

**WORKSHOP: When can trustees take their costs from the trust fund – practical issues**

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- (a) Trustee costs of authorised and unauthorised transactions. What is an ‘authorised’ transaction?
- (b) Trusts with no liquid assets - the costs of borrowing. When can trustees expect to be indemnified for borrowing which is not expressly authorised by the trust or under statute?
- (c) Trustees in disputes – trustee with no assets taking costs from the fund to defend hostile litigation, and special applications – Beddoe and pre-emptive costs applications.
- (d) *Berkeley Applegate* applications for costs out of trust funds

**(1) Problem – Unauthorised costs in general**

Trustee Co Ltd is the trustee of The New Money Property Investment Fund – think of it as a form of unit trust.

It is, as its name suggests, a property investment fund.

It has wide powers of investment in real property, but they are subject to certain administrative restrictions – advice from accountants and authorisation from an investors’ committee. And let’s assume all other powers of investment are excluded.

Trustee Co Ltd decides to spend some money by way of:

- Buying Non-Fungible Tokens (“NFTs”) and
- Maintaining some property it already owns.

In neither of these cases do they get advice from accountants or authorisation from the investors’ committee.

Leaving aside the actual purchase / maintenance prices, Trustee Co Ltd also incurs its own costs in doing this – lawyers, surveyors and agents costs.

**(1) Questions**

- Can Trustee Co Ltd get these costs out of the trust fund?
- Does it make a difference in the maintenance prevents loss?
- Does it make a difference if the NFTs turn a profit?
- Do you have to go to court to authorise the costs, or is it as of right?
- Does it make a difference if Trustee Co Ltd owes the trust fund for other breaches/misfeasance?
- What if it is insolvent, and cannot pay back money first?
- What if such liability by Trustee Co Ltd is merely currently alleged?

**(2) Problem – Borrowing costs**

Trustee Co Ltd now has lots of solid, but illiquid, investments. They need to do something – say, employ an accountant to give advice on a potential disinvestment and then reinvestment. But in the absence of cash, they have to borrow. There are no express powers of borrowing in the trust deed.

**(2) Questions**

- Can they borrow – and will they be indemnified for the borrowed sum and the costs of borrowing (interest) if they do so?
- Is there a difference between the capital and the interest on the borrowing?
  - Does it make a difference as to whether you pay the indemnity out of the trust capital or income?
- Does it make a difference if what they want to do is entirely discretionary? If it is just one possible action, and doing nothing is also entirely legitimate?

**(3)(i) Problem – litigation funding costs**

Some of the trust’s assets have gone AWOL and Trustee Co Ltd wants to sue to recover them. There is no express power of entering into litigation funding.

**(3)(i) Questions**

- Can Trustee Co Ltd enter into litigation funding?
  - If it recovers assets through litigation, can it use those assets to
    - Pay the litigation funding?
    - Pay its own costs of arranging the litigation funding?
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**(3)(ii) Problem – litigation costs in general**

Trustee Co Ltd has allegedly done something wrong. Say, **allegedly** invested improperly in NFT’s without committee authorisation and the NFT’s are now of dubious value.

Mr X (a member/beneficiary of the New Money Property Investment Fund) is suing Trustee Co Ltd for this alleged misfeasance and also seeks removal of the trustee. Trustee Co Ltd has a plausible defence (it says the committee did authorise) but has no money (or insurance) at all. The directors of it are concerned about their reputations and wish to ensure it defends itself. They too have no money or insurance.

**(3)(ii) Questions:**

- Can Trustee Co Ltd use trust funds to pay for their legal costs pending resolution of the dispute? In particular:
  - Can it make a Beddoe application for their legal costs?
  - Can it make a pre-emptive costs application?
  - What other options does it have?
- Can Trustee Co Ltd’s lawyers accept funds from the trust fund to pay for their bills?

**(4) Problem – Berkeley Applegate Applications**

Trustee Co Ltd has made a complete balls-up of the administration of the New Money Property Investment Fund and its own internal management. It is so bad that provisional liquidators are appointed over Trustee Co Ltd. There are allegations of commingling of funds and improper use of client monies. The records and accounts are a mess and it is not clear which beneficiaries are entitled to what assets.

The provisional liquidators realise that in order to just work out what is going on with Trustee Co Ltd it will need to spend some money. But Trustee Co Ltd has very limited funds. The company also has a pool of trade creditors.

The liquidators have received a flood of letters from clients asking for “their” money back. Some of these claims are over assets which have competing clients claims and some are over assets held by the company in its own account.

**(4) Questions**

Can the provisional liquidators take funds from the trust fund to pay for:

- Their investigation of Trustee Co Ltd?
- The administration of the assets held by Trust Co Ltd?
- Their handling of claims by the clients?