A waste of time?
An update on claiming damages for wasted management time

Wasted management time was established as a recoverable head of loss 65 years ago (British Motor Trade Association v Salvadori [1949]), but until relatively recently there was a considerable degree of uncertainty surrounding the circumstances in which a claim for this type of loss could be successful: tort claims were, in this context, treated differently from contract claims; there were no appellate decisions; and there was a notion that a claimant had first to prove that it had suffered some other form of pecuniary loss (Lonrho v Fayed (No 5) [1993]). Furthermore, whilst a company could recover wasted time if it hired consultants to do this work, it could not recover by way of damages if its own employees carried out the work (Admiral Management Services Limited v Para-Protect Europe Limited [2002]).

However, there has been somewhat of a sea change over the past few years, such that, in circumstances where a claimant has a cause of action for damages, the Courts are increasingly inclined to allow the recovery of sums in respect of the cost of management time, even where that work has been done in-house. Firms of accountants who find themselves named as defendants to proceedings are therefore increasingly likely to face claims for damages recoverable in respect of the claimant’s wasted management time.

Equally, however, the flip side of these developments is that there are now greater opportunities for accountants to claim damages under this head of loss. It has, historically, been frustrating for accountants that, save in certain circumstances, firms cannot recover from the defeated party the cost of management time which has necessarily been devoted to dealing with legal proceedings.

Particularly galling for larger firms, who frequently take on this additional burden in-house, has been a tendency for Courts to award costs or damages under this head only in circumstances where external consultants have been brought in to do the required work. This approach may now be shifting, and this article seeks to highlight some circumstances in which recoveries can be made, either as damages or costs.

**Damages claims against accountants for management time**

Situations in which accountants may face claims for management time fall broadly into two categories:

**Mitigation**
Such claims might arise where negligent tax advice has led to a tax liability arising, and the former client may claim for management time spent attempting to mitigate the tax liability, for instance by alternative tax planning or setting aside trusts.

Similarly mitigation costs might arise where advice has been given on a commercial transaction which it has transpired now needs to be restructured as a result of a client having relied upon negligent advice.

**Investigation**
Investigation will, for instance, be required following an auditor’s failure to identify a fraud in a company.

It will be necessary to investigate the effects of negligent advice given in a whole range of other circumstances, for instance in relation to a commercial transaction where due diligence and/or modelling has been performed negligently and the client may seek to claim in respect of management time spent investigating the position.
If on the receiving end of a claim for management time as damages it is obviously advisable to press the claimant to disclose for scrutiny all available documents which should be capable of verifying any such claim (e.g. payroll slips and time sheets).

**Bringing a damages claim for wasted management time**

The circumstances in which such claims might be brought by an accountant firm would include:

- Indemnity claims (for example when an accountant sues in respect of negligent advice which has been received from a tax barrister or other external consultant upon whose advice the accountant, as well as the client, has relied)
- Counterclaims for damages (e.g. for negligent misstatement by client companies to their accountants)

**General principles**

To succeed in bringing a claim for damages under this head it is necessary to demonstrate:

- The extent to which staff has been diverted to deal with this issue
- That the diversion caused significant disruption to its business

If these two elements are established, there is a rebuttable presumption that, had the staff not been diverted from their usual work, they would have directly or indirectly generated revenue in an amount at least equal to the cost of their employment. In other words, the claimant will be able to recover by reference to the cost of their employee's time rather than by reference to any loss of revenue suffered.

**Extra hours and higher rates**

It is also possible for a firm to recover damages in respect of any additional management time which has been paid for, over and above the usual remuneration of the employees concerned (for instance where employees have worked extra hours and/or at a higher hourly rate). In such circumstances it appears that it is not necessary also to demonstrate that there has been significant disruption to the business.

**Investigations prior to the commencement of litigation**

A distinction is conventionally drawn between investigations which are carried out by claimants prior to the commencement of proceedings (recoverable as damages) and those that were begun thereafter (irrecoverable as damages). Whilst it has long been an established principle that staff time diverted to deal with litigation in which the company/firm is involved is generally irrecoverable as damages (Cockburn v Edwards (1881), subject to the exceptions set out in the following bullet point), disallowing any claim for damages in respect of investigative or mitigation work done after the point at which proceedings are commenced is arguably a somewhat arbitrary approach and it is unclear whether it will be adopted in relation to more complex investigations which have multiple purposes.

**Maintaining records**

Although the courts are increasingly adopting a more relaxed approach to the evidencing of claims for damages in respect of management time, it would be prudent to keep clear and contemporaneous records of the costs which are being claimed. It is important that anyone mounting a claim for wasted management time:

- Identifies at an early stage which staff will be performing the relevant tasks and justifies why this is so
- Decides whether to respond to a ‘disaster’ by hiring new staff or diverting existing staff; consideration should be given to hiring new staff or paying existing staff to act outside their normal working hours for extra pay; whilst this might potentially be a more expensive option, the amounts paid will be recoverable in full without it being necessary to show that there has been disruption to the business or that existing staff have been diverted from their usual work
- Adopts a thorough approach to documenting the cost of the work done contemporaneously or immediately after it has happened, in terms of hours spent by employees/managers, the likely time spent going forward on remedial work if required, and the exact hourly rates claimed (ideally by producing and retaining payroll slips and time sheets); a lack of such records may restrict recovery to nominal damages
- If investigatory work is done, records the purpose of the investigation – it will not be recoverable if it is to prepare for litigation, but will be recoverable if it is to determine the nature/consequence of a wrong
- Records the tasks that the employees/managers were unable to undertake (but would otherwise be performing) due to the work required to investigate or mitigate the loss

However, it is still worth bringing a claim even if contemporaneous records are not available, especially if the claim is small, as a court may accept retrospective evidence of the time which has been spent, in the form of witness and documentary evidence, as in AEW Architects and Bridge UK.COM Limited (although, as in the latter case, a discount may be applied).
Claiming for wasted management time as part of a claim for costs

Finally, it is in some circumstances possible to recover these expenses as part of a claim for litigation costs. The circumstances in which such a claim might be made would include for time spent:

- Dealing with the fallout of a freezing order which is subsequently discharged
- Responding to a disclosure order (e.g. in a fraud where there is no fault on the part of the accountant)
- Responding as a defendant to a claim

Where management time is spent martialling the facts this will not be recoverable, as a party to litigation is expected simply to absorb such costs (Sisu Capital Fund Ltd and others v Tucker and others [2005]). However, there are three exceptions:

- If a party’s own employee is acting as an expert, this expense will be recoverable as a cost of the litigation, provided they are the most suitable experts to utilise (Re Nossen’s Letter Patent and Admiral Management)
- When the party’s employees are acting as its lawyers before lawyers have been instructed, such that the party will be regarded as having at that stage acted as a litigant in person and therefore being able to recover its costs pursuant to CPR 46.5(6)(a)
- The cost of in-house lawyers can in some circumstances be recovered regardless of whether independent solicitors are also instructed (Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd and another [2006]), however only if the work carried out by the in-house lawyer can be characterised as legal work rather than work for the ‘client’ and only if that work does not duplicate the work done by external solicitors

As when claiming management time as damages, it is important that good records of these costs are kept.

Review of case law

Principles

R+V Versicherung AG v Risk Insurance & Reinsurance Solutions SA & Ors [2006]
The Court held that it was not necessary to prove actual loss of profit in tortious claims. Furthermore, rather than restricting recoveries to circumstances in which a claimant had hired consultants to do this work, damages could be recovered when the work had been done by direct employees. The claimant was awarded damages in circumstances where management and staff time had been wasted in investigating and mitigating the aftermath of a conspiracy to defraud and dealing with the claims that arose therefrom, on the precondition that it could be demonstrated that the business had been disrupted due to diversion of staff time.

Aerospace Publishing Ltd v Thames Water Utilities Ltd [2007]
The Court of Appeal considered the question of claims for management in this case, and approved the approach taken in R+V Versicherung. The case established that there should no longer be a distinction between the approach to claims for management time brought in tort and contract cases. The Court of Appeal devised a three-part test for determining when damages could be claimed in respect of the wasted management time of direct employees, as follows:

- The claimant must demonstrate the extent of the diversion of the staff
- The claimant must demonstrate that the diversion caused significant disruption to its business
- If these two elements are established, there is a rebuttable presumption that, had the staff not been diverted from their usual work, they would have directly or indirectly generated revenue in an amount at least equal to the cost of their employment. In other words, the claimant will be able to recover by reference to the cost of their employee’s time rather than by reference to any loss of revenue suffered

4 Eng Ltd v Harper and another [2008]
Damages were recovered for management time in circumstances where the claimant (pursuant to a board resolution) had paid two employees a higher hourly rate to undertake work necessary to investigate, outside of their normal working hours, the fraud and corruption on the part of the defendants which was at the heart of the underlying claim. The court drew a distinction between a) a claim for compensation in respect of a liability incurred by a claimant to pay for the additional hours worked by members of its staff and b) the cost of diverting staff. With respect to b), the claimant must prove that there has been significant disruption to its business, but in relation to a) the claimant is entitled to the amount that it actually paid to the staff in question, which is perhaps easier to prove.

Avrahami v Biran [2013]
Newey J drew a distinction (which was acknowledged to be narrow) between investigations referable to the attempted reconstitution of the claimant’s business activity, carried out prior to the commencement of proceedings (recoverable as damages), and those that were begun thereafter, which were thus referable to the claim (irrecoverable as damages): Aerospace Publishing. The claimant accepted during the course of the trial that his fees related to “the investigation of the litigation”, and his claim was therefore rejected on the basis that the work done was referable to the claim.
Further information
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**Evidencing loss**

Bridge UK.COM Limited v Abbey Pynford plc [2007]
The Court held that it was possible retrospectively to assess time spent through witness evidence and other records of what happened as a result of the wrong, even though no contemporaneous documents existed (albeit that a 20% discount on the number of hours claimed was applied).

Imun Said Abdul Aziz Al-Rawas v Pegasus Energy Limited [2008]
In this case, although there was no contemporaneous evidence to prove disruption to the business, the judge employed a “common sense” approach. The case concerned a search order which was carried out and then subsequently discharged on its merits. The judge concluded that the sheer scale and timing of the search was such that it must have seriously disrupted business and awarded damages for wasted management time.

National Museums and Galleries on Merseyside Board of Trustees v AEW Architects and Designers Ltd [2013]
Akenhead J was heavily influenced by the oral and written evidence which thoroughly documented the loss. When the defendant attempted to attack the claimant’s lack of contemporaneous documents, such as time sheets and payroll records, their argument was dismissed on the basis that they had never sought disclosure of such documents.

Flogas Britain Ltd v Calor Gas Ltd [2013]
The Court awarded wasted management time despite there being no contemporaneous documents relating to meetings that took place and how time was spent. In circumstances where the claimant’s customer database had been compromised to a competitor, the judge concluded it was clear that the Claimant had to exert management time to establish strategies to overcome this.