the settlor and Alan as to whether the trust had been validly revoked or not.

H [11] At an early stage negotiations began between the settlor and Alan, although it is fair to say that they have proceeded very slowly and there have been interruptions. Be that as it may, eventually agreement has been reached and at the hearing before the Court on 9 February all four beneficiaries confirmed through counsel that they agreed to the revocation dated 19 November 2005 being held to be effective, with the consequence that Anburn has, as a matter of law, been holding the

trust assets as nominee for the settlor since that date. The Court duly made an order to that effect. The recognition of the validity of the revocation is part of a wider agreement reached between the four beneficiaries which involves, *inter alia*, the creation of a new settlement, but that is not a matter for this Court.

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[12] This left the question of the remuneration and indemnity of the trustee upon which the Court heard argument. The beneficiaries argued that:

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- (i) Anburn is not entitled to any remuneration because it was not authorised to act as a trustee during the relevant period; and
- (ii) Anburn should not be indemnified in respect of the legal fees of Sinels and its claimed remuneration should be reduced as both were unreasonably incurred and excessive;

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We shall consider each of these in turn.

(i) Is Anburn entitled to remuneration?

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[13] Anburn has submitted fee notes for the period March 2005 to December 2006 totalling £28,615. We were informed that, as at 30 January 2007, this sum had increased to £32,749. The fees have been calculated on the basis of the hourly rates charged by ASL for Mr Olsen’s time and any other fee-earners who have worked on the file.

[14] Clause 4(e) of the trust deed provides:

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‘Any Trustee for the time being hereof *who shall be a company authorised to undertake trust business* shall be entitled in addition to reimbursement of its proper expenses to remuneration for its services in accordance with such company’s published terms and conditions for trust business in force from time to time.’ [Emphasis added.]

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[15] When this standard provision was incorporated in the trust deed in 1990, there was no requirement for a trustee in Jersey to be licensed to act as a trustee. However, following the extension of the *Financial Services (Jersey) Law 1998* to cover the activities of trust companies, a company must now be registered by the JFSC if it is lawfully to carry on trust business. Anburn is not so registered and accordingly it is not a company which is authorised to undertake trust business. In those circumstances clause 4(e) does not entitle Anburn to be remunerated. Mr Sinel did not dispute this analysis.

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[16] However, *Art 26(1) of the Trusts (Jersey) Law 1984 (the 1984 Law)* provides as follows:

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‘26 Remuneration and expenses of trustee

- (i) Unless authorized by:

- (a) the terms of the trust;

- A (b) the consent in writing of all the beneficiaries; or
 (c) any order of the court,

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

B Mr Sinel submits that the Court should exercise its power under *Art 26(1)(c)* to remunerate Anburn in accordance with the fee notes which have been submitted.

[17] The Court was referred to *Re Duke of Norfolk Settlement Trust* [1982] Ch 61 which confirmed the inherent jurisdiction of the Chancery Division of the High Court to allow a prospective or existing trustee to be remunerated where none was provided for in the trust deed and which held further that such jurisdiction also extended to increasing or varying the remuneration provided for in the trust deed in respect of past or future services of a trustee. In that case the trustees had been called upon to provide services beyond those envisaged at the time of the creation of the settlement. In passing Fox LJ explained the basis of the power as follows at 78:

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'When the court authorises payment of remuneration to a trustee under its inherent jurisdiction it is, I think, exercising its ancient jurisdiction to secure the competent administration of the trust property just as it has done when it appoints or removes a trustee under its inherent jurisdiction.'

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[18] Mr Gleeson submits that *Art 26(1)* is to be read disjunctively, so that the Court cannot exercise its power under *sub-paragraph (c)* if there is provision for remuneration in the trust deed in accordance with *sub-paragraph (a)*. *Sub-paragraph (c)* may be exercised to authorise remuneration where none is provided for in the trust deed but may not be exercised effectively to vary the trust deed by varying the remuneration clause.

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[19] We do not accept that argument. There is no reason to consider the supervisory jurisdiction of this Court to be any narrower than that possessed by the Chancery Division of the English High Court. We have no doubt that the power of the Court extends not only to authorising remuneration but also to increasing or varying the amount of remuneration provided for in the trust deed. In our judgement *Art 26* is entirely consistent with such jurisdiction and is not to be read as confining the power of the Court to make an order concerning remuneration to those cases where there is no provision for remuneration in the trust deed.

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[20] The question is whether the Court should exercise its jurisdiction to provide for remuneration of Anburn notwithstanding that, because it is not authorised to carry on trust business, clause 4(e) does not authorise it to be remunerated at present. Mr Gleeson, supported by Mr Franckel, submits that, on the facts of this case, the Court ought not to exercise its power for, *inter alia*, the following reasons:

- (i) The fact that Anburn is still the trustee is entirely the fault of Mr Olsen who should have ensured the transfer to Herald as intended at the end of 2001.

- (ii) When Mr Olsen discovered in March 2005 that Anburn was still the trustee, he did not immediately inform the settlor; on the contrary he wrote on April to the settlor's legal advisers and instructed them not to copy the letter to the settlor. A
- (iii) When he did inform the settlor of the fact that Anburn, an unlicensed trustee, remained as trustee, he misled the settlor as to the reasons for the failure to transfer to Herald, claiming that he had requested an explanation from Herald but that their 'reply sheds no light on the matter' when in fact their reply had placed the blame for the failure firmly on Mr Olsen. B
- (iv) He did not act on the settlor's letter of 17 May 2005 requesting that Herald be appointed as trustee as originally envisaged in 2001. On the contrary he wrote back seeking to persuade the settlor that ASL should be appointed as trustee instead. C
- (v) He never drew to the settlor's attention the fact that, because Anburn was not registered, it was not entitled to charge remuneration under clause 4(e). D
- (vi) Although it was true that, after signing the deed of appointment in August 2005 appointing ASL as trustee in place of Anburn, the settlor had refused to take the necessary steps to allow this to proceed by refusing to sign ASL's terms of business, this was perfectly understandable as he had by then lost faith in Mr Olsen because of the latter's refusal to recognise the revocation, his failure to ensure that the trustee of the trust was licensed to act and other matters. E
- (vii) Despite acknowledging by the date of the hearing that Anburn was not entitled to remuneration under clause 4(e), Anburn and its lawyers had at no stage made a formal application to the Court to exercise its power under *Art 26(1)(c)*. Anburn had simply rendered fee notes and left the settlor and beneficiaries to object. F
- (viii) Anburn should have sought directions at an early stage as to the validity of the revocation. The Court would not necessarily have allowed an indemnity out of the trust fund at that stage. G

[21] We have carefully considered the above points together with the other arguments raised by Mr Gleeson. The power of the Court to authorise or vary the remuneration of a trustee is a power to be exercised sparingly. Nevertheless we have no hesitation in concluding that, on the particular facts of this case, we should exercise our power to authorise Anburn to be remunerated for the period from 1 March 2005 to date. Our reasons briefly are as follows: H

- (i) The settlor clearly intended to have a professional trustee. He appointed a professional trustee originally and replaced that trustee with Anburn in May

- A 1996. At that time Anburn was authorised to act as a trustee and was therefore authorised to charge in accordance with clause 4(e). It is clear that the settlor expected Mr Olsen to represent the trustee and that in effect the trustee's charges would be based upon the time which Mr Olsen spent on the matter together with any support staff.
- B (ii) We find that it was indeed Mr Olsen's fault that Anburn has remained as trustee. We were not impressed by the correspondence in which he sought to blame others, whether Herald or, subsequently, the settlor. From April 2003 until February 2005 he was a director of both Anburn and Herald and he was the director responsible for the trust. It was therefore his responsibility to ensure that what everyone had agreed upon, namely the transfer of the trusteeship from Anburn to Herald, should take place. It may well be that he delegated the matter to be processed within Herald, but it remained his responsibility to ensure that this occurred.
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- D (iii) Nevertheless, we do not see that the failure to transfer should lead to a decision that the trustee should not be allowed to charge. The settlor (and therefore the beneficiaries) envisaged that the trust would be looked after by Mr Olsen and that the corporate trustee would charge for his time. Subject to consideration of amount, it cannot make any difference to them whether that trustee happens to be Herald, Anburn or ASL, depending on which company is Mr Olsen's employer at any given time. It follows that charges raised by a professional trust company based upon the provision of Mr Olsen's time is exactly what the settlor and beneficiaries must have expected to pay and that is what they are now being asked to pay. We do not see that equity requires that they should receive a windfall benefit of the trust being administered free of charge when that was not what anyone at any stage envisaged. Conversely, it seems to us harsh to punish Mr Olsen for his inefficiency in procuring the transfer by depriving him of all remuneration notwithstanding that he has, in good faith, spent considerable time on the affairs of the trust.
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- G (iv) We accept that Mr Gleeson's criticisms of the manner in which Mr Olsen informed the settlor of the problem over the trusteeship have some validity, although we also accept that Mr Olsen thought it in the best interests of the trust for him to continue to act because of his personal knowledge and involvement over a long period and that is why he recommended ASL instead of Herald. We also accept that his reason for stating that his letter of April should not be copied to the settlor and Coralie was because the letter contained references to certain confidential conversations between him and the settlor concerning Coralie's role in the matter. Taking matters in the round, we do not accept that any misjudgements or mistakes of Mr Olsen in connection with such matters make it unjust or inequitable for him to be remunerated for the time spent acting as trustee.
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(v) We accept that Anburn has been ill advised in not bringing a formal application for the Court to exercise its power under *Art 26(i)(c)*. However, the fact remains that the Court has heard full argument on whether Anburn can or should be remunerated. As we shall mention in more detail shortly, this is a trust with modest assets and we think it to be in the best interests of all concerned to bring the matter to a conclusion as speedily and economically as soon as possible. To adjourn this hearing on a technicality in order for a formal application to be made does not seem to us to be in anyone's interest.

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(vi) If Anburn had sought directions prior to the issue of the representation, we see no reason why the Court would not have granted it the usual indemnity in respect of its legal costs.

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[22] Accordingly we hold that Anburn is entitled to charge for time spent by Mr Olsen and others provided that such time was not spent unreasonably. The next question is, at what rate? The fees have been billed at the current hourly rates of ASL; but ASL is of course not the trustee. Anburn is the trustee but has no standard rates as it has not been carrying on business since 2001. Had matters proceeded as originally agreed, Herald would have been the trustee as at March 2005. Whether, following Mr Olsen's move, the trusteeship would have transferred from Herald to ASL cannot be known at this stage. What is clear is that the trust should not bear any greater costs than it would have if Herald had remained as trustee. Accordingly, if ASL's rates are higher than Herald's, the excess cannot properly be charged. Conversely, if Herald's charges are more than ASL's, we do not think it would be just that ASL and Mr Olsen should benefit from this, given that the fact that Anburn is still the trustee is Mr Olsen's fault and we cannot be certain what would have happened in March 2005 had Herald remained as trustee. Accordingly we think that the only fair solution is to rule that the hourly rate should be that charged by Herald or ASL, whichever is the lesser. Furthermore, the hourly rate must of course be the rate which was in effect at the time the work was carried out, not at any subsequently increased rate. The fact that there has been a delay in payment is largely due to the fact that Anburn is unregistered and we do not see that the beneficiaries should suffer increased fees on that account.

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(ii) The trustee's indemnity in respect of legal costs and the level of remuneration

[23] Until May 2006 there had been a certain amount of inconsistency in both thought and practice in relation to a trustee's costs. Orders were being made for the trustee to recover its legal costs out of the trust fund on an indemnity basis, and sometimes (but not always) the Court ordered these to be taxed if not agreed. The Greffier would then exercise his power of taxation under r12 of the Royal Court Rules 2004 and would apply the scales laid down in connection with that process for Factor A and Factor B. This meant that, in many cases, the amount which the trustee could recover out of the trust fund following taxation was noticeably less than the sum which had been charged by its lawyers. It followed that either the trustee had

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A to make up the difference out of its own assets or the lawyers had to forego some of their fee, which meant that lawyers would act for trustees at a lesser rate than they would act for ordinary litigants.

B [24] In an important judgment in *Alhamrani v Russa Management Ltd* [2007] WTLR 1317 Bailhache, Bailiff sought to clarify the position. He reiterated that, both under
 C customary law and by virtue of *Art 26(2) of the 1984 Law*, a trustee is entitled to be indemnified out of the trust fund in respect of all expenses reasonably incurred. This includes legal fees. A trustee is not expected to fund expenses incurred in connection with the administration of a trust (including legal fees) out of its own pocket. It followed, he held, that, in cases of non-adversarial litigation, questions of taxation under *r12* did not arise. Very different considerations applied in hostile litigation where, for example, a trustee was being sued by a beneficiary for breach of trust; in those circumstances the trustee was incurring legal expenses to protect its own interest, not those of the beneficiaries of the trust fund.

D [25] The effect of the Bailiff's judgment was helpfully summarised by Page, Commissioner in *Alhamrani v Alhamrani* [2007] JRC 012 at para 7 (passages in italics are quotations by Commissioner Page from the Bailiff's judgment and the references to the paragraphs in the Bailiff's judgment are omitted):

- E (i) The general principle is that '*a trustee, acting reasonably and in the exercise of its duties, powers and discretions, is entitled to an indemnity from the trust fund in relation to all costs and expenses properly incurred*'.
- (ii) Strictly speaking, that principle is one that arises as a matter of basic trust law and an express order to such effect is unnecessary.
- F (iii) In such circumstances, no question of taxation arises – even if such an order (that is, an order for an indemnity from trust funds) is made in express terms.
- (iv) It is to be emphasised that this general principle only applies where a trustee is acting reasonably.
- G (v) This general rule can be displaced or overridden by the Court but only by specific order to that effect.
- H (vi) A beneficiary who thinks that a trustee has acted unreasonably and ought not to be entitled to recover his costs in full (or, perhaps, at all) has the same remedies as those available for any alleged breach of trust or fiduciary duty, or for other misconduct; to say that without the automatic operation of taxation there is no mechanism for preventing the '*plundering of the trust fund*' by an unscrupulous trustee is therefore incorrect. '*Nothing which I have stated above should be taken as indicating a carte blanche to use the trust fund for the payment of legal or professional fees in an improper, immoderate or disproportionate way. A beneficiary or other interested party who wishes to complain of such misconduct has a*

right of recourse to the Court, which would not hesitate to use its supervisory jurisdiction to impose appropriate orders or penalties...'

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[26] As Page, Commissioner said at para 6 of *Alhamrani*, the Court may choose to exercise its general supervisory jurisdiction in this respect in a number of different ways. One method might be for the Court to consider the reasonableness of the remuneration or legal fees sought to be paid out of the trust fund on application by the beneficiaries. However, it is highly unlikely that this would be undertaken by the Court itself (in the form of the Bailiff alone or the Inferior Number). Whilst the Court would be willing to consider issues of principle (eg should a particular application have been brought) the Court would almost certainly delegate to the Greffier the task of exercising its supervisory jurisdiction over the reasonableness of the detailed sums claimed. However, it is of fundamental importance to appreciate that, following *Alhamrani*, the Greffier would not be acting as a taxation officer. He would merely be considering whether the amount in question was reasonably incurred. For convenience we propose that this process should be referred to as 'assessment', in order to distinguish it from taxation.

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[27] On 1 March 2007, following the hearing in this case, the Bailiff delivered a further judgment ([2007] JRC 053) supplementing his original judgment referred to at para [24] above. In response to the suggestion that the taxation process was the only defence which beneficiaries had against the plundering of the trust fund by a trustee, the Bailiff confirmed that the Court had ample power under its general supervisory jurisdiction in relation to such matters and went on to say at para 8:

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'There is a threshold to overcome. It does not seem to me that the Court is likely to invoke its supervisory jurisdiction lightly, as indicated at paragraph 23 of the May 2006 judgment, particularly if it is satisfied that in general a trustee has been acting reasonably in the best interests of the trust. Nonetheless, if satisfied that something has gone wrong, the Court may take appropriate action. Counsel for the first party suggested that a breach of trust, breach of fiduciary duty or other misconduct was setting the hurdle too high, and that beneficiaries needed a remedy for minor or irritating actions on the part of a trustee. It seems to me that the characterisation of what conduct is sufficiently bad to give a judge real cause for concern that something has gone wrong must be left for decision on a case-by-case basis. Suffice it to say that, in my judgement, small flies in the ointment are unlikely to cause the engagement of the supervisory jurisdiction of the Court. Nonetheless, it may be worth repeating that a trustee is entitled to his indemnity out of the trust fund only in respect of costs and expenses reasonably incurred. If a judge has real cause for concern that certain costs might not have been reasonably incurred, that might well cause him to engage the Court's supervisory jurisdiction and take appropriate action.'

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A [28] Mr Franckel, supported by Mr Gleeson, argued that there were real grounds for concern in this case and that an assessment should be ordered both in relation to the trustee's remuneration and the legal fees. He expressed particular concern about the level of Advocate Sinel's fees. He submitted first that the matter must be put in context. This was a trust with modest assets. The properly and stamp collection together were worth something in the region of £1m. One of the reasons for the proposed sale of the property was so that a smaller property could be purchased and some capital put aside to produce an income for the settlor and Coralie, who were in need of such. This was therefore a classic case where costs should be kept proportionate to the amount at stake and the issues involved. In respect of the latter, once Alan had been convened, it was clear that the dispute as to the validity of the revocation was to be fought between the settlor and Alan. As the Bailiff made clear at the hearing on 24 April, the trustee was thereafter to take a back seat. We agree that it should have been clear to the trustee and its legal advisers that it should be neutral once Alan was concerned, even if no formal order to this effect was made on 24 April.

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D [29] In fact, said Mr Franckel, the trustee and its legal advisers had not acted in this way. A review of the correspondence and activities showed Sinels acting in a confrontational manner and not simply taking the role that a neutral trustee should take. Indeed, the legal fees charged by Sinels amounted to something in the region of £75,000 and the trustee's own fees extended to some £32,000 so that a total of over £100,000 was being claimed. He submitted that this was wholly disproportionate to the amount at stake and to the role which the trustee should have been undertaking. By way of comparison, Mr Franckel informed the Court that his fees for acting for Alan, who was one of the protagonists, were approximately one-third of those sought by Sinels.

E [30] In support of the main thrust of his submission, Mr Franckel pointed to the following examples:

- F (a) Improper fees
- G (i) Anburn had charged £4,872 in time spent in dealing with the JFSC which related to its unregistered position. This was not properly chargeable to the trust fund.
- (ii) Time was charged both by Anburn and Sinels for dealing with Anburn's professional indemnity insurance position (PII). This was a matter which related purely to the protection of the trustee personally and was not a matter which was properly chargeable to the trust fund.
- H (iii) There were certain items (eg Mr Olsen consulting with Sinels concerning his rights against his fellow shareholder in Anburn) which were nothing to do with the trust and were not properly chargeable to the trust fund.

- (b) Inappropriate work

- (i) It was unreasonable of the trustee and Sinels to charge for the preparation of a supplemental affidavit by Mr Olsen in May 2006. Although it was

correct that Mr Olsen had been ordered by the Court on 24 April to file such an affidavit, Sinels were aware that, immediately following the hearing on 24 April, the settlor and Alan had entered without prejudice negotiations to try and settle the matter and Sinels should either not have prepared the affidavit or should at any rate have sought clarification from the settlor and Alan as to whether they needed to continue with preparation of the affidavit.

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(ii) On 20 June 2005 a consent order was made for discovery within 28 days ie by 11 July. Although negotiations had been broken off, they had recommenced after 20 June and on 7 July Mr Franckel informed Sinels of this fact. On 11 July Sinels e-mailed Mr Franckel asking whether he and Mr Sinclair (of Voisins, who then represented the settlor) had agreed to postpone the scheduled timeframes for discovery and inspection whilst negotiations took place, to which Mr Franckel immediately replied that he was in the hands of Mr Sinclair and that he would revert as soon as he had heard from Mr Sinclair. However, he suggested that it would be inappropriate in the meantime for the trustee to carry out any significant step that week, when it was aware that discussions were taking place. Despite this, Sinels proceeded to incur time on 11 and 12 July in order to complete discovery. In this respect Sinels' fees totalled £2,400.

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(iii) In June and July Sinels took the initiative in enquiring whether the trustee should instruct an expert medical witness in connection with the settlor's capacity to revoke the trust. Mr Franckel argued that this was inappropriate for a trustee which was acting neutrally.

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(iv) In October, Sinels insisted on issuing a summons for directions asking for various orders from the Court. This was objected to by the other parties as they were still in negotiations and considered it to be unnecessary. In the end, the only order which was made out of those sought by the summons was a consent order that the trustee act neutrally. This added nothing to the existing position. Sinels' invoice in respect of that period totalled £2,479. The settlor and Alan of course also incurred costs in respect of the summons.

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(c) Excessive charging

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The settlor and Alan made joint objections to the costs of the trustee and its advocates on 10 January 2007 which were produced to the Court. Suffice it to say that a number of detailed criticisms were made suggesting that excessive time had been spent by the trustee and Sinels in a number of areas.

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[31] Mr Sinel vigorously defended the level of trustee remuneration and legal fees. He said that the work done was necessary because of the concerns over the validity of the revocation and that the trustee had not stepped outside the role of a neutral trustee. In relation to the allegedly inappropriate work, the time spent on the supplemental affidavit and discovery was reasonably incurred because there was a

A Court order requiring these matters to be done. In relation to the medical expert and summons for directions, the trustee was frustrated by the lack of progress and by the fact that it was not being kept informed as to the state of negotiations. The summons for directions was necessary in order to bring some order to the proceedings and to ensure that the other parties got on with things.

B [32] Mr Sinel also submitted that in fact the litigation was partly hostile because the representation sought an order that the trustee was not entitled to any remuneration because it was not licensed to carry on business as a trustee. However, we regard that argument as self-defeating. If the litigation was hostile, the principles summarised by the bailiff in *Alhamrani* are of no application and Mr Sinel cannot rely upon them. In fact, although the issue of remuneration is raised in the representation, the main issue is clearly the validity of the revocation and it is in that respect that most of the costs have arisen. Insofar as the costs associated with the argument over remuneration and legal fees is concerned, we will consider what order to make on that in due course.

C [33] We have carefully considered all the various arguments put forward by Mr Sinel objecting to any form of assessment or other review by the Court, but we have concluded that the beneficiaries have crossed the necessary threshold and have raised sufficient grounds to give us real concern as to whether the amounts sought by the trustee in respect of remuneration and by way of indemnity for legal costs were unreasonably incurred. Very briefly, our reasons are as follows:

E (i) We are concerned at the level of fees. This is a trust with modest assets and in those circumstances it is incumbent upon a trustee and its legal advisers to bear this in mind and to endeavour to keep the costs to a level which is proportionate to the amount and issues at stake. Naturally we cannot say at this stage whether the remuneration and legal expenses claimed will ultimately be found to be unreasonable but, on the face of it, legal fees of £75,000 and trustee fees of £32,000 where the assets are about £1m and the trustee's duty has been to act neutrally since 24 April 2006, do give rise to real concern as to whether they have been reasonably incurred.

F (ii) We do have concerns as to whether the trustee and its legal advisers have fully understood and appreciated what is involved in acting neutrally. We find that, even though no express order was made on 24 April 2006 that the trustee should be neutral, it should have been obvious that, from that date, that was the role the trustee had to fill. Battle had been joined between the settlor and Alan. The tone and content of some of the correspondence from Sinels to which we have been referred suggests that the approach being taken was not always that to be expected of a neutral trustee. Indeed the trustee's skeleton argument submitted that it would be wholly inappropriate for the Court to determine the validity of the purported revocation without hearing full and proper evidence. Furthermore, at the commencement of this hearing, although all four beneficiaries, who between them are entitled to the entirety of the trust fund,

confirmed that they were in agreement that the Court should recognise the revocation of November 2005, Mr Sinel continued to express concerns on the part of the trustee about what was being proposed and whether the revocation was in fact valid. This was not consistent with the position of a neutral trustee who is simply leaving the beneficiaries to fight the matter out.

(iii) Mr Sinel very properly conceded immediately that time spent in connection with the JFSC concerning registration was not properly to be charged to the trust. However, he maintained that time spent in relation to PII matters was properly chargeable. We do not agree. PII exists to indemnify a trustee in respect of claims by third parties (such as beneficiaries). Correspondence with a trustee's insurers or consideration of the insurance position generally are actions taken for the protection of the trustee, not in the interests of the beneficiaries of a trust. We find that time spent in this connection was not properly chargeable to the trust.

(iv) As to the four examples of alleged inappropriate work, we agree with Mr Sinel that, given the existence of a court order, it was reasonable to proceed with the production of the supplemental affidavit. As to discovery, we can imagine that most lawyers might well have adopted a rather more conciliatory approach to the matter and, following receipt of Mr Franckel's e-mail of 10 July, would have sought clarification as to whether he had spoken to Mr Sinclair or would have indicated that, unless they heard from Mr Franckel and Mr Sinclair within a certain timescale, they would feel obliged to proceed with discovery. However, the fact remains that Mr Franckel did not revert further nor did Mr Sinclair and in the circumstances we do not think that we should categorise Sinels' actions in proceeding as unreasonable, given the existence of a court order for discovery. As to the time spent in connection with the medical expert and a summons for directions, we consider that in both of these cases the actions taken went well beyond those to be expected of a neutral trustee and were unreasonably incurred.

(v) As to the detailed criticisms of time spent, we are of course not able to determine this but, suffice it to say that, given the other matters referred to above, they provide additional support for the concern which the Court has already found to exist.

[34] In all the circumstances we have concluded that this is an appropriate case in which to order an assessment of the trustee's remuneration and the legal fees in respect of which the trustee seeks an indemnity. As this is the first such assessment, we set out the following by way of assistance to the Greffier:

(i) An assessment is not a taxation. The scales applicable on a taxation are of no relevance.

- A (ii) As the bailiff made clear in *Alhamrani* (para 23), a trustee's duty embraces an obligation to consider whether a particular lawyer or firm of lawyers is appropriate to the problem upon which advice is sought, and the scale of trust assets. Some firms may be more expensive than others. A trustee should be alert to the necessity of employing advisers whose skills and charges bear a proper relationship both to the nature of the problem and to the size of the trust fund. In this case, we consider it reasonable for the trustee to have consulted a litigation advocate of the experience and seniority of Mr Sinel. Accordingly, provided that Sinels' hourly rates are not out of line with those charged by other leading firms, the hourly rate allowed in an assessment should be the standard rate of charge of Sinels for the fee-earner in question.
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- (iii) The Greffier is therefore likely to be concentrating on two aspects, namely whether a particular matter is one upon which it was reasonable to spend time; and secondly, whether the degree of time spent on a particular matter was reasonable.
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- (iv) The test is not whether the Greffier thinks the fees were incurred at the right level; it is whether they were reasonably incurred. Put another way, they may only be disallowed if they were unreasonably incurred. As has been said on many occasions, two people can come to two completely different decisions, both of which are reasonable. To take a simple example, in preparing a pleading, one lawyer might draft a three-page pleading, whereas another might draft a five-page pleading. In most cases it will not be possible to say that one is right and one is wrong, they are simply two different ways of achieving the same end and both are reasonable. In that event the time spent on preparing the five-page pleading is not unreasonably incurred and must be allowed. It is only if something falls outside the band of reasonable actions that something should be disallowed.
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- (v) The assessment process should be exercised against the background of the general rule *viz* that a trustee acting reasonably is entitled to a full indemnity out of the trust fund. If costs or expenses are to be disallowed in relation to a specific item, it must be on the basis that the item was incurred unreasonably, and that is a high hurdle. We think that, on assessment, the Greffier should also apply the same principle as is laid down by r12/5 in relation to taxation on the indemnity basis, namely that any doubts that the Greffier might have as to whether the costs were reasonably incurred or of a reasonable amount should be resolved in favour of the trustee.
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[35] There is of course a theoretical difference between the remuneration of a trustee and its expenses such as legal fees. In the case of the former, the decision of the Court on an assessment will determine the level of remuneration that the trustee can charge and that will be the end of the matter. However, in relation to an account for disbursements (such as legal fees) the actual decision of the Court will simply be whether the trustee is entitled to indemnify itself out of the trust fund in respect of

those legal fees. Thus, if legal fees are rendered in the sum of £10,000 but, under the assessment procedure, the Court determines that £5,000 was unreasonably incurred, the result is that the trustee may only indemnify itself as to £5,000 out of the trust fund. In theory, it will be left to pay the remaining £5,000 to its lawyers out of its own resources. However, because the process of assessment is different from that of taxation in that the taxation scales are of no application and an item from a legal bill is to be disallowed only if it is unreasonable, it is likely to be very difficult for the lawyer subsequently to sue the trustee successfully for the balance of £5,000. There is an implied term in any such contract that the fees will be reasonably incurred and if the Court has found that £5,000 of charges was unreasonably incurred, it is hard to see how, on a future occasion, the lawyer is going to succeed in showing that they were reasonably incurred and that the trustee should therefore pay them. Thus the practical effect should in most cases not be adverse for the trustee. There may of course be exceptions. For example, if the trustee has insisted on the lawyer carrying out certain work which the court has subsequently held to be unreasonable, the fault will lie with the trustee rather than the lawyer and the trustee will have to bear the cost from its own pocket.

[36] We would add two matters for the guidance of the Greffier in relation to the facts of this particular case:

- (i) The revocation having been held to be valid, the trustee has in fact been holding the trust fund as a mere nominee for the settlor since 19 November 2005. The responsibilities of a nominee are of course considerably less than those of a trustee of a discretionary or other conventional trust. However, the trustee believed in good faith that it was or might be holding the assets of the trust upon the trusts set out in the trust deed until 9 February 2007 and it was therefore incumbent upon the trustee to behave and act accordingly. It follows that the trustee is entitled to be remunerated until 9 February 2007 on the basis that it was acting as trustee of the trust and was accordingly subject to all the duties and responsibilities of such a trustee.
- (ii) One of the arguments raised by the settlor at various stages was that he had an absolute right to revoke the trust and that the trustee should have accepted the revocation; costs arising as a result of the trustee's refusal to do so were therefore unreasonably incurred. We did not understand Mr Gleeson or Mr Franckel to be pursuing that argument at the hearing. However, for the avoidance of doubt, we state that, having regard to the affidavits and correspondence before us, we are quite satisfied that Mr Olsen (and therefore the trustee) acted entirely reasonably in querying the revocation. On the information available to him, he acted quite correctly in querying whether the settlor was acting of his own free will. We are of course not to be taken as making any finding on this; we are merely holding that Mr Olsen acted reasonably in not accepting the revocation initially, consulting with legal advisers and then pleading to the representation to the effect that the trustee

A had reservations over the revocation. Indeed, as we have seen, Alan adopted those arguments. If Mr Olsen had not queried the revocation, Alan and Robin would almost certainly be in a much worse position than they now are.

B (iii) It follows that the concern which we have expressed in relation to the level of remuneration and legal fees does not arise in connection with the actions of the trustee prior to the issue of the representation. Our concern arises in connection with the actions of the trustee and its legal advisers following the hearing of 24 April 2006, when Alan was convened, following which the trustee should have been acting neutrally and accordingly the reasonableness of the hours spent by the trustee and its legal advisers has to be considered in that context.

C (iv) Insofar as the Court has in this judgment determined any issues of principle (eg that it was reasonable to file the supplemental affidavit or that it was unreasonable to issue the summons for directions), the Greffier must of course proceed in accordance with those findings.

D **The hearing of 18 January 2007**

E [37] On 18 January 2007, the deputy bailiff heard an application for directions as to whether the trustee should, through the directors of Castlehaven, begin marketing the property Abney Thatch. The directions sought were confined to the marketing of the property, not to agreeing to any sale. The settlor and Coralie, with the concurrence of Alan, had requested the trustee to act in this manner but the trustee had refused to do so without the directions of the Court. Having heard argument, the Court, for the reasons set out in a brief judgment of that date, directed the trustee to proceed with the marketing.

F [38] Mr Gleeson, supported by Mr Franckel, says that the trustee acted unreasonably in requiring that a direction from the Court be obtained. The mere marketing of the property – as opposed to concluding any sale – was a simple matter to which any trustee should have agreed without difficulty. He said that the correspondence from Sinels leading up to the application was unhelpful and raised points of no substance which simply increased costs. The Court had found against Mr Sinel on all the points which he had raised. As to the suggestion that the trustee had to seek directions and surrender its discretion to the Court because of the refusal of the JFSC to confirm that placing the property on the market would not cause Anburn to be prosecuted for carrying on unauthorised trustee business, this was the fault of Anburn because it had not ensured that a licensed trustee remained as trustee of the trust. The beneficiaries should therefore not be penalised by an order that the trustee's costs should come out of the trust fund.

H [39] Apart from the JFSC point, Mr Sinel's three grounds for suggesting at the hearing on 18 January that the Court should not agree to the marketing of the property were that Anburn did not know whether it was acting as a trustee of the trust or a simple nominee of the settlor; that the existing tax advice confirming that there were no adverse English tax consequences simply from marketing the property

was insufficient and that further tax advice should be taken; and that it was not clear at that stage whether the best course would be to sell the shares in Castlehaven or to sell the property itself out of Castlehaven and that might affect the way in which the property was marketed, alternatively marketing followed by a decision not to proceed with a sale could give the property a bad name.

[40] It is true that the Court was unimpressed with these three arguments and dismissed them with little difficulty. The Court has considered very carefully whether the trustee's position was so devoid of merit as to lead to a conclusion that it was behaving unreasonably. However it is important to bear in mind the sentiments expressed in *Re Esteem* (2001) 16(A) (Unreported, JRC, 15 January 2001) at para 14(iv) as follows:

'Indeed I would not wish to discourage trustees from making a recommendation when they seek the directions of the Court in administrative proceedings. It is not helpful to the Court for the trustee metaphorically to dump the problem in the Court's lap saying "there you are, you sort it out". The Court is entitled to expect the fullest assistance from a trustee who should ensure that all relevant law is before the Court and that all the arguments for and against the various possible courses of action are rehearsed. The Court will usually be assisted by the trustee recommending a particular course of action and explaining the reasons for its recommendation. It will of course then be for the Court to decide whether it agrees. It would not be in the public interest for trustees to be discouraged from making recommendations for fear of being penalised in costs just because the Court decides against the recommendation.'

[41] The Court believes that the trustee's arguments in this case came very close to falling outside to the band of what was reasonable but has just been persuaded that, having regard to the importance of ensuring that trustees are able to seek directions where it is reasonable to do so and to put forward suggestions about what the appropriate course is, it would not be right to deprive the trustee of its costs in relation to the hearing of 18 January.

[42] Had the Court decided that the trustee had acted unreasonably in presenting the three grounds referred to above, the Court would have disallowed the costs because it is true that, if the refusal of the JFSC had been the sole ground for applying to the Court, this should not be laid at the door of the beneficiaries because it is entirely the trustee's fault that the position has not been regularised. However, that position does not arise in view of the Court's finding on the other arguments.

Wasted costs

[43] The settlor and Alan assert that they have incurred unnecessary costs as a result of the trustee's unreasonable actions (eg time spent by their lawyers on dealing with the summons for directions referred to above). They claim a sum of approximately £1,000 and say that this sum should be deducted from any costs allowed to the

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A trustee. In our judgement we cannot deal with such a matter at a hearing concerning the trustee's fees and right of indemnity in respect of legal costs. In effect what is said by the settlor and Alan is that they have been caused loss by the wrongful actions of the trustee. This is a claim which must be formulated, brought and proved in the same way as any other claim. It cannot be dealt with as part of a directions hearing or assessment on costs.

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Summary

[44] In summary the Court orders that:

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(i) Anburn is entitled to be remunerated as trustee, such remuneration to be at whichever is the lesser hourly rate of Herald or ASL in charging for Mr Olsen's time;

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(ii) the trustee is entitled to the usual indemnity as to its costs in respect of the application concerning the marketing of the property heard on 18 January; and

(iii) the fees of the trustee and the legal costs of Sinels (including those in relation to the hearing of January) shall be subject to assessment in the manner described above.

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Representation

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G

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[2008] WTLR 508

