

12-11-2010

**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE FSD 45/2009ASCJ**

<b>BETWEEN</b>	<b>ATC (CAYMAN) LIMITED (“ATC”)</b>	<b>APPLICANT</b>
<b>AND</b>	<b>ROTHSCHILD TRUST CAYMAN LIMITED  (“ROTHSCHILD”)</b>	<b>RESPONDENT</b>

**IN OPEN COURT  
BEFORE THE HON. CHIEF JUSTICE  
THE 30<sup>TH</sup> -31<sup>ST</sup> MARCH 2010 AND 12<sup>TH</sup> NOVEMBER 2010**

Appearances: Ms. Melanie Crinis and Mr. Ross McDonough for the Applicant  
  
Mr. Simon Taube Q.C. instructed by Ms. Sara Collins of Conyers  
Dill and Pearman for the Respondent

## **RULING**

1. I have before me for resolution what are essentially questions of entitlement to costs, arising from circumstances surrounding the transfer of trust assets upon the removal of one trustee and its replacement by a successor trustee. The circumstances also give rise to the wider question of what is the right of an outgoing trustee to an indemnity for its liabilities (including its costs), where the indemnity is to be provided by the successor trustee.
2. The Applicant successor trustee (“ATC”), commenced this action by way of Originating Summons (“OS”) on 11 August 2005. As originally commenced, the OS sought the determination of legal issues relating to the scope of the rights of indemnity and protection due to the Respondent (“Rothschild”), as the outgoing

trustee of the two trusts – the Makar Trust and the Nomad Trust (“the Trusts”). Rothschild ceased to be a trustee on 5<sup>th</sup> August 2005 when ATC became sole trustee in its place.

3. The OS was issued by ATC some six days after Rothschild was replaced as trustee and when it had emerged that Rothschild would be asserting a possessory lien over the assets of the Trusts, unless and until ATC provided Rothschild with an acceptable expressed indemnity against any actual or contingent liabilities with which Rothschild might be confronted in relation to its role as former trustee. Among the possible contingent liabilities then of live concern to Rothschild, were possible tax liabilities, under United States law; which might have accrued to Rothschild personally because of steps taken by Rothschild while Trustee, to restate the Trusts and appoint their assets to new trusts, the consequence of erroneous United States tax advice.
4. This concern of Rothschild’s is said to have become exacerbated by the fact that, in the midst of negotiations about the proper extent and form of Rothschild’s indemnity, the settlor of the Trusts and ATC threatened that they would commence other hostile proceedings against Rothschild for breach of trust arising from Rothschild’s refusal to hand over the Trust assets. In the event, such hostile proceedings were not commenced until 11<sup>th</sup> October 2009 by writ, well after the transfer of the assets (save for a retained sum of \$439,000, which is one of the subjects of the present application; “the retained sum”). The Writ Action therefore seeks damages from Rothschild arising from the earlier allegedly improper retention of assets. The Writ Action was later widened to include claims for

breach of trust, grounded on the further allegations that Rothschild had failed to keep proper records and accounts of its trusteeship of the Trusts.

5. While the Writ Action was not instituted until much later – as mentioned in October 2009 – Rothschild now points to the threat of it in August 2005 as then having given additional currency to its concerns to secure what it reasonably regarded as the indemnity and lien to which it was entitled.
6. Similarly, until resolved by order of the Court on 12<sup>th</sup> July 2005 on an application at the instance of the settlor – relying on principles of *In Re Hasting-Bass ([1975] Ch. 25* – the erroneous tax advice which led to the restatement of the Trusts and the appointment of their assets into new trusts, continued to be of concern to Rothschild and is now said to have lent justification to its insistence at that time, upon its specified form of indemnity. The decision on the *Hasting-Bass* proceedings is reported at 2004-05 CILR 485.
7. It is against that background (to be expanded upon by examination in detail below) that Rothschild says that the present and remaining issues on the OS relating to costs and now being pressed by ATC, should be resolved. Rothschild says that when viewed objectively against the background, its own conduct was reasonable throughout and so its costs incurred in pressing for the indemnity and lien to which it was entitled, including the costs of these OS proceedings, are recoverable. ATC argues to the contrary and seeks the resolution of the following issues which remain to be resolved in the OS, in its favour:
  - (i) That the funds held by Walkers (Rothschild's local lawyers at that time) pursuant to the Order of this Court on 21 December 2005, be transferred in

their entirety to ATC forthwith. This is the aforesaid retained sum of \$439,000 which by that Order of the Court, it was approved (with the consent of ATC) that Rothschild might retain to secure its claim for disputed costs incurred which, up until that date of 21 December 2005, Rothschild accepted could be met in that way. ATC says that Rothschild no longer has any reasonable basis for keeping the retained sum and specifically, can have no claim to it in respect of Rothschild's costs, such costs having been only unreasonably and unjustifiably incurred by Rothschild in the first place, by dint of its improper insistence upon an express indemnity from ATC and upon a lien over the assets.

Rothschild's case is that it was, and remains, entitled to the retained sum to reimburse or remunerate it in respect of work and expenses which it properly undertook or incurred by virtue of its trusteeship in respect of the following matters:

- (a) \$23,780 for Rothschild's unpaid management fees;
- (b) \$103,396 for Rothschild's extraordinary fees of the separate Hastings-Bass Application issued by the settlor against Rothschild;
- (c) \$212,897 for Rothschild's extraordinary fees incurred during the removal and its hand over of its trusteeship down to December 2005; and

(d) \$100,000 as incurred by Rothschild in legal fees in connection with its removal and the hand over of its trusteeship down to December 2005.

Rothschild says that as the result of the continuing OS proceedings, it has incurred further substantial legal and administrative costs since December 2005. That the retained sum represents only amounts which, as at 21 December 2005 it had incurred. It is also likely to incur legal fees and other expenses in the Writ Action if it proceeds.

(ii) That Rothschild provides all documents relating to the Trusts which have not yet been provided.

ATC has discerned from the documents which have been provided by Rothschild that there must be other documents which have not been provided. ATC therefore seeks this order on the basis that Rothschild has an ongoing obligation as the predecessor Trustee to provide full disclosure of all trust documents. Rothschild claims to have already made full disclosure and that in doing so up until 26 February 2008, had made reasonable efforts to comply with ATC's requests for further documents. Whether this order that ATC seeks would be appropriate, depends on what can be made of the evidence relating to this issue. As there will be dispute about the evidence, the resolution of the disclosure issue is clearly better left to the Writ Action. It would follow that any costs incurred or to be incurred in relation to it should also be left to the Writ Action.

Accordingly, having heard from both sides at the beginning of the hearing, during the hearing on the 31<sup>st</sup> March 2010 I directed, in relation to this issue, as follows:

*“If and to the extent that there were costs incurred between September 2005 and August 2009 (when the OS was amended to reintroduce claims for production of books and records) referable to such claims and to which ATC should be entitled (on behalf of the Trusts) as against Rothschild (as predecessor trustee); such costs should be claimed in the writ action where the question of breach of duty of disclosure (among others) is to be litigated.”*

In light of those directions, I do not intend to deal any further with this head of claim now under the OS.

- (iii) That Rothschild accounts to ATC for all amounts that it has paid itself by way of fees and expenses and all amounts paid to its legal counsel from time to time throughout its tenure as Trustee. If it is impossible for Rothschild to do this then Rothschild should provide sworn evidence of this from someone with firsthand knowledge of the facts.

Here too ATC asserts, against the background of acrimony and distrust, that Rothschild’s unreasonable behaviour justifies an enquiry of this kind and that as the former Trustee, Rothschild is obliged to comply.

However, in light of Rothschild’s assertion that it has already provided an account to the best of its ability, if ATC wishes to dispute that position, in my view ATC should do so in the context of the Writ Action. I therefore do not propose to deal further with the issue here other than to re-affirm Rothschild’s obligations to comply with the Order of 21 December 2005.

In other words, in light of the Order already made in these proceedings on 21 December 2005 (see chronology below), I will simply re-affirm that Order here.

- (iv) That Rothschild pays ATC's costs of the OS proceedings on the indemnity basis. This issue will be resolved now in the way the issue of costs of applications of the nature of the OS are usually resolved – that is: on the merits and to follow the event of the outcome of the OS as that can be determined having regard to all the circumstances.
8. It follows from the foregoing, that in order to resolve the two remaining issues on the OS relating to costs (that is: (i) and (iv) above), I must consider the competing views as to the validity and reasonableness of Rothschild's insistence upon an indemnity and lien to its satisfaction, against the background of the prevailing circumstances at the relevant times.
  9. This approach will imply that if Rothschild is found to have been justified then it cannot be condemned in the costs of having sought to advance its position.
  10. Approached in that way, this application gives rise to an important point of principle which must be addressed. As helpfully identified by Mr. Taube QC, it is this:

*Whether, under the terms of the Trusts Settlements combined with the general law, Rothschild was entitled to proper covenants of indemnity from ATC (as successor trustee) and a lien and, under the terms of Clause 15.5 of the Deeds of Settlement, that lien in*

*such amount as Rothschild in good faith thought necessary to protect itself.*

Thus, the ultimate issue is whether or not Rothschild as trustee, could in good faith have thought that what it was doing by way of insisting on its indemnity or lien, was justified.

11. There would follow also, what may be termed “subsidiary issues”, as identified by Ms. Crinis:

- (i) *Whether, even if correct in its position taken over its indemnity or lien, Rothschild should nonetheless be entitled to its costs of the litigation only on the standard, not the indemnity basis; because a trustee’s indemnity does not cover costs incurred in hostile litigation for the protection of a trustee’s own position, only costs incurred for the purposes of benefiting its trust estate.*
- (ii) *Conversely, if I were to conclude that these costs issues should be resolved in favour of the Trusts (per ATC), whether the costs should be awarded against Rothschild on the indemnity, rather than the standard basis, given Rothschild’s conduct.*

**The disputed costs of the Hasting-Bass proceedings**

12. These would be a significant portion (\$103,396) of the retained sum and so coming with sub head (i) of the OS. Rothschild was removed as Trustee upon 30 days notice provided on 5 July 2005 in accordance with the Trust Deeds. ATC was appointed with immediate effect such that there was an overlapping 30 day period of co-trusteeship, until 5<sup>th</sup> August 2005.



13. It is said that the settlor of the Trusts had been, for some time, unhappy with Rothschild's administration of the Trusts. In conjunction with the other beneficiaries, he issued the *Hastings-Bass* proceedings in early 2005 to unwind the restructuring of the Trusts which had been carried out by Rothschild. The beneficiaries allege that Rothschild had unreasonably delayed in instituting such proceedings in its own name as Trustee. It was agreed with Rothschild that it would cease to act as Trustee once the *Hastings-Bass* proceedings had been completed. It is now argued by Ms. Crinis that because of its recalcitrance and dilatoriness over the *Hastings-Bass* application, Rothschild should not be allowed its costs related to it.
14. It is to be noted however, that in granting the *Hastings-Bass* relief in its order of 12<sup>th</sup> July 2005, this Court then directed, with the consent of all the parties, that Rothschild should have its costs of those proceedings on the indemnity basis from the Trusts Fund. There was then no allegation of any unreasonable behaviour on Rothschild's part such that it should have been deprived of any of its costs.
15. Moreover, in an earlier interlocutory hearing, the Court (per Levers J.) then expressed the view that the delay in bringing those proceedings before the Court was the fault of the settlor.
16. Given those findings by the Court, it would now be inappropriate for me to conclude to the contrary, at least insofar as any aspect of the costs in dispute is said to be attributable to Rothschild's dilatoriness or recalcitrance in seeking the resolution of the ill-advised restructuring of the Trusts by way of the *Hastings-Bass* proceedings.

17. This accusation was, itself, however, the cause of acrimony and delay and is relied upon by Rothschild now as reason also for its concern in having insisted upon an acceptable indemnity. An offer of \$30,000, made by ATC on 6 December 2005 to cover all costs incurred by Rothschild in respect of its own professional fees for the Hastings-Bass proceedings; all costs associated with the handover of the assets; all costs of these proceedings and all other costs of its trusteeship; Rothschild regarded and rejected as derisory in all the circumstances.
18. Thus the dispute over those actual and quantifiable costs – let alone the concerns over the other contingent and unquantifiable liabilities for which Rothschild sought its indemnity – became a disruptive source of contention in and of itself.
19. Rothschild's concerns over its potential or contingent liability to United States tax as one of its reasons for insisting on its indemnity, was not laid to rest until the 26<sup>th</sup> July 2005. This was when the advice of Bruce Judelson, who is commonly regarded by the parties as an expert on United States tax, was obtained confirming that as a matter of United States law, there should be no primary or secondary liability for Rothschild to United States tax.

#### **Handover of Financial Assets**

20. This became the most relevant cause of controversy and the aspect most central to the issues to be resolved now. The full transfer of the Trust assets (save for the retained sum of USD439,000) did not occur until after a period of four and one-half months. This spanned 5<sup>th</sup> July 2005 – when Rothschild was first served with the 30-day Notice of its removal – until 21 December 2005; when this Court made an order by consent of the parties that Walkers would keep the retained sum as

disputed fees in their trust account until agreement between Rothschild and ATC for its release or until further order of the Court.

21. Rothschild then – on 21<sup>st</sup> December 2005 – transferred the remaining one-half assets of the Trust (valued at approximately \$19 million) to ATC, the other half having been earlier transferred on 31<sup>st</sup> August 2005.
22. Ms. Crinis places great emphasis on this eventuality. She says that it points to the unreasonableness of Rothschild's position taken until then by which Rothschild had been insisting on an indemnity from ATC of its own wording and the retention of the assets in the meantime. The fact that it ultimately settled upon a lien of only the retained sum, is clear indication, she says, of the hitherto unreasonableness of Rothschild's position.
23. The further following aspects of the chronology will serve to set the full context. It picks up (from that prepared by Ms. Crinis, cross checked for accuracy with that prepared by Ms. Collins) on the 20<sup>th</sup> July 2005, when ATC sent its draft form of indemnity to Rothschild. Then one notes that 6 days later, on 26<sup>th</sup> July 2005, Bruce Judelson's advice on the U.S. tax position is obtained by Rothschild.

20 July	ATC sent Rothschild an executed copy of the draft indemnity proposed by ATC. Significantly it was implicitly limited to the value of the Trust assets such as they may be in the hands of ATC from time to time	Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 43
22 July	Speechly Bircham (Rothschild's U.K. lawyers) wrote to Campbells for ATC saying that in order to consider whether to accept an indemnity from ATC they wanted sight of ATC's personal accounts for the past 3 years together with certain assurances from the directors.	Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 47
26 July	Bruce Judelson provided the requested tax opinion citing that there was no risk of any liability to Rothschild.  Campbells wrote to Speechly Bircham advising that ATC was offering an indemnity in its capacity as Trustee from the assets of the Trusts and was not prepared to be held personally liable.	Tab 3 Vol. 1 First Affidavit of Peter Goddard Exhibit PAG4 Page 9  Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 50
29 July	Speechly Bircham wrote to Campbells enclosing an indemnity which they stated Rothschild was prepared to accept (the "Rothschild Indemnity") which inter alia made ATC personally liable in certain circumstances (to be examined below) and provided Rothschild with a full release.	Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 52
3 August	Rothschild provided ATC with a purported "entire list of assets" belonging to the Trusts which it requested Mr. Allison (the settlor) to approve and to sign a full release in relation thereto. The list, from ATC's point of view, was incomplete in significant respects.	Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 59
4 August  (ATC having agreed to set aside assets)	Campbells wrote to Speechly Bircham again requesting confirmation as to the amount Rothschild intended to assert a lien over and that they were still taking instructions regarding inter alia the Rothschild Indemnity.  Speechly Bircham responded by saying that the Rothschild Indemnity was the only one that they were prepared to advise their client to accept and was "non-negotiable".	Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 71  Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 71

10 August	<p>Speechly Bircham responded saying that they intended to assert a lien over US\$550,000 worth of assets but would not commence transferring any of the assets belonging to the Trusts until the Rothschild Indemnity had been signed. Rothschild would then also hand over the books and records of the Trusts.</p> <p>Campbells responded saying that without prejudice to ATC's right to object to a lien, it would agree to hold US\$550,000 in a joint bank account pending resolution of the issues regarding the outstanding fees.</p>	<p>Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 76</p> <p>Tab 3 First Affidavit of Peter Goddard Exhibit PAG4 Page 79</p>
11 August	ATC issued the OS	Tab 2
25 August	<p>Hearing before Chief Justice Smellie. The matter was adjourned for the purposes of seeing whether the parties could reach agreement, however there was a misunderstanding as to the extent to which Rothschild was willing to negotiate. Pursuant to the indication by the Court, Campbells therefore wrote to Walkers providing an open offer of settlement which included an offer to retain a minimum amount of trust assets (\$1.5 million) for a set period of time (two years).</p> <p>ATC would also retain \$450,000 in a bank account in joint names of Walkers and Campbells (reduced from \$550,000 because ATC no longer asking Rothschild to prepare accounts earlier required). ATC also no longer requiring Rothschild to prepare accounts for any year and willing to waive Rothschild's obligations to do so.</p>	Tab 7 First Affidavit of Sara McKay Exhibit SM1 Page 1
31 August	<p>Rothschild, through Walkers, rejected the offer outright without making a counter offer on the basis, inter alia, that it claimed that it was not lawful for ATC to make such an offer as it would constitute an unlawful fetter upon ATC's discretion as trustee. Rothschild did however offer to start transferring the books and records of the Trusts and asked ATC to phone Rothschild to make arrangements. Rothschild also suggested that they <u>might be willing to transfer 50% of the assets</u> of the Trusts if this was practical from a logistical perspective.</p>	Tab 7 First Affidavit of Sara McKay Exhibit SM1 Page 11
5 September	<p>The day before the next scheduled hearing of the OS Walkers wrote to Campbells advising inter alia that Rothschild would transfer to the control of ATC all of the assets of the Trusts save for \$2.5 million for each Trust, i.e., a total of \$5 million. Further, that Rothschild would transfer the remainder apart from US\$550,000 once an agreed indemnity had been executed. In this regard Rothschild was willing to amend the Rothschild Indemnity to impose a 6 year limitation period.</p>	Tab 8 Second Affidavit of Sara McKay Exhibit SM1 Page 3

6 September	Hearing before the Chief Justice. Among other things addressed, ATC abandons application for an order that Rothschild should prepare accounts from January 2002 and for an order for inspection of documents held by Rothschild.	
16 September	Rothschild sent two courier packages containing original documents to ATC which constituted what ATC saw as only a small fraction of the documents held by Rothschild.	Tab 14 Paragraph 21 Third Affidavit of Peter Goddard
3 October	Via letter from Campbells dated 3 October, ATC made a further open offer to Rothschild in an attempt to address their concerns with respect to the Indemnity whilst preserving ATC's interests. This incorporated the offer of a floating charge over a portion of the assets of the trust for a fixed period. Further correspondence ensued.	Tab 9 Second Affidavit of Peter Goddard Exhibit PAG8 Page 109
10 October	Rothschild refused to deliver any correspondence files to ATC on the basis that it was not its policy to do so.	Tab 9 Paragraph 15 Second Affidavit of Peter Goddard Tab 14 paragraph 22 Third Affidavit of Peter Goddard
Oct – Nov	Rothschild refused to provide any further original documents and correspondence and refused to allow ATC to inspect its documents.	Tab 14 paragraph 22 Third Affidavit of Peter Goddard
Nov – Dec	Rothschild offered to copy all of the Trusts' documents created since 2001 and send them to ATC. Rothschild advised ATC that the documents consisted of in excess of 25 boxes of documents and due to the amount of photocopying its charges were \$7,500. ATC paid the amount of \$7,500 to Rothschild.	Tab 14 paragraph 22 Third Affidavit of Peter Goddard
12 December	The day before the next scheduled hearing ATC received one box of documents which did not, from ATC's perspective, constitute a complete set of documents.	Tab 14 paragraph 23 Third Affidavit of Peter Goddard
13-14 December	The matter went before Chief Justice Smellie who ruled that the proposed indemnity and floating charge over \$1.5 million offered by ATC did not constitute an unlawful fetter on the trustee's discretion. He also noted <i>"that it can seldom, if ever, be appropriate for a trustee to exert undue pressure to secure its own entitlements, to the detriment of its beneficiaries by withholding the entire or very large portions of the trust fund"</i> .	Tab 12

14 December	At the hearing it seemed that the form of indemnity to be given to Rothschild was agreed to by the parties. It was agreed that a minimum level of assets of \$2 million would be retained in the Trusts for a period of 3 years from 4 August 2005 to be secured by either an undertaking or a charge. It was further agreed that Walkers would write to Campbells with any drafting comments on the documents already provided.	Tab 14 Third Affidavit of Peter Goddard Paragraphs 13-14
20 December	The day before the further court hearing whereby ATC was seeking an order that the remaining assets be transferred, Walkers wrote to Campbells stating that Rothschild intended to transfer the remaining assets to ATC less the sum of \$550,000 regarding the disputed fees. ATC had earlier been willing to agree that this amount be held in escrow pending resolution of those issues. The agreement for retention of \$2 million and written indemnity was, however, pressed no further by Rothschild.	Tab 14 Third Affidavit of Peter Goddard Paragraph 8
21 December	The Court made an order based upon Rothschild's assurances that the funds would be transferred and upon " <i>Rothschild having an obligation as former Trustee of the Trusts to provide a full account to ATC for all of its dealings with all of the assets held by it in its capacity of Trustee of the Trusts.</i> " The Retained Sum (\$439,000) was also ordered to be held by Walkers pending further order or the agreement of the parties.	Tab 13 Vol. 1
<b>2006</b>		
	After this date the parties continued to have exchanges over the nature and extent of Rothschild's duty to disclose trust documents and to provide trust accounts, including accounting for its own fees and expenses.	Tab 14 Paragraphs 24 - 26 Third Affidavit of Peter Goddard

24. That being the relevant context, an examination must now be taken of the terms of indemnity offered by ATC and that insisted upon until 14 December 2005 as being "non-negotiable" by Rothschild, for the determination of the question in the context of these Trust Agreements: "Was Rothschild's conduct justifiable?"
25. The executed ATC Indemnity (in identical terms for both Trusts) presented to Rothschild under cover of letter from ATC on 20 July 2005 were in these operative terms:

*“ATC Trustees (Cayman) Limited hereby agrees to indemnify Rothschild Trust Company Limited as former Trustee of the Agreement [of Trust] out of the Trust Fund and the income thereof in respect of any contingent or prospective liability, including any Tax in respect of the Trust Fund or the income thereof; or otherwise in connection with the trusts created pursuant to the Agreement.”*

26. It must be recognised that words “out of the Trust Fund and income thereof” implicitly meant “as the Fund and income thereof might be from time to time”. Rothschild, in its letter of 29<sup>th</sup> July 2005 rejected ATC’s form of indemnity. By contrast, the draft forms of indemnity proposed by Rothschild on 29<sup>th</sup> July 2005 were in these main operative terms:

*“4. Indemnity and Exculpation of Outgoing Trustee”*

- 4.1. The Outgoing Trustee and its officers, directors and employees and their respective personal representatives shall not be liable for any act or omissions with respect to its trusteeship of the Trust except for loss caused to the Trust by the Outgoing Trustee’s actual fraud, dishonesty or gross negligence.*
- 4.2. Subject to the following sub-clauses, the Continuing Trustee’s liability under this clause 4 is limited to the value of the Trust Fund from time to time.*
- 4.3. The Continuing Trustee hereby covenants with the Outgoing Trustee full and effectually to indemnify it and its officers, directors and employees and their respective personal representatives from and in respect of all liabilities, actions, proceedings, claims, demands, costs and expenses for or in respect of which the Outgoing Trustee may be or may become (or may be alleged to be) liable as trustee or former trustee of the Trust or in connection with the assets subject thereto (including but not limited to any taxes, duties, interest and penalties due thereon and all costs in connection therewith), save and except for any loss caused to*



*the Trust by the actual fraud dishonesty or gross negligence of the Outgoing Trustee.*

4.4. *If the Continuing Trustee retires or is removed as a trustee (or the trustee) of the Trust, the Continuing Trustee shall be discharged from all liability under the covenant contained in their Deed if the persons who are or become trustees of the Trust immediately following the retirement of the Continuing Trustee enter into a direct covenant with the Outgoing Trustee or its successors in title (where appropriate) in terms similar to those of this Deed.”*

27. Rothschild’s indemnity then goes on to provide that to the extent there is a diminution in value (by way of distributions) of the Trust Fund while in the trusteeship of the Continuing Trustee, then to the extent only that the recipients covenant with Rothschild to secure its indemnity to the value of any distributions received, the Continuing Trustee’s personal liability to indemnify Rothschild would be reduced.

28. Rothschild’s draft would finally, under the heading “*Trustee’s lien*” provide that:

*“Nothing in this Deed shall impair or prejudice in any way any lien to which the Outgoing Trustee is entitled in respect of any claim for costs, charges or expenses in respect of the Trust, including but not limited to any claim for cost, charges or expenses of the Outgoing Trustee.”*

29. The first thing to remark upon about the Rothschild Indemnity is that notwithstanding Clause 4.2, it is by no means limited to the value of the assets of the Trust fund as that value might be in the hands of ATC, from time to time. On a reasonable interpretation of the Rothschild draft, in particular Clauses 4.3 and 4.4, it would appear that the Continuing Trustee’s liability would extend to whatever Rothschild’s liability became, subject only to the excluded liability for actual fraud, dishonesty or gross negligence. This became the fundamental point

of departure from the proffered ATC Indemnity which purported to be limited to the value of the assets as held from time to time.

30. The next thing to note is that, in addition to its unlimited indemnity, Rothschild asserted its continuing right to a lien over the assets including for its costs, charges and expenses – the lien which it eventually relinquished save for the retained sum of \$439,000.
31. The starting point of the legal analysis must be with the relevant provisions of the Trust Deeds. They are in identical terms in both Trusts in Clauses 6.19 and 15.5 and 9.1 of the Deeds:

*“6.19. Power of Indemnity: The Trustees are authorised to indemnify and to enter into any indemnity in favour of any former Trustee or other person in respect of any contingent or prospective liability, including any Tax in respect of the Trust Fund or income thereof, or otherwise in connection with the trusts created pursuant to this Agreement.*

*The Trustees may, in the exercise of an absolute discretion, apply the whole or any part of the Trust Fund or the income thereof by way of mortgage, pledge or otherwise howsoever as security for such indemnity.”*

*“15.5. Indemnification of Retiring or Removed Trustee: a retiring or removed Trustee shall be entitled to require and receive from each continuing Trustee or new Trustee an indemnity in the terms described in section 6.19 of this Agreement.*

*Any Trustee shall have the right on retirement or removal or upon its otherwise ceasing to be a Trustee hereof or, upon distribution or withdrawal of assets forming part or all of the Trust Fund unless otherwise indemnified to its satisfaction, to withhold such assets as it shall in good faith consider necessary on account of liabilities whether vested, contingent or otherwise to which it may as Trustee be subject or otherwise in order to satisfy its rights of indemnification granted by this Agreement or by law.” (emphases added)*

32. Purely as a matter of contract based upon the construction of those provisions of the Trust Agreements, it is readily apparent that ATC's insistence starting with its letter of 20<sup>th</sup> July 2005, that it had no obligation to provide a written form of indemnity and that it was sufficient for it to give a covenant limited so as to indemnify Rothschild "*out of the trust fund or income thereof*" (implicitly such as it may be from time to time), was wrong.
33. ATC's further insistence in the correspondence that followed, that its liability should end if it no longer possessed the trust fund served, quite understandably, to exacerbate Rothschild's concerns.
34. At the least, Rothschild was entitled to expect an assurance from ATC coupled with the offer of indemnity that the value of the Trust Fund would not be allowed to be diminished during the currency of its indemnity to below an amount reasonably estimated to secure Rothschild's indemnity. That it would be appropriate for ATC as Continuing Trustee to seek to preserve the value of the trust assets for those purposes, is a matter already decided by this Court in this case; albeit more than five months after ATC had taken its initial position in this regard. See Ruling of 13 December 2005 (reported at **2006 CILR 73**) on the question whether ATC could validly withhold trust assets to ensure that Rothschild's claim to indemnity would be covered for a specified period of two years and limited, as ATC had then proposed, to an amount of \$1.5 million. It was then decided that ATC could validly so act with the bona fide intention to meet obligations owed to Rothschild as former trustee, without creating an

improper fetter upon the exercise thereafter of ATC's discretionary dispositive powers under the Trusts.

35. ATC's view of the matter, as explained by Ms. Crinis, was that Rothschild had no right, in all the circumstances then prevailing, to insist upon a written form of indemnity upon being removed as trustee. But that view, in light of Clause 15.5 of the Trust Deed (above) was plainly wrong.

36. On the other hand, in light of Article 9.1 of the Deeds, Rothschild's insistence that the indemnity to be provided by ATC should be personal and unlimited (see Clauses 4.3 and 4.4 of the Rothschild draft above) was, for reasons to be expanded upon below, itself erroneous.

37. In relevant part Article 9.1 reads:

*"Every trustee shall be entitled, in the purported exercise of his or its duties and discretion hereunder (including without limitation the management or administration of or the performance of other services to any company, corporation, partnership or other entity whose shares or ownership interests are comprised directly or indirectly in the Trust Fund) to be indemnified out of the Trust Fund and the income thereof against all expenses and liabilities notwithstanding that:*

*(i) such exercise constituted a breach of such Trustee's duties;*

*or*

*(ii) proceedings are brought by any Beneficiary in respect of an alleged breach of duty by such Trustee,*

*unless it is established that such breach of duty was brought about by such Trustee's own actual fraud or dishonesty or gross negligence.*

*All indemnities, protections and exculpations granted in this Agreement shall extend to each current and former director, officer or employee of any Trustee and shall be in addition to any and all rights to indemnity granted or implied by law. (emphasis supplied).*

38. Thus, as the words in emphasis imply, insofar as the right of indemnity is granted by the Trust Agreements, it is limited to the value of the assets of the Trust Fund. Such right of indemnity does not, however, diminish whatever right of indemnity a trustee might have by application of the general law but is expressly recognised to be “in addition to” such rights.
39. The question arises: Does the right to indemnity, either by statute or at common law, go beyond the value of the trust assets as they are at the time the right to indemnity occurs?
40. It is necessary to answer this question as an element of deciding whether Rothschild's position was justifiable. Mr. Taube Q.C., argued for a right in Rothschild to have insisted upon an unlimited indemnity from ATC.
41. As a matter of the demonstrable reasonableness of Rothschild's concerns, he cited a “taxonomy” of the following five (5) categories of potential liabilities; some of which, because they were unquantifiable, he asserted , required of ATC covenants of the kind specified in Rothschild's draft clauses 4.3 and 4.4:

- (i) identified and quantified liabilities (i.e.: actual liabilities);
- (ii) identified but as yet unquantified liabilities (eg: work done but not yet billed);
- (iii) contingent liabilities – identifiable and quantifiable but depending on a contingency may or may not become actual (eg: potential tax liability which could be resolved either way);
- (iv) identified contingent but unquantified liabilities (eg: a case where the Trustee is being sued by the settlor or beneficiaries or suit is threatened and if the Trustee ultimately succeeds would be entitled to recover its costs from the Trust Fund);
- (v) liabilities which are at present unidentified and contingent (eg: potential tax liabilities arising from retrospective tax legislation or from liabilities arising as a result of other change of legislation affecting Trust assets – see as an example affecting land held in trust: *X v A and Others* [2000] 1 All E.R. 490).

42. As a matter of the general law, it does appear that Rothschild was entitled to insist upon an indemnity expressed to cover these categories of potential liabilities, including potential liabilities to third parties. As *Lewin on Trust* explains (18<sup>th</sup> Ed. Chp. 21-10 p677):

*“A trustee’s need for indemnity arises from the basis on which a trust is administered. ...a trustee acts as principal (not as an agent) in connection with the administration of the trust and consequently does incur personal liabilities to third parties,*

*whether or not he is acting in accordance with his powers and duties as trustee....*

*Thus there are two distinct relationships. The first is the relationship between the trustee and the third parties with whom he deals in the administration of the trust. This will generate personal liabilities for the trustee, and so far as these personal liabilities are concerned, the terms of the trust will generally be of no direct importance. The second is the relationship between the Trustee and the beneficiaries in connection with the liabilities incurred out of the first relationship. The second relationship is concerned with the trustee's rights of indemnity, and depends upon the terms of the trust and the manner in which the trust has been administered by the trustee."*

43. As Lewin also explains (op. cit. para 21-11) a trustee's personal liability to third parties may well prove to be unlimited unless it is expressly made clear that in his dealings on behalf of his trusts, he acts "as trustee but not otherwise" or "as trustee only".
44. The obvious implication of all this for Rothschild and for the Trusts upon Rothschild being removed as Trustee, was that Rothschild was entitled to take a reasonable assessment of the extent to which it may have incurred actual or contingent liabilities (including to third parties), while having acted properly as Trustee and such as would entitle it to be indemnified.

45. Similar considerations would inform the reasonable basis upon which a trustee might seek to exercise its right to a lien over trust assets upon being removed as trustee.
46. These considerations would arise whether the lien is exercisable as a matter of contract under the Trust agreement or as a matter of the general law.
47. As Lewin also explains (op. cit. para 21-33 p690):

*“A trustee, and each of the trustees separately where the trustees are more than one in number, has a first charge or lien upon the trust fund, conferring an equitable interest in the trust fund, in respect of the liabilities, costs and expenses covered by his right of indemnity. The trustee’s charge takes priority over the claims of the beneficiaries and of purchasers or mortgagees claiming under them. The trustee’s right of indemnity as secured by the charge or lien comprises rights of **reimbursement, exoneration, retention and realisation**, as follows:*

- (1) *A trustee who incurs a liability may discharge the liability out of his own resources and then reimburse himself from the trust property. [(The right of reimbursement also finds statutory expression in this jurisdiction in section 47 (2) of the Trusts Law (2009 Revision)].*
- (2) *Alternatively, a trustee may, and usually will, discharge or pay the liability directly from the trust property so as to exonerate himself from the liability....*



(3) *A trustee may retain trust assets or income until he has been indemnified both as regards to present liabilities, to the extent needed for the purpose and, in general, as regards contingent or future liabilities for which he may become accountable, to the extent required to meet the worst case on the basis of reasonable but not fanciful assumptions. A beneficiary or his assign cannot compel a transfer of the trust funds until the trustee's just demands have been met....(emphasis added)*

48. Another leading text treats with the issues of the trustee's equitable lien similarly in this way (from Underhill and Hayton 17<sup>th</sup> Ed. Ch. 20 Article 83.1):

*"The trustee's lien covers present and future liabilities and extends over both capital and income so as to confer upon him a beneficial interest in the nature of a non-possessory equitable lien with priority over the claims of the beneficiaries. After retirement or removal of a trustee his lien automatically binds the trust fund in the hands of the successor trustees. When trustees exercise discretionary powers to distribute trust funds to a beneficiary they may be regarded as releasing any equitable lien of themselves or any predecessors unless such lien is expressly preserved.*

*When trustees are obliged to distribute trust funds to persons absolutely entitled under the terms of the trust, they have a right to retain assets to cover future liabilities and a right to preserve their*

*lien (though they may rely on personal covenants of indemnity): if they do not expressly exercise such rights, it seems they will lose them."*

49. I am content to adopt and apply those excerpts from the leading text books as accurately reflecting the true state of the general law – based as they are upon the settled cases – in relation to the trustees' right of indemnity and lien and as they may be taken as relevant to the issues before me.
50. In the present context, the words from the excerpts which I have emphasised are of special significance.
51. For one thing, as paragraph (3) above from Lewin explains, an outgoing trustee's right to retain trust assets, while allowed to cover the worst case of contingent or future liabilities, must be predicated nonetheless on the basis of reasonable, not fanciful assumptions. As is also there explained by the further words in emphasis, the right to retain assets exists only until the trustee's just demands, so predicated upon reasonableness, are met.
52. The words in emphasis from the passage from Article 83.1 of Underhill and Hayton do however, serve to identify the natural tensions that will likely develop between an outgoing trustee and its successor in relation to the preservation of the latter's interest in its equitable lien over trust assets. For, to the extent that the successor trustee must continue in the exercise of discretionary dispositive powers, to distribute trust assets; the outgoing trustee will be concerned to ensure that its lien is preserved so far as necessary, in respect of those assets or by express covenant of the successor trustee in that regard.

53. This is the very tension that laid at the heart of the dispute between ATC and Rothschild over the extent of ATC's obligation as successor trustee to indemnify Rothschild if ATC were to be free to diminish the value of the Trust Fund by way, for one thing, of the distribution of assets.
54. But none of this suggests and I have seen nothing else that suggests the proposition that Rothschild should be entitled to an indemnity from ATC as successor trustee that went beyond the value of the trust assets as at the time of transfer of assets or beyond the value of a reasonable retention of assets.
55. Indeed, I am satisfied that, up to this point in the analysis, the following principles can safely be extracted and stated:
- (i) Rothschild was entitled by way of both its contractual and equitable lien, to retain so much of the trust assets as to reasonably assure itself that its actual and contingent liabilities arising from its due and proper administration of the Trusts were covered.
  - (ii) It was also entitled, as a prerequisite to the relinquishment of its lien as so defined, to an indemnity that would achieve the same ends.
  - (iii) Having regard to the implicit requirements of reasonableness governing both its right to a lien and to its indemnity, Rothschild was required, in good faith, to seek to identify a sum to be secured by its lien or indemnity, so as to release those assets which may not have been required to be retained, and to have done so with all reasonable promptness. In so doing, Rothschild was not allowed to take into account "fanciful assumptions".

- (iv) For those purposes, and in any event; Rothschild was not entitled to insist upon an indemnity from ATC going beyond the value of the Trusts assets as those may have been at the time of their transfer to ATC. Otherwise, Rothschild would have been insisting upon an indemnity greater than that to which it was entitled, either as a matter of contract or equity; while it was Trustee.
- (v) Equally, ATC was not entitled to insist upon Rothschild accepting an indemnity of less value than the value of the assets at the time of their transfer to ATC; subject only to it being clearly established that Rothschild's liabilities could be reasonably quantified and capped.

56. I should note that I arrive at the foregoing conclusions after consideration also of supplemental submissions filed on behalf of Rothschild and ATC which discussed the relevant dicta from the leading case of *Muir vs City of Glasgow Bank* (1879) 4 App. Cas. 337 HL and *Marston Thompson and Evershed plc v Benn* [2007] WTLR 315 where the dicta from the *Muir* case were recently applied.

57. These cases serve as authority for what must now be regarded as the settled principle already cited above (from Lewin) that a trustee acts as a principal (not as an agent) in connection with the administration of his trust and so will incur personal liabilities to third parties not limited only to the value of his trust assets, unless in his dealings with those third parties as trustee it is made clear that his own liabilities are so limited. This will be the case even though, as between the trustee and those with whom he entered into his relationship as trustee, he is entitled to an indemnity for his liabilities to third parties.

58. The principle is succinctly explained by Chadwick J (as he then was) in Marston Thompson & Evershed plc v Benn & Others (above) “the Rugby Club case” at p 320 b-c (citing Muir v City of Glasgow Bank (above): in deciding that the trustee’s liability in that case to the plaintiff lender, was personal going beyond the value of the mortgaged Rugby Club property which had been held in trust:

*“There is also no doubt that a person who, being a trustee, enters into a contract as such for the benefit of the trust estate undertakes an obligation which can be enforced against him personally by the other party to the contract. Nor is there any doubt that, if the making of the contract was within his powers as trustee, he will be entitled to an indemnity out of the trust assets. The question whether in any particular case the obligation of the trustee to the other party to the contract is limited by reference to his indemnity out of the trust assets or is unlimited is one of construction.”*

59. For the reason that the trustees in that case had not managed to limit their liability to the plaintiff lender by reference to their own indemnity out of the trust assets, the trustees were held to be personally liable for the balance of the mortgage loan over and above the realised value of the mortgaged Rugby Club property.

60. Here, Mr. Taube relies on those two cases for the proposition (which I simplify) that because ATC had not sought to limit its liability to Rothschild as outgoing trustee and as a third party, ATC could not rely on its own indemnity limited to the value of the trust assets, even if that is indeed the limit of its own indemnity as a matter of the arrangement between itself as successor trustee and those with

whom it entered into its arrangements. Rothschild's right to an unlimited indemnity as a matter of the general law was something ATC must be regarded as having been on notice of at the time of its succession and so ATC was not allowed to seek unilaterally to impose the limits of its own indemnity upon Rothschild.

61. While I have already explained and accepted the correctness of this argument insofar as it asserts an obligation on ATC to indemnify up to the value of the Trust assets at time of transfer, there are, in my view, a number of reasons why this argument of Rothschild's is unattractive and unpersuasive insofar as it asserts a right in Rothschild to have insisted upon an unlimited personal indemnity from ATC:

- (i) Rothschild is not a true "third party" to the successive trust arrangements – as were the plaintiffs in Muir or the Rugby Club cases above true third parties having no notice of the nature of the trust arrangement between the debtor Rugby Club and its trustees, the defendants. Here Rothschild, as the outgoing trustee, would have had notice of the likely extent of the indemnity limited to the value of the Trust assets given by the Trust Deeds and to which ATC was succeeding and which ATC was expressly authorised by the Trust Deeds to give to its predecessor.
- (ii) Perhaps even more to the point, in the Muir and Rugby Club cases, the trustees had contracted with the third party plaintiffs in their personal capacities in terms not limited to the extent of the value of their own indemnities given to them as trustees. In this case by contrast, Rothschild has entered into no contract with ATC. Rather Rothschild relies on what it

asserts is a condition of ATC's obligation of its succession as trustee imposed by the general law, to provide Rothschild with ATC's personal indemnity to the full extent of any liability Rothschild might have itself properly incurred, going even beyond the value of the Trust assets as that value stood at the time of succession or transfer to ATC.

(iii) ATC could not have been reasonably contemplated by Rothschild to have been assuming so wide an obligation to indemnify Rothschild not being in a position, as successor trustee, to know what liabilities Rothschild might have personally incurred on behalf of the Trusts and even perhaps going beyond the value of their assets.

(iv) To the extent that ATC's and Rothschild's conduct upon succession would have been guided by industry norms, it seems well enough established from the literature, that an outgoing trustee's indemnity to be provided by the successor trustee would be ordinarily limited to the value of the trust assets as at the time of transfer.

62. It appears indeed, to be the case in practice, that a successor trustee would take steps to secure whatever assets may be reasonably required to meet the indemnified liabilities of the outgoing trustee and to protect itself in respect of its own assumed liabilities (imposed by the general law) to indemnify its predecessor. This practice would not be consistent with some general wider unlimited obligation.

63. See generally in this regard: Kessler QC, Drafting Trust and Wills Trusts, a Modern Approach, 7<sup>th</sup> Edition Sweet and Maxwell, 2004 (at page 419 paragraph

33.2.4); “The Proper Protection of Liens, Indemnities or Otherwise for those who Cease to be Trustees”; The Trust Law Committee Consultation Paper: www.kcl.ac.uk/dipsta/law/tlc and commentary by local practitioner Ingrid Pierce in Paper presented to Premier Forum of Trust Professionals entitled “The Big Brawl – Negotiating the Trustee’s Indemnity” March 2005. See also the form of Precedent of Deed of Appointment, Retirement and Indemnity 2007 recommended by the Society of Trust and Estate Practitioners which was also presented at that forum.

64. So, while I do not disagree with any of the legal principles extracted from the settled case law as cited by Mr. Taube on behalf of Rothschild, in the absence of any express provision in the Trust Deeds imposing personal liability upon ATC to indemnify Rothschild over and above ATC’s ability to indemnify itself from the assets of the Trusts as at the time of transfer, I conclude that it would be wrong of the Court to impose such liability by implication of the general law, or otherwise.
65. In the context of the modern trusts relationship between professional trustees and their beneficiaries, one would expect to see such liability expressly stated before it can be imposed. The Trust Deeds in this case do no such thing.

The Subsidiary Issues: should costs in these proceedings be awarded to either side and if so, on the indemnity basis?

66. ATC brought the OS proceedings to obtain a number of different reliefs some of which – those appertaining to the provision of accounts and disclosure of trust documents by Rothschild – must now be pursued, if at all, in the context of the Writ Action.



67. At one stage ATC appeared to have abandoned its claim for those heads of relief (see chronology above as at 6 September 2005).
68. The subsequent revitalisation of those heads of relief in the OS proceedings no doubt consumed significant time and costs, entitlement, to which, like the heads of relief themselves, I regard as appropriate for resolution in the Writ Action. I therefore expressly make no order now in respect of the costs related to the arguments over them in the OS proceedings, but order that those costs be adjourned to be resolved depending on the outcome in the Writ Action.
69. My approach is different however when it comes to the question of the costs associated with the arguments over the right to indemnity and the lien both as those costs arose before and during the OS proceedings.
70. ATC, as the protagonist in the OS proceedings, seeks the return of the retained sum of \$439,000. That sum, since December 2005, along with the present issue of costs has been the only “live” issue on the OS from ATC’s perspective in respect of Rothschild’s right to its indemnity and lien (apart, of course, from those heads of claim now reserved to the Writ Action).
71. Misguided though Rothschild’s approach may have been in insisting upon the Rothschild Indemnity; as at December 2005, it no longer did so. Rothschild relinquished its lien over one-half the assets on 31 August 2005 and over the rest on 21 December 2005 (save for the retained sum kept by agreement and Order of the Court). I am told that an issue for the Writ Action will be whether retention of all and then one-half of the assets for the respective periods of time, was harmful to the Trusts, having regard to Rothschild’s obligation to have assessed its real

- exposure to liability in a reasonable and timely manner as already discussed above.
72. While I therefore make no findings specifically as to the appropriateness or otherwise of Rothschild's conduct in this regard, I must recognise that my conclusions which follow as to the costs of the OS are bound to reflect upon the reasonableness of Rothschild's position taken over its right to its indemnity and lien.
73. If, as I have concluded in this case, the retention of the retained sum of \$439,000 on Rothschild's behalf since 21<sup>st</sup> December 2005 has been reasonable (a matter which must be regarded as beyond dispute having regard to the Order of the Court with ATC's consent in this respect) it must follow, to my mind, that the costs associated with the OS as they relate to the arguments over Rothschild's retention of this sum since 21<sup>st</sup> December 2005, must be awarded to Rothschild.
74. But as can be seen from the chronology, significant time and expense would have been taken before December 2005 in relation to the indemnity and lien, generally. As to such other costs of the OS between the date of commencement of the OS (11<sup>th</sup> August 2005) and the 21<sup>st</sup> December 2005 (when the issue of entitlement to an indemnity and lien was resolved) and indeed, to the conclusion now of the OS proceedings; I also conclude, for the following reasons that Rothschild shall be entitled to its costs.
75. Though erroneous in its insistence upon the Rothschild Indemnity, Rothschild had not been presented on the chronology above as explained before me, with a form

of indemnity by ATC that Rothschild was obliged to accept. Both sides took entrenched positions which militated towards the conflict in the OS proceedings.

76. As outgoing Trustee entitled to an indemnity and lien Rothschild is not to be condemned in the costs of the resultant legal proceedings unless it can be shown that it acted, not only erroneously, but also that (and to the extent that) it acted in bad faith or otherwise misconducted itself. This is in the sense as explained long ago by Jessel, M.R. in Turner v Hancock (1882) 20 Ch. D. 303, 304 C.A.:

*“These rights [(of a trustee to all their proper costs incident to the execution of the trust)] resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract.*

*Any departure from these principles in the general course of the administration of justice in this court would tend to destroy, or at least very materially to shake and impair the security of mortgage transactions and the safety of trustees....*

*It is not the course of the court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous*

*persons who might undertake them for the sake of getting something by them.”*

77. The applicability of this dictum to the even more modern trust context was confirmed by Ungood-Thomas J. in ***In Re Spurling’s Will Trusts [1966] 1 W.L.R. 920, 931***; where he cited and applied it.
78. I adopt his explanation below such that in my view, in the absence of misconduct as defined; if the costs of a trustee incurred in making good its claim for an indemnity and lien were excluded from its right to costs; “*it would drive a coach and four through the very raison d’etre which Jessel M.R. invoked for the principle which he lays down; namely, the safety of trustees, and the need to encourage persons to act as such by protecting them ‘if they have done their duty or even if they have committed an innocent breach of trust’*”, per Ungood-Thomas J. in (***Re Spurling’s Will Trusts***) (above) at 935 D-E)); there concluding upon the trustee’s entitlement to costs in that case, having successfully defended against claims for breach of trust.
79. In this case, the approach to be taken by this Court – where the question is the entitlement to its costs of a professional trustee which is innocent of misconduct – can be no different.
80. ATC has not succeeded in showing that Rothschild has misconducted itself in the sense required. There were between 20 July 2005 and 21 December 2005, as Rothschild submits and as I accept, genuine issues of construction arising in connection with Rothschild’s claim for indemnity. Indeed, in bringing the OS

proceedings for, among other things, construction of the Trust Deed indemnities, ATC recognised this.

81. The erroneous positions taken by Rothschild (at least as I have found, in its insistence upon the Rothschild Indemnity) and by ATC (in its offer of the unduly limited ATC Indemnity) are to be regarded as “innocent” in all the circumstances then prevailing and within the meaning explained by Ungood Thomas J. (above).

82. Rothschild is therefore entitled to its costs of the OS proceedings from beginning to end.

83. Ms. Crinis argues that Rothschild should nonetheless not be entitled to its costs of the OS on the indemnity basis. She argued that when a trustee engages in hostile litigation against its trust and succeeds, it must be regarded as a normal litigant. It is not in those circumstances litigating in fulfilment of its duties owed to its trust as trustee but seeking to advance its own interests vis-à-vis its trust (and so vis-à-vis the beneficiaries). It must therefore be treated as would any other party bringing a claim against the trust and so, if successful, must be entitled to recover its costs only on the standard party and party basis. She points out that in the context of ordinary litigation indemnity costs are only exceptionally awarded where the unsuccessful party is shown to have litigated in an unconscionable and blame-worthy manner: *Sagicor General Ins. V Crawford Adjusters (Cayman) Limited and others 2008 CILR 482* and *Nike Red Estate Limited v DeBruyne and others 2002 CILR 31*.

84. I approach this final question on the following bases.

85. First, although on the somewhat erroneous basis already explained; Rothschild's pursuit of its indemnity from ATC and insistence upon its lien was innocent. There is insufficient basis upon which I can conclude that Rothschild acted in bad faith at any stage. Indeed, its demonstrated willingness to relinquish substantial portions of the assets at different stages and its attempts at negotiation of a quantifiable lien, suggest the contrary.
86. Second, Rothschild has been only defending itself in the OS proceedings, responding as it has been to the various heads of claim brought by ATC in the OS. Those heads of claim, apart from the question of costs of the OS itself and entitlement to the retained sum, have either been reserved to the Writ Action or are no longer to be pursued by ATC. Rothschild may not here and now be found to be liable for any of those other heads of claim or for the costs to be properly associated with them.
87. Third, Rothschild, having already transferred the Trust assets (save for the retained sum) and having been replaced as Trustee, is no longer able to indemnify itself from the Trust Fund for its costs above and beyond the amount of the retained sum. Its entitlement to full indemnity for costs would therefore be a matter of an order in these proceedings, not a matter only of reliance on its contractual indemnity. It follows that to the extent there is room for judicial discretion, that discretion arises to be exercised now. So, even if I do not accept as correct in principle Ms. Crinis' arguments in this regard, the basic principle is that the costs of litigation are always to be awarded in the discretion of the Court.

88. Mr. Taube QC did not accept that there is a discretion to be exercised in circumstances where – as he insists these are – the costs of litigation arise purely from a trustee successfully seeking to enforce its indemnity and lien which in terms would entitle it to that very indemnity for its costs. It would follow that the successor trustee must be ordered to honour that entitlement in full, in such amount as it may be.
89. For this proposition he relies on *Turner v Hancock* and *Re Spurling's Will Trusts* (both above).
90. I think that as a general proposition this must be correct. However, it will be apparent even from the dicta in those cases, that the discretion exists and that judicial assessment is required. As per Jessell MR in the passage quoted from *Turner v Hancock* there is the suggestion that the entitlement of trustees to their costs will be enforced by the Court “*if they have done their duty...*” as those words were adopted by Ungood-Thomas J. in *Re Spurling's Will Trust*.
91. The principle was explained by Millet LJ in his oft-cited judgment delivered on behalf of the Court of Appeal in *Armitage v Nurse [1998] Ch. 241 at 262*:

*“The respondents...submit that trustees are entitled to a lien over the trust fund for their costs, and that this lien extends to the costs of litigation, including the costs of defending themselves against a charge of breach of trust: ...The lien is only lost by misconduct.*

*But the principle is in my opinion overstated. Trustees are entitled to a lien on the trust fund for the costs of successfully*

*defending themselves against an action for breach of trust. That was the position in Re Spurling's Will Trust as it was in Hancock v Turner which it followed. But on what principle can one justify their right to recoup themselves out of the trust fund for the costs of unsuccessfully defending themselves against such an action? It offends all sense of justice.*

....

And at p262-263

*...it is not enough to deprive trustees of their right to recoup their costs out of the trust fund that the claim is a claim to recover money from them for the benefit of the trust. If the trustees succeed, then the claim was not well founded, and they cannot be denied their right of recoupment. I would add that even if the claim succeeds, yet they may not have so conducted themselves to lose their right to recoupment.*

*In the present case, the judge deprived the respondents of 20 per cent of their costs because they had put forward arguments on which they had been unsuccessful. That was a proper exercise of his discretion.”*

(Millett LJ then went on to explain why it was however wrong, in the circumstances of the case, for the judge to have further prevented the respondents from recovering the other 20 per cent from the trust fund still held by them as



trustees – an option which is of course, no longer available to Rothschild here beyond recovery from the retained sum).

92. What *Armitage v Nurse* does explain in this context however, is the principle that a Court, purely as a matter of the exercise of discretion, can curtail a successful trustee's entitlement to recover its costs of litigation where, among other things, some of its arguments were unsuccessful and so contributed in a significant way to the wastage of time and costs. This can be so whether or not the trustee would still be entitled to recover the rest as a matter of contract on the basis that it did not act in bad faith or otherwise in breach of duty so as to justify denying its contractual entitlement as well.
93. In *In re Grimthorpe, dec'd [1958] Ch 615* (a case relied upon by Ms Crinis for the proposition that trustees are not entitled to indemnity costs of hostile litigation against their trusts) the issue before the Court was really one of the basis upon which a trustee's costs may be directed by the Court to be subject to taxation. In that case, the costs incurred by the trustee were incurred in the course of seeking the Court's directions enabling the trustees to widen the range of investments of the trusts money. The costs were therefore incurred by the trustees acting in their capacity as such and in the interests of the trust. The Court (per Dankwerts J.) confirmed that in such a case the trustees were entitled to their costs to be assessed on the full indemnity basis and explained, in light of **Practice Directions (Trustee's Costs)** dated October 27, 1953 [1953] 1 W.L.R. 1365; what that concept meant.

94. The Practice Directions provided:

*In cases in which trustees are parties in their capacity as such, and in which it is appropriate that they should be indemnified as to their proper costs and expenses of the proceedings, the order as to the costs of the trustees should direct taxation of their costs and expenses of and incident to the action [application] [matter] without the addition of the words "as between solicitor and client". On such a direction all costs and expenses properly incurred by the trustee will be allowed by the taxing master...*"

95. As Dankwerts J. explained (at 621):

*The reason for a direction of that kind was that it had been realised that a taxation on the basis of solicitor and client was merely on a slightly more generous scale than taxation on the basis of party and party, and that it did not restore to the person whose costs were being taxed amounts which in many cases had been paid out quite properly by the person in question and in the ordinary course of the duties of a trustee."*

96. I am satisfied that the case was therefore not meant to stand for the wider proposition argued by Ms. Crinis; that a trustee who successfully sues his former beneficiaries or successor trustee can only be entitled to costs on the standard basis because he was not suing in his capacity as trustee but only in his own interest.

97. Nor do the further cases relied upon by Ms. Crinis make the proposition any stronger, in my view.

98. In *In Re Dargie 1954* Ch. 16, the question was simply whether trustees, having obtained an order for costs to be taxed "as between solicitor and client" and paid out of the estate, were entitled, nonetheless, to pay themselves out of the estate the

portion disallowed on taxation. The question was answered firmly in the negative (because the portion of expenditure had been improperly incurred) but, of note for present purposes, with the Court confirming also that costs are awarded in the discretion of the Court. No wider principle emerged to the effect that the Court could not have awarded the trustees their full costs because of the hostile nature of the action taken against them by beneficiaries in which they had succeeded and recovered their costs.

99. Ms. Crinis also relied upon a series of cases from Jersey. They do not alter my view of the basic principles as to costs or the Court's discretion to award them.

100. In ***In Re Carafe Trust [2005] JLR 159*** the primary question before the Court was whether a retiring trustee was entitled to recover all of its legal fees incurred as trustee before it retired. It was held that some of those fees were irrecoverable having been incurred by the retiring trustee in defending its own interests (that is: in seeking to press for an indemnity and lien to which it was clearly not entitled, having been offered an escrow arrangement which it should have accepted). In the course of so doing, the retiring trustee had moreover improperly sought to pressure the settlor and beneficiaries into accepting its demands by threatening to withdraw its services before the transfer of the assets was complete.

101. In the circumstances the retiring trustee had not acted properly throughout and so, implicitly confirming the existence of its undisputed discretion, the Court disallowed some of its legal and other fees.

102. Similarly, in ***In the Matter of E, L, O and R Trusts [2008] JLR 360*** where the trustee had refused to resign despite its obvious conflict of interest, the costs

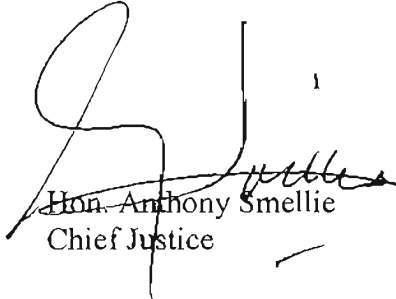
incurred by it in seeking the directions of the Court as to whether it should resign were not justified. They were therefore disallowed by the Court. Here too, there was no dispute about the discretion of the Court to make such an order, the trustee's indemnity notwithstanding.

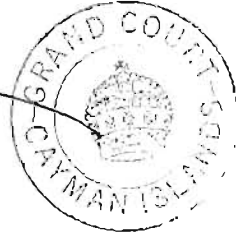
103. In *In the Matter of the Essel and Bruce Trusts [2008] JLR Note 18* appears an extreme example of protraction in the transfer of trust assets from a retiring to a continuing trustee taking place over several years in circumstances where the Court concluded nine months should have sufficed.
104. The Court held that the retiring trustee was in breach of its duty in the interests of its beneficiaries to have co-operated fully and actively in the transfers and to have transferred the assets as soon as reasonably possible, subject only to its right to be provided with reasonable security for its fees and liabilities. In the circumstances of that case, that was, it seems to me, an axiomatic conclusion. Regrettably, the notation of the case does not indicate what, if any, order was made as to costs.
105. In summary then, I think the case law mandates as follows. A trustee will be entitled to a full indemnity for its costs and expenses incurred in the course of its duties, as well as in the course of successfully litigating against its beneficiaries in hostile litigation but "that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain; they are entitled to be paid back all that they had to pay out." Per Dankwerts J. in *Re Grimthorpe* (above at p623) (emphasis added).
106. Trustees are not, therefore, automatically and invariably entitled to their costs on an indemnity basis, even when successful in respect of hostile litigation with their

beneficiaries, which is designed to define and secure their personal rights as individuals, vis-à-vis their trusts. They are so entitled where they successfully defend themselves against an action for breach of trust (or any other claim) but they may be deprived of part of such costs where they put forward unsuccessful arguments that unduly prolonged the case (*Armitage v Nurse* (above)) or for some other reason deemed fit in the discretion of the Court. And see generally, *Underhill and Hayton* (op cit, at Article 83.2 page 1001).

107. Applying those principles to this case, in the exercise of my discretion, I conclude that Rothschild shall have its costs of the OS proceedings themselves from beginning to end but on the standard party and party, rather than on the full indemnity basis.
108. My primary reason for so ordering is that Rothschild while not shown to have acted in bad faith, was erroneous in its insistence upon an unlimited covenant from ATC going beyond the value of the Trust fund as it stood at the time of the transfer and so contributed to the disagreement that spawned and propagated the OS proceedings. Were it not for that disagreement, litigation, if not avoided altogether, would likely have been shorter and simpler, going essentially to the question of the extent of Rothschild's lien.
109. Accordingly, Rothschild's costs are to be taxed, if not agreed, on the standard basis, with it being certified that the case was one fit for the involvement of leading counsel.
110. This does not, however, affect Rothschild's right to a full indemnity for its costs of the *Hastings Bass* proceedings or other expenses properly incurred as trustee

prior to or after the commencement of the OS proceedings, subject of course, to  
the costs which have been reserved to the Writ Action.

  
Hon. Anthony Smellie  
Chief Justice



November 12, 2010