

Does trustee remuneration in Guernsey have to be reasonable?

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Contacts:

St John Robilliard
Partner, Guernsey

Matthew Guthrie
Senior Associate, Guernsey

Tim Crook
Senior Associate, Guernsey

For contact details, please see the end of this briefing.

In the recent English case of *Pullan v Wilson, Riches and Adams* [2014] EWHC 126(CH) Judge Hodge QC (sitting as a Judge at the High Court) was asked to consider the reasonableness of remuneration charged to a number of family trusts for the benefit of the Pullan family by a professional trustee.

The case turned around the fees charged by David Wilson, a chartered accountant based in Leeds for acting as a trustee of the trusts which in turn owned shares in underlying companies valued in excess of £100million.

The trusts were all governed by English law and contained various different charging provisions where professional trustees were appointed. Some of them contained no charging provision at all and instead reliance was placed on section 29 of the Trustee Act 2000. This entitles a trustee who acts in a professional capacity (but is not a trust corporation) to receive reasonable remuneration out of the trust fund for any services he has provided if each of the trustees has agreed in writing that he may be remunerated for those services. The defendant's counsel agreed that regardless of the precise wording used in each of the trusts, Mr Wilson was only entitled to remuneration that was proper and reasonable for acting as trustee.

A single joint expert was appointed to consider the reasonableness of the fees charged. Mr Wilson was required to file an account of his fees with the expert and Mr Pullan (a beneficiary and the claimant) was then required to file a notice specifying the amount by which he considered the fees charged exceeded proper and reasonable remuneration.

The Judge noted that much time and effort might have been avoided had applicable hourly rates to be charged for the defendant

and his assistants been identified to the trustees before the defendant accepted his position as trustee. Continuing he stated that "if this unhappy litigation serves no other useful purpose, I trust that it will serve as a warning to trustees, to those appointing them, and (where appropriate) as it would have been in the present case, given the background of disputes and ongoing litigation between the trustees and the beneficiaries to the principal beneficiaries, to clarify the precise basis of a trustee's charges and remuneration in advance."

It is interesting to note that the Judge was of the view that a professional trustee is not necessarily entitled to charge by reference to his normal charge-out rates (or those of his assistants) unless these have been specifically identified and approved before the work is undertaken. He felt to hold otherwise would be to deprive the Court of any effective control over a trustee's remuneration.

The Judge considered that although there may be a range of possible rates of reasonable and proper remuneration, the Court is required to determine what was the reasonable and proper rate to charge on the facts in the circumstances of the particular case. The burden of proving an agreement as to the defendant's hourly rate rested upon him as the accounting party and on balance, the Judge felt that the defendant has discharged his duty.

Mr Wilson had raised invoices totalling £849,890.00 and the claimant sought an adjustment down of £238,284.00. The Judge held that £400 was a reasonable and proper hourly rate of remuneration for Mr Wilson to charge on the basis that the claimants' awareness of the rates being charged was good evidence that the rates were reasonable. The Judge ordered that the remuneration rate

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for his assistant be reduced down from £250 per hour to £200 per hour and then ordered that a discount of 7.5% be applied to both rates to reflect administration and other non-productive time.

It was also accepted that Mr Wilson was entitled to remuneration from the trusts for work which he carried out as a director of the underlying companies held within the trusts on the basis that he was only appointed as such to protect the interests of the trusts and ultimately the beneficiaries.

As to the matter of costs, the Judge held that Mr Wilson was not entitled to any of his costs and required him to pay 25% of the costs of the claimant in the matter. As the ultimate adjustment down of the defendant's remuneration was only £20,348 (as against total charges to the trust of around £850,000), the question of costs for each party became the most important issue to be resolved.

What does this mean for trustees of Guernsey law trusts?

The Trusts (Guernsey) Law, 2007 only permits a trustee to remuneration for his services if authorised by the terms of the trust, the consent in writing of every beneficiary or an order of the Royal Court. As the class of beneficiaries will frequently include minors, it is often not possible to rely upon this second limb.

On the one hand this is more restrictive than the position under the English Trustee Act 2000 as there is no general entitlement to remuneration for trustees in Guernsey. On the other, there is no express importation of a

requirement for the remuneration of a trustee of a Guernsey law trust to be reasonable. However, if charges levied by a professional trustee in Guernsey were considered to be excessive, it seems unlikely the Court would permit them to stand.

What then are the lessons which should be taken from *Pullan* for trustees of Guernsey law trusts?

- The first is that if the beneficiaries request the trustee to account for its fees, the burden of proof is likely to fall upon the trustee to show that (1) it was entitled to charge those fees; and (2) the fees charged are reasonable.
- The second is that the court is likely to have little sympathy where the basis on which a trustee will charge has not been clearly set out in advance of the trustee being appointed and appropriate terms of engagement entered into.
- Finally, a trustee who is required to defend the fees he has charged before the Courts may find himself unable to recover his legal costs unless he is completely successful.

Contacts:

St John Robilliard, Partner, Guernsey
+44 1481 731 440
stjohn.robilliard@mourantozannes.com

Matthew Guthrie, Senior Associate, Guernsey
+44 1481 731 424
matthew.guthrie@mourantozannes.com

Tim Crook, Senior Associate, Guernsey
+44 1481 739 384
tim.crook@mourantozannes.com