



Re Townsend (Deceased) [2021] EWHC 3079 (Ch): Implications for the drafting of trustee charging clauses

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Introduction

The role of trustee is *prima facie* carried out gratuitously. Subject to the terms of the trust, a trustee is entitled to be indemnified out of the trust against the costs and expenses properly incurred, but a trustee is not *prima facie* entitled to any allowance from the trust for their time or services rendered to the trust. Otherwise, there may be a conflict of duty and interest.

This general rule is, however, subject to exceptions, and a trustee (or personal representative – s.35(1) Trustee Act 2000) is entitled to payment for their services if their remuneration is permitted by the terms of the trust, or by statute (e.g. s.29 of Trustee Act 2000), for example.

The issue in *Re Townsend*

Re Townsend raises a question about whether an executor who is engaged in a profession or business unrelated to the administration of trusts or estates (i.e. not acting in a professional capacity under s.28(5) Trustee Act 2000) can rely upon a common form of professional charging clause contained in a will to charge for time spent on the administration of the estate.

The charging clause in issue in *Re Townsend* (corrected for typos) was as follows:

"MY TRUSTEES shall have the following powers in addition to their

powers under the general law or under any other provision of this Will or any Codicil hereto:

(g) for any of my Trustees who shall be engaged in any profession or business [to] charge and be paid (in priority to all other dispositions herein) all usual professional and other fees and to retain any brokerage or commission for work or business introduced transacted or done or time spent by him [or] his firm in connection with the administration of my estate or the trusts powers or provisions of this Will or any codicil hereto including work or business outside the ordinary course of his profession and work or business which he could or should have done personally had he not been in any profession or business". (Emphasis added)

Mrs Heselton acted as joint executor of Mrs Townsend's estate and sought to charge the estate around £43,350 in total for her time and work in that capacity. To put this amount in context, Mrs Heselton's charges would cover almost all of the estate's income during the period she acted as executor.

Mrs Heselton's evidence on her engagement in a profession or business included:

- A wholly unspecified "business" in which Mrs Heselton had been engaged since 1991 which enabled her to establish a law scholarship.
- Debt recovery companies which had been in operation since about 1992. Mrs Heselton's interests in those companies was unspecified.
- Acting as practice manager of her husband's firm of solicitors since 1992. The basis of her employment was unclear.
- In 2014, she established a "French Art Café and Gallery" in North London.
- Claims that she was engaged in the business and management of commercial and residential property since before Mrs Townsend made her will.

First instance decision

In 2019, Deputy Master Lloyd made a declaration sought by the new executor of Mrs Townsend's estate (Mr Brunton) that Mrs Heselton was not entitled to charge the estate for her time. The Deputy Master was not satisfied that Mrs Heselton's activities in administering the estate were done in the course of her profession or businesses.

The first appeal

Mrs Heselton appealed. Mr David Rees QC sitting as a Deputy High Court Judge dismissed the appeal.

The Deputy Judge said that on a review of the authorities:

"charging clauses, like other clauses capable of benefitting a trustee or executor, should be restrictively construed." [26]

But in this case where the person seeking to rely upon the clause is not responsible for its terms:

"I can see no reason why they should not be entitled to have the will fairly construed according to the natural meaning of the words used, albeit subject to the qualification that where there is doubt as to the natural meaning of the clause it should be construed against the executor or trustee." [27]

Looking at the construction of the charging clause, the Deputy Judge held that the use of the words "*usual professional and other fees*" (highlighted above) were key. He held that these words governed, not just the amount of the fee that could be charged, but the nature of the work for which a fee may be charged. He held that the words required there to be a link between the scope of the profession or business in question and the work the trustee has carried out in connection with the administration of the estate which the trustee is seeking to charge the estate for [30]. So, in relation to the charging clause in question, the trustee can charge for their work or time spent on the administration of the estate only if that work falls within the scope of their profession or business; i.e. it attracts or incurs their usual professional fees [44].

The Deputy Judge went on to say that, provided the work done falls within the scope or type of work carried out by the trustee in their profession or business, they may charge for it even if they are acting personally or otherwise not within the "ordinary

course" of their business (in an attempt to deal with the wording in the charging clause which included "*work or business outside the ordinary course of his profession and work or business which he could or should have done personally had he not been in any profession or business*"). But the Deputy Judge said the trustee must first show that the work would attract a "usual professional or other fee" from someone engaged in their profession or business. [32].

The Deputy Judge obtained limited assistance from the decision of Buckley J in *Clarkson v Robinson* [1900] Ch 722, which the Deputy Judge said emphasised the distinction between remuneration for services that were within the scope of the trustee's/executor's profession or business and work that falls outside of this scope.

The Deputy Judge said that as a matter of common sense, the charging clause cannot be construed to apply to any person setting up any business to which they devoted negligible time, and allow that person to then charge the estate for any act they carried out in relation to the administration of the estate, irrespective of the nature of their business [42]-[43].

Looking at Mrs Heselton's evidence, the Deputy Judge said the Deputy Master was correct to conclude that Mrs Heselton's activities in administering the estate were not done in the course the businesses that she had identified.

Second Appeal

Mrs Heselton has been granted permission to appeal for a second time. The appeal is currently listed for a hearing on 16 June 2022.

Analysis & Implications of Re Townsend following the first appeal

Arguably the Deputy Judge has taken a very strict approach to the construction of the charging clause, to restrict its scope to time charged by a trustee on the estate only if acting in the course of their profession or business. In doing so, it might be said that the Deputy Judge reached an unnatural reading of the words: "*who shall be engaged in any profession or business... including work or business outside the ordinary course of his profession*" and "*be paid all usual professional and other fees... for... time spent by him... in connection with the administration of my estate...*".

Furthermore, the charging clause in issue in *Re Townsend* contains standard form wording. The proper construction of this clause therefore has potentially wide-reaching ramifications. (Although admittedly the nature of Mrs Heselton's businesses and the limited nature of the information she chose to provide the court on these businesses, means that there might not be many executors or trustees in her position who want to claim the benefit of a charging clause.)

In future, given the Deputy Judge's reasoning, and until the decision is overturned, if a testator or settlor wants to ensure that their executor or trustee can charge the estate or trust for work not within the scope of the executor or trustee's profession or business and s.28 of the Trustee Act 2000 does not apply (i.e. the trustee is not acting in a professional capacity as defined in s.28(5)), it might be wise to expressly state this in the charging clause. For example, looking at the charging clause in *Re Townsend*:

- Inserting the words "(and whether or not acting "in a professional capacity" within the meaning of section 28(5) of the Trustee Act 2000)" after the words "any profession or business".
- Amending the words "all usual professional and other fees" to read: "all professional and other fees (whether usual or otherwise reasonable in all the circumstances)"

[Nb: These are just drafting suggestions based on the clause contained in *Re Townsend*. The clauses of an individual trust or will should be independently reviewed and construed on their own terms.]

The second appeal of *Re Townsend* is awaited, which will hopefully provide further guidance as to the construction and drafting of trustee/executor charging clauses.

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