

Trustee fees – reasonable or not?

Service area / [Trusts and Private Wealth](#)

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Date / [June 2021](#)

[Trilogy Management Limited v White Willow \(Trustees\) Limited and Others, 13 May 2021](#)

The Royal Court of Jersey has recently held that the charging of a responsibility fee for undertaking work in relation to a trust structure was unreasonable on the basis that the nature of the work had evolved since its appointment as trustee two years previously. The case will be interesting reading for trustees, but should not be taken as authority for the proposition that trustee responsibility fees are of themselves unreasonable. To the contrary, the Court acknowledged that it is common for trustees to charge by way of responsibility (or fixed) fees combined with fees based on time spent.

The judgement concerned two issues which had arisen in relation to the administration of a charitable trust (the **Foundation**), but it is the second issue, namely the fees being charged by the trustee of the Foundation, which this briefing note focuses on.

Facts

This judgment is the latest instalment in long running litigation. There have been a number of judgments issued previously, in particular one judgment in 2014 and one in 2016 (the 2014 Judgment and the 2016 Judgments, respectively). The background is set out fully in the 2014 Judgment but it is worth a brief reminder of the relevant background to put the Court's latest judgment in context.

The dispute concerned the Foundation, which was established in 1987 by an individual known as OM. The Foundation holds shares in JY, a Jersey company. JY in turn held shares in three companies, whose assets consisted of properties in an overseas jurisdiction. In 2004, as a result of a compromise

reached in proceedings before the Royal Court, all income and capital distributions received by the Foundation were to be paid to eight charitable sub-trusts in equal shares. Trilogy Management Limited (**Trilogy**) acts as the trustee of three sub-trusts and the remaining five sub-trusts had a different trustee.

The former trustee of the Foundation was a company called YT, until White Willow (Trustees) Limited (**White Willow**) was appointed by the Court in March 2016, the Court having ordered in its 2014 Judgment that YT be removed as trustee of the Foundation and replaced by a new trustee.

The 2014 Judgment made it clear that, from that point forward, the sole purpose of the Foundation was to provide funding for the sub-trusts. It was anticipated that, ultimately, the entire structure would be liquidated; the hostility between the family members made management of the structure untenable.

When White Willow was ultimately appointed in 2016, its fees for the first two years of its trusteeship were fixed by the Court in its Act of Court dated February 2016 giving effect to the 2016 Judgment. There was acknowledgement by the Court "*that the special circumstances of the Foundation, including the hoped-for short tenure of the trusteeship justify substantial remuneration for the new trustee (using that word, for once, in the broad sense of the trustee and the investment companies which it controls)*".

It ordered that the responsibility fees for the Foundation would be fixed at £50,000 per annum for two years, and any additional time spent would be charged at hourly rates "*not exceeding £500 for directors and partners and not exceeding £250 for administrators*". No provision for remuneration was

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made beyond the initial two year period and the Court stated that “*remuneration after that period would have to be justified in accordance with the general law and on the facts as they then appear*”.

The Act was silent in relation to responsibility fees charged in respect of the companies, the Court having been invited to make provisions in relation to the fees for the underlying companies, but having declined to do so. In correspondence with the Court, it was understood by White Willow (which understanding was confirmed by the Court) that White Willow would set its fees (including as to responsibility fees) in relation to the underlying companies acting reasonably and in accordance with its obligations under the trust deed and the Trusts (Jersey) Law 1984. Whilst Trilogy was aware of the correspondence, it did not provide any comment.

White Willow set its responsibility fees for each of the underlying companies at £40,000 per year.

Issues raised by Trilogy regarding fees

The properties held in the Foundation were sold and final sale proceeds received towards the end of the first half of 2017. From that point, the assets of the various companies consisted of cash or cash equivalent investments. The companies that held the properties were subsequently dissolved during the second half of 2018 so that the only remaining asset of the Foundation was JY; and JY’s assets consisted solely of the cash assets that had not yet been distributed to the sub-trusts.

Against this background, Trilogy raised certain concerns in relation to the fees charged by White Willow, principally the responsibility fees charged by White Willow in relation to the companies, the responsibility fees for the Foundation after the expiry of the two year period (which expired on 9 March 2018) and the charging of employee time at rates higher than the limits set by the Court.

Trilogy alleged that the fees were either prohibited by the Act of Court, or if they were not found to be prohibited, they were unreasonable.

Were the fees permitted?

The Court in its judgment said it was clear ‘beyond doubt’ that the Act did not prohibit the charging of responsibility fees for the companies and specifically left the matter for White Willow as new trustee to determine.

In relation to the responsibility fee for the Foundation after the expiry of the two-year period, again the Court did not consider that this was prohibited either by the Act or under the terms of the trust deed.

The Court also had no hesitation in rejecting Trilogy’s submission in relation to hourly rates. The Act fixed a maximum hourly rate for the management team and a maximum hourly rate for the administration team; it did not require all non-directors and partners performing a management role to charge at the lower rate of £250.

The issue was therefore whether the fees that were charged were reasonable.

Were the fees unreasonable?

The Court made three important preliminary points. First, its role was confined to determining whether the remuneration charged was unreasonable; it could not interfere simply because, had it been appointing White Willow, it would have fixed different fees from those that were in fact charged. Secondly, responsibility fees are not of themselves unreasonable; it is common for trustees to charge by way of a fixed fee combined with fees based on time spent, with the fixed fee varying according to the size of the trust fund, the complexity of the situation, and the risks and responsibilities in relation to the trust. Thirdly, the Court should not apply a different standard to charitable trusts from private trusts when considering whether a remuneration package was or was not reasonable.

In relation to the question of responsibility fees for the companies, the Court concluded it was not unreasonable to charge such fees for the first two years. In setting its fees in relation to the underlying companies, White Willow was entitled to take the view that it was ‘*stepping into the lion’s den*’ given the strain and hostility among family members (who were still involved in the administration of the sub trusts). It was also entitled to take the view that it was exposed to risks of litigation and criminal investigations in relation to the properties held in the Foundation. The substantial value of the trust fund, with accompanying levels of responsibility, was also a factor White Willow was entitled to take into account.

However, the Court considered that continuing to charge the company responsibility fees, along with the trustee responsibility fees, beyond the two year period was not reasonable. By March 2018, the properties had been sold and matters were significantly less complex such that White Willow was no longer justified in charging company responsibility fees in addition to fees for time spent.

As to the question of the trustee responsibility fee of £50,000 for the Foundation, the court considered this was justified for one further year until March 2019, but not thereafter. By March 2019, matters had become comparatively straightforward in terms of complexity and risk and the Court considered White Willow was not entitled to a trustee responsibility fee in addition to time spent.

Comment

While on the face of it this judgment might be of some concern to trustees, the Court was keen to emphasise the exceptional nature of the situation before it. The trustee in this case was appointed by the Court and its remuneration after the first two years was expressly left to the trustee to determine. A Court is accordingly going to assess the question of remuneration after this period with some rigour, particularly where, as in this case, the circumstances that existed at the expiry of the two year period were very different from the circumstances that existed at the time the trustee was appointed.

Continued

The Court made very clear that the judgment should not be taken as a commentary on the reasonableness of responsibility (or fixed) fees other than in the very particular circumstances of this case, so trustees should not despair – nothing in this judgment should be taken as authority that trustees cannot properly charge responsibility fees. Indeed the Court confirmed that it was commonplace for trustees to do so and gave a useful indication of the types of factors a trustee would typically take into account when assessing the level of responsibility fees to be charged.



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