

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD 97/13

BETWEEN:

SCOTIABANK & TRUST (CAYMAN) LTD.

Plaintiff

AND:

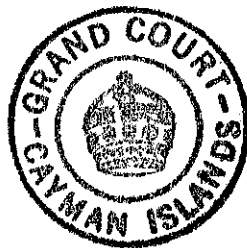
DAVID AXELROD & others

Defendants

Hearing: May 13, 2015

Judgment: June 1, 2015

Henderson, J.



**Mr. R. Davern & Ms. L. DaCosta
of Conyers Dill & Pearman (Cayman)
for the plaintiff**

**Mr. R. Lindley and Ms. S. Tibbett
s of Appleby (Cayman) Ltd.
for the 1st to 3rd defendants**

**Mr. A. Huckle
of Maples and Calder
for the 4th defendant**

**Mr. A. Turner and Ms. E. Deane
of Turners
for the 5th defendant**



JUDGMENT

1. The JC Trust ("the Trust") was established in 1999 in the Cayman Islands for the benefit of the fifth defendant, Jellian Cuartero ("the Beneficiary"), who was then a minor. In 2001 the Trust was transferred from the original trustee to the plaintiff ("the Trustee") Scotiabank & Trust (Cayman) Ltd. The first to fourth defendants are the protectors (collectively "the Protectors") of the Trust.
2. Having attained the age of majority and having become, in the words of the Declaration of Trust ("the Declaration"), a "U.S. Person", the Beneficiary has directed that the Trust be transferred to the State of Oregon. The Trustee is not permitted to act as such in Oregon so (pursuant to article 3.5 of the Declaration) the Trust must be terminated and the Trust property transferred to a trust known as the JC U.S. Trust to be administered by an Oregon trustee. The dispute before me is about the Trustee's entitlement to charge a termination fee and to retain a reserve to cover future expenses.

Termination Fee

3. The Trustee's right to remuneration for rendering its services is established by article 12.3 of the Declaration which reads:

A Trustee shall be entitled to act and be remunerated as a trustee on such terms as shall be set forth in a separate letter agreement with the Protectors; provided, however, that if no such agreement shall be in effect, the Trustee shall be entitled

to be remunerated such amounts as shall be in accordance with its standard published fee schedule in effect from time to time.

4. The article provides for two alternative ways of ascertaining the Trustee's remuneration:

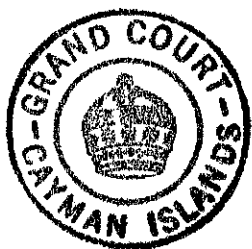
by a letter agreement with the Protectors; or by reference to the Trustee's standard published fee schedule. The Trustee relies upon the first alternative – a letter agreement. By letter dated September 3, 2001 the Trustee gave to the Protectors an annual fee quotation of US \$75,000. The quotation was said to apply to "routine trust administration matters" and to be subject to periodic review. After addressing the question of out-of-pocket expenses, the letter says:

In all other respects our Standard Terms and Conditions (see attached schedule) will apply.

5. Attached to the letter was a copy of the Trustee's "Schedule of Fees, Standard Terms and Conditions" which provides that upon termination or distribution of the Trust the Trustee is entitled to a fee equal to one percent of the market value of the Trust fund.

6. By letter dated September 7, 2001 the first defendant David Axelrod replied on behalf of the Protectors. He accepted the proposal. Mr. Axelrod was and is an attorney practicing in Oregon.

7. In 2006 there was some discussion between the Trustee and the Protectors about the adequacy of the fixed annual fee. By letter dated March 17, 2006 the Protectors

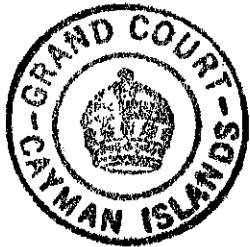


authorized the Trustee to increase the fixed fee to US \$150,000 per year. This letter makes no reference to the Schedule of Fees.

8. By letter dated September 6, 2011 the Trustee wrote to the Protectors to confirm the terms of the existing fee agreement. The letter stipulated an annual fixed fee of US \$150,000, made reference to transaction fees, and then said:

We wish to confirm these important points: ... Work associated with the termination or transfer or liquidation of a Fiduciary Structure ... will be charged as per Scotiatrust's published Schedule of Fees.

9. The termination fee in the Schedule was the same as in 2001. The position of the Protectors (who are unanimous on the issue) is essentially that they never agreed to a termination fee and that such a fee is unreasonable.
10. The Protectors have denied any intention of agreeing to pay fees set out in the Schedule of Fees for non-routine matters such as termination. None of the Protectors has been able to produce a copy of the 2001 letter agreement. The position they have taken is based upon their present recollection of the discussions in 2001 and was advanced before they had the benefit of seeing the Trustee's copy of the 2001 letter agreement.
11. The documentary evidence I have described satisfies me that the Trust instrument provides for fees to be set by a letter agreement, that the letter agreement of 2001 incorporates by reference the Schedule of Fees, and that the Schedule provides for a one percent termination fee. Nothing in the 2006 letter changes that. The 2011 letter



confirms the existing agreement including the agreement to pay a termination fee of one percent.

12. The Protectors say that in any event such a fee is unreasonable. On this application I am asked to provide directions to the Trustee; this is not a claim in contract. The question is not whether the Trustee has a contract enforceable at law against the Protectors but whether this Court is satisfied that the proposed termination fee is reasonable.

13. A professional trustee will “normally” charge a termination fee and this will “normally be a percentage of the value of the trust fund in accordance with the trust corporation’s published scale of fees”: *Lewin on Trusts*, 18th edition, 2008, at pages 569-570. In context, the editors of *Lewin* imply that they see nothing unreasonable in this.

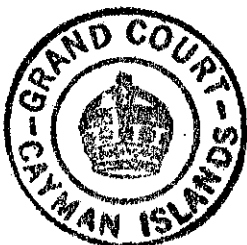
14. Is there a normal percentage? *Lewin* makes no mention of one. I have the evidence of Ms. Michelle Desrosiers on that subject: she says that one percent is “a perfectly common percentage”. This is not the evidence of an independent expert; Ms. Desrosiers is an employee of the Trustee. Her affidavits leave me in no doubt as to where her sympathies lie.

15. I do not accept that a percentage termination fee is necessarily reasonable simply because it is usual. It is certainly the case that a trustee is entitled to reasonable compensation for the additional work required by a termination when the trust



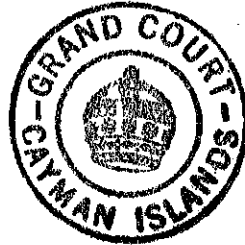
instrument provides for that. A reasonable fee is one which is in proportion to the amount of time spent on non-routine services and the level of skill, training and experience required of those performing the services. There should be some commercial rationale for the fee; it must bear a reasonable relationship to the value of the service. Where there is a free market for the provision of professional trust services evidence of an industry standard is some evidence of reasonableness. It is not conclusive.

16. Ms. Desrosiers' evidence, although relatively lengthy, says little about the time spent on termination services or the qualifications of those rendering the service. She does say that the time spent so far has been "inordinate". As an example, she refers to the time spent retrieving the 2001 letter agreement and 2006 letter. She says that "extensive" searches were made of "electronic databases and hard copy files" for these documents. At first, these searches produced "a complete blank". The letters were located eventually, but only after "exhaustive researches (sic)". She appears to regard the production of these letters as an unnecessary but costly task. It is remarkable that a professional Trustee would have to make such an extraordinary effort to locate documents establishing its right to fees. The impression left by this evidence is that much of the time now being spent on the termination is a result of the Trustee's own disorganization.



17. In the absence of specific, reliable evidence which would allow me to quantify the appropriate remuneration, I must make a general estimate. My direction to the Trustee is that a withdrawal fee of US \$40,000 is reasonable compensation; anything more is excessive.

Retained Amount



18. In addition to the claimed termination fee, the Trustee asks for a direction that it may retain US \$250,000 for "up to six years" to secure it against further costs. For the most part, the Trustee's concern is that it will incur the cost of defending a claim in negligence or breach of trust; it wishes to retain the money for up to six years because that is the relevant limitation period.

19. The Trustee's right to an indemnity is set out in article 10.3 of the Declaration. The indemnity is not available for expense "brought about by [the] Trustee's own actual fraud, willful misconduct or gross negligence". The Trustee is entitled to be indemnified for acts of ordinary negligence or innocent breach of its duty.

20. During argument counsel to the Protectors and counsel to the Beneficiary disavowed any present intention of advancing a claim in negligence or breach of duty. Their positions could change if the forthcoming accounting by the Trustee suggests a viable claim.

21. In essence, the Trustee is seeking security for its costs if it has to defend itself in the Cayman Islands. My understanding is that all of the prospective plaintiffs reside outside the jurisdiction and thus would be liable to an order for security for costs if they start litigation here. That is sufficient protection for the Trustee. In any event, I am not satisfied that there is a credible threat of litigation at the present time. I decline to give a direction approving of a retained amount which is additional to the termination fee.

Fourth Defendant's Costs



22. The fourth defendant asks that her legal costs of approximately US \$138,000 be paid to her from the Trust on the indemnity basis. The Beneficiary is opposed.

23. After the Trustee began this application for directions, three of the four protectors retained the firm of Appleby to advise them. The fourth defendant, the mother of the Beneficiary and also a protector, declined to do so because of her animosity toward Mr. Axelrod (one of the other protectors) arising from evidence he gave in a divorce action. She retained separate counsel at a cost of US \$21,000, and then, being dissatisfied with counsel's services, retained a second firm of attorneys. The latter firm has now sent invoices to her in the amount of US \$117,000.

24. Thus, because of a personal dispute unrelated to the Trust, the fourth defendant has incurred an unnecessary expense of US \$138,000. It was unnecessary because a simple majority of the Protectors can bind them all: Declaration, article 13.6. Any decision by the fourth defendant concerning the Trust, arrived at with or without legal advice, would be ineffective if the other three protectors are in agreement, as has been the case. At most, she might reasonably have sought a second opinion reviewing Appleby's advice. I direct that she may have the sum of US \$10,000 from the Trust in partial satisfaction of her cost of retaining the second firm. Anything more would be unreasonable.

Order & Costs



25. When the prospective new trustee has undertaken to act and after the Trustee has rendered its final accounting, it may have its discharge.

26. The Trustee, the Beneficiary and the first to third defendants may speak to costs if they are unable to agree. All parties are at liberty to apply.

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