The Remuneration of Pension Trustees: Some Current Issues

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This article deals with two discrete aspects of the law and practice relating to trustee remuneration – a recent decision of the Court of Appeal and the Pensions Regulator's Single Code of Practice.

The law reports are full of sweeping statements to the effect that that there is a general rule of equity that trustees are not entitled to profit from their trusts, and it is well-established applies as much as to pensions trusts as other trusts. See, for instance, *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32 where Lindsay J pointed out, however, that the rule is "riddled with exceptions".

Under the general law trustees are not able to charge for their services, but it has long been common to include in trust instruments clauses entitling them to do so despite the general rule. And if one traces the development of the clauses in common use the history is of widening the scope of charging clauses in response to decisions of the courts restricting the ability to charge. But it is still necessary to interpret the particular clause, as the Court of Appeal had to in *Re Townsend's Estate* [2022] EWCA Civ 880 and the effect of a charging clause may be narrower than might at first blush be supposed and may be a trap for the unwary.

Omitting irrelevant wording relating to brokerage and commission, the clause in question (with numbering added by Nugee LJ who gave the only reasoned judgment) authorised:

> [1] any of my Trustees [2] who shall be engaged in any profession or business [3] to charge and be paid all usual professional and other fees … [5] for work or business

> introduced transacted or done or time spent by him or his firm [6] in connection with the administration of my estate or the trusts powers or provisions of the will or any codicil thereto [7] including work done or business outside the ordinary course of his profession and [8] work or business which he could or should have done personally had he not been in any profession or business

The deceased had died in 2003, and her will was proved in 2004. The administration turned out to be both lengthy and contentious and in 2016 the court removed the executors and appointed an independent solicitor as sole personal representative in their place. In 2019 one of the former executors provided the new administrator with a revised estate account, showing rents of £48,900 from letting the deceased's residence, but reduced by an administration charge made by the executor of £43,350 (£300 a month for 144.5 months). Unsurprisingly, this was challenged and quite apart from anything else there must have been a serious question as to the amount of the charge.

The executor was a Dominican lawyer living in London, who had been engaged in various activities including employment with a firm of solicitors, debt recovery companies, a café and a gallery providing studio and gallery space for artists.

The case was heard by a deputy master, and on appeal from the master, a deputy high court judge before reaching the Court of Appeal. All three tribunals held that the above charging clause permitted an executor who is engaged in a profession or business to charge for their time spent or work done in connection with the administration of the estate only if the time was spent or the work done in the course of that profession or business.

The deputy judge held that the phrase "usual professional and other fees" was the key to the meaning of the clause: those words governed not just the amount of the fee that can be charged, but the nature of the work for which a fee may be charged. They required there to be a link between the scope of the profession or business in question and the work that the trustee has carried out in connection with the administration of the estate and in respect of which he is seeking to charge.

Nugee LJ agreed that this part of the clause did, indeed, indicate what the clause is aimed at – enabling those who are engaged in a profession or business to charge their usual fees for work done in the course of that profession or business. The good sense of that was (he said) self-evident. If

professionals or persons engaged in business provide services to the estate in the course of their profession or business, the clause enables them to charge the going rate for those services despite being an executor. If the estate did not use their services, it would normally have to pay a similar amount to some other person in the same profession or business to carry out the work.

The Lord Justice rejected arguments based on the wording at [7] and [8]:

- the wording in [7] was designed to avoid an argument that although an executor is a professional and provides services in the course of that profession he cannot charge if the work is outside his usual practice, so that an executor is a surveyor whose practice consists of valuing commercial property can charge for valuing the deceased's residence, even though valuing residential property is not what he ordinarily does; and
- the wording in [8] was designed to avoid case law holding that a charging clause did not permit a professional to charge for work that a lay person could have done.

The upshot was that, to take two examples discussed in the case, an executor who was a dentist or builder could not charge for his services in the administration of the estate or trust. I may say that this did not come as a surprise to me: my godmother appointed me as an executor in the evident belief that I would be able to charge for my services, but was unable to do so while my non-executor brothers and cousins benefited from legacies from which I was excluded. But one can well imagine a lay trustee failing to spot the significance of the phrase "usual professional and other fees" and as a result misunderstanding the scope of the clause.

While there was some discussion in argument about whether employees could qualify as a person engaged in business, it was not necessary to decide the point: Nugee LJ said that it was "probably" right that an employee would not qualify, but wished to reserve the precise position as there might be less clear cut cases, for example if the executor was technically an employee of a company but at the same time a director and owner of the company. In this context, one thinks of the member of a limited liability partnership even though the business is carried on by a separate entity, the LLP.

All of this is at first sight far-removed from the field of pensions. Most pension trustees of occupational pension schemes do not charge for their services: they tend to be executives of the sponsoring employer and/or and members of the scheme. But where they do want to charge it is

important to check the wording of the charging clause and if necessary amend it. The wording of the clause considered in *Townsend* is not unusual and it appears unlikely that it would extend to an executive or member. It is more likely to extend to a member of a profession, for example an accountant, actuary or solicitor. But be that as it may, one can well imagine a lay trustee not versed in the niceties of semantic analysis as a tool of interpretation misunderstanding the clause.

Turning to the Pensions Regulator's new Single Code of Practice, currently in draft but due to come into force next spring, one finds a "module" (TGB016) dealing with remuneration policy.

It applies to governing bodies of private sector occupational pension schemes with more than 100 members, but the Regulator suggests that other schemes may wish to adopt the same principles as good practice.

The starting point is that the governing body should establish a remuneration policy, that is a policy that sets out the levels and means for remunerating those undertaking activities in relation to the scheme paid for by the governing body and/or sponsoring employer and keep a written record of it.

The Code says that the Regulator expects that:

- the policy should be proportionate to the size, scale, nature and complexity of scheme activities;
- it should support the sound, prudent and effective management of the scheme and be aligned with the scheme's long-term interests;
- it should apply to all persons or corporate bodies who effectively run the scheme, those who carry out key functions or whose activities materially impact the scheme's risk profile;
- the policy should include measures to mitigate potential conflicts of interest and focus on 'in-house' roles, such as trustees, trustee secretary, administrators and sub-committees;
- the policy should be reviewed at least every three years, but in most cases it will be appropriate to do so annually or immediately following any significant changes to the scheme's governance arrangements;
- the policy should include an explanation of the decision-making process for the levels of remuneration, and why these are considered to be appropriate;

- the governing body should consider any outsourced service provider, including but are not limited to, administration, actuarial, legal advisory, and investment services;
- the policy should be published on the scheme website or otherwise made available to scheme members.

Preparing a policy may therefore require a good deal of time and consequent expense. Some will wonder whether this is proportionate in the case of smaller schemes.

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