

Taxation can prove taxing

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"I have always tried to hide my efforts and wished my works to have a light joyousness of springtime which never lets anyone suspect the labours it has cost me."

Henri Matisse

"My favourite things in life don't cost any money. It's really clear that the most precious resource we have is time."

Steve Jobs

In the case of trustees however, this quote is both true and false. Time is often the most precious resource trustees have, simply because it is this commodity that the client pays for.

Raising the topic of costs often has the effect of causing people's (particularly lawyers') eyes to gently glaze over. If all of the issues a trustee faces were invited to a party you would probably find costs chatting in the kitchen and studiously avoiding the karaoke.

Costs is an often overlooked area, simply because it is ever-present and generally agreed at the outset. However, this does not mean there are no pitfalls for a trustee and, as in the case of *Artemis Trustees Limited and anor v Sandle and anor*, a failure to properly deal with your fees and that of the trust advisers can be catastrophic.

The original proceedings in *Artemis v Sandle* concerned the replacement of the incumbent trustees and any reasonable provision for security for the purposes of indemnifying the outgoing beneficiaries. As part of this process it was necessary to consider what fees the outgoing trustee was legitimately entitled to.

The trust deed permitted professional trustees to charge and be paid all usual professional and other charges for business transacted time spent in connection with the administration of the trust, including the ability for the trustees to engage professional agents and advisors at the trust's expense.

The current trustee accepted the position that the outgoing trustee was entitled to be paid proper remuneration for carrying out the management and administration of the trust.

The Court held that:

The [outgoing trustees] are entitled to be paid from the Trust's Assets: (i) remuneration; and (ii) indemnity for expenses; claimed in respect of work done or services performed in connection with their claimed lien over the assets of the Trust... if and to the extent that an independent Trustee of the Trust expecting to continue in office as such could have reasonably thought it appropriate to perform such work or services and/ or incur such expenditure on behalf of the Trust.

The matter was then passed to the taxation judge, who, using the above principles as a guideline, interrogated the trustees claims for fee payments from 2011 to 2017.

Regulatory | Real estate | Private client and trusts | Insolvency and restructuring | Dispute resolution | Corporate | Banking and finance

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The outgoing trustees claimed they were entitled to a payment of approximately £2.35m from the trust fund in respect of their fees and expenses.

Following taxation the Court concluded that:

- The net result of the fee claims was that of the £2.36m claimed, the Court accepted only approximately £300,000 was payable.
- Taking into account what the outgoing trustees had already paid themselves the net result of the fee claims was that the outgoing trustees actually had to repay to the current trustees approximately £340,000 and Euro1,500. This represented a £2.36m 'swing' from what the outgoing trustees sought to what they ultimately were found to be entitled to.
- In addition the outgoing trustees had to pay costs of the various Court applications amounting to approximately £310,000.

The series of cost judgments in *Artemis v Sandle* provides a salutary warning for trustees and how the Court views fee claims by trustees.

Whilst the more extreme examples of attempted billing (one of the trustee's attempted to charge the trust for receiving the trust lawyers' electronic Christmas card and also for congratulating them on a promotion) are obvious, the judgment sets out the Court's view on individual invoices and the basis on why any charges have been disallowed.

However, some key principles can be distilled over the course of those judgments. In particular the key lessons for trustees are:

- Ensure there are correct agreements in place. Whilst a trustee may have the ability to charge for its professional services it remains necessary for the trustee to properly document the basis on which those fees are charged to the trust fund.
- Properly maintain records – the outgoing trustees were simply unable to evidence a number of their assertions for fees – if you cannot demonstrate that the work has been done then you will not be entitled to it.
- Do not guestimate – the outgoing trustees admitted that much of their fee claims were based on 'guestimates' – when raising fee invoices for £500,000 on a time-charged basis it is wholly inadequate to not properly account for your time.
- Distinguish between work which is for the benefit of the trust (which is properly payable by the trust) and work which is for the benefit of the trustee personally (which is payable by the trustee only).

Interrogate charges raised by trust advisers – the trustee's role is to properly supervise those agents instructed on behalf of the trust. The trustee should therefore ensure that the work has been carried out and is properly chargeable.

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