Case No: PT-2019-000323
Neutral Citation Number: **[2019] EWHC 2446 (Ch)**

HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUST AND PROBATE LIST

The Rolls Building
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Fetter Lane
London
EC4A 1NL

BEFORE:

CHIEF MASTER MARSH

BETWEEN:

(1) **NICHOLAS GAVRIEL**
(2) **TRYFON GAVRIEL** — **CLAIMANTS**

- and -

HOPE DAVIS — **DEFENDANT**

Legal Representation
Gavin McLeod on behalf of the Claimants
Jonathan Edwards on behalf of the Defendant

Judgment

Judgment date: 30 August 2019

Chief Master Marsh:

1. This is my judgment following the disposal hearing of this Part 8 claim which concerns the estate of Charalambos Tryfon Gavriel who died on 25 May 2016. He left a will dated 8 July 2012. The will is simple. He left his entire estate to his two sons, Nicholas and Tryfon who are the Claimants in these proceedings. The will appointed Miss Hope Davis as his executrix. She is the Defendant to this claim. Miss Davis obtained a grant of probate on 19 December 2016. The grant shows the net value of the estate was about £1.9 million, but, in fact, it appears that the net value was considerably less than that, probably of the order of £1.3 million, and the principal asset comprised in the estate was the deceased's home.

2. The Part 8 claim is brought by the Claimants as beneficiaries under the provisions of CPR Part 64. They seek directions from the Court. They say that there is currently an impasse in the finalisation of the winding up of the estate because the Defendant is making a claim for fees for the work she says she has undertaken in dealing with the estate. The Court is asked to deal with two principal questions. First whether under its equitable discretion the Court should permit the Defendant to be remunerated and, secondly, if so, in what quantum. There is a subsidiary issue, which has not occupied more than a very small part of the hearing, concerning whether the estate has borne penalty fees imposed by HMRC which it would not have borne had the administration of the estate been carried out with reasonable diligence. The Claimants seek a direction as to whether such charges should be borne by the Defendant personally.

3. As the claim has developed, the real issue between the parties concerns whether or not there was an agreement or understanding reached between them, such that the general proposition that in the absence of a charging clause the Defendant should not be entitled to charge remuneration for her work, is abrogated. The general principle that applies, which is part of the self-dealing rule, is not in doubt. This is perhaps, more than anything else, a claim that involves a cautionary tale where an executor takes a grant in respect of a will, which does not have a charging clause, without having obtained a clear agreement in writing from all the beneficiaries that reasonable or fixed charges can be made.

4. The evidence before the Court comprises a witness statement from the First Claimant and a witness statement from the Defendant. Before dealing with that evidence I need to say something about the procedural position today. The Court, having considered the claim, as is the usual practice in every part claim, determined that a disposal hearing should be fixed and notice of today's hearing was given to the parties. In determining that a disposal hearing should take place, the Court had in mind that the substance of the dispute concerns a relatively small sum, that is the sum of £27,300, which is the amount the Defendant seeks to charge. It is clear that the considerations set out in the overriding objective will, in many circumstances, militate in the direction of an early disposal, certainly in the High Court, of a claim involving such a sum. Of course, such a disposal hearing should only proceed if the Court can properly deal with the matter on the available evidence.

5. Prior to today's hearing, the parties appear to have formed the view that today's hearing should only deal with directions and those directions were proposed to involve a trial taking place with a time estimate of one and a half days, with the parties having an additional opportunity to exchange further witness evidence. Although that will be a course of action the Court may adopt in some Part 8 claims, it is important to bear in
mind, in my judgment, the provisions of CPR 8.5 and 8.6. In substance, those rules require the parties to provide the Court with all the evidence upon which they intend to rely, in the case of the Claimants with the claim and in the case of the Defendant with the evidence served under CPR 8.5. CPR 8.6 provides expressly that no written evidence may be relied upon at the hearing unless it has been served in accordance with rule 8.5, or the Court's permission has been obtained. It is not, as a general rule, open to, in particular, a defendant to come to a hearing and to say, in effect: "I have provided you with a witness statement but it does not give all the evidence I wish to rely on. I want to have another opportunity to put in additional evidence." That is not the way claims under Part 8 are intended normally to proceed. All the more so where the court has fixed a disposal hearing and given notice to the parties to that effect.

6. I heard submissions from counsel concerning whether today's hearing should proceed as a disposal hearing. I gave an indication at the outset that I was minded to do so, unless I was satisfied that there were conflicts on the evidence that would make it impossible or improper for the hearing to proceed. What emerged from the submissions is that, and this is common ground between counsel, if the Court is able to undertake an evaluation of the evidence on a similar basis to that under CPR Part 24, and to conclude that the evidence does not meet the Part 24 threshold, in other words the evidence is fanciful, then the Court is entitled to proceed, notwithstanding that on the face of it there are issues of fact between the parties. I heard full and, as is to be expected, careful submissions from Mr Edwards, who appeared for the Defendant, seeking to persuade me that the case should go to a trial and the Court could not safely conclude his client's evidence was fanciful. I will deal with those submissions in a moment.

7. I would first observe, based on the evidence, that the estate the Defendant has dealt with is not an especially complex or valuable one. The estate undoubtedly required work to be undertaken in dealing with HMRC and establishing a value for the property, and there was some marshalling of investments to be undertaken. It does not appear to me, however, that the estate involved specialist skills such that only a professional person would have been able to deal with it.

8. The principles that are in play are not in doubt. They are helpfully summarised in *Williams, Mortimer and Sunnucks*, 21st edition, at paragraphs 51.02 and 51.04. In the absence of a charging clause an executor is not entitled to be remunerated other than to be reimbursed out of pocket expenses. There are exceptions to that rule, the relevant ones being where the Court authorises remuneration or where there is an agreement between the executor and the beneficiaries that charges may be made. There is a secondary position, which I can, by way of shorthand, refer to as the *Boardman v Phipps* [1966] UKHL 2 jurisdiction. This is summarised in paragraph 51.09 in *Williams, Mortimer and Sunnucks*. In essence, the Court, even in the absence of a charging clause or an agreement, may authorise remuneration. The

principles that are recorded in that paragraph include that the power is to be exercised sparingly and in exceptional circumstances and that the Court should, when deciding whether to exercise the power, have regard to all the circumstances of the case, including the honesty of the representative. There is, however, a wider consideration in play, namely that there may be circumstances in which it would be inequitable for beneficiaries to take the benefit of the executor's efforts without paying for the skill and labour which produced it. I will come to that provision in due course.

9. The Defendant took out a grant on 19 December 2016. It might have been expected that prior to that date, in light of there being no charging clause, the Defendant would have made her position clear. However, that is not the case. There is an email sent by the Defendant to the Claimants on 13 February 2017. That is, of course, shortly after the grant had been obtained. The email is quite brief, and it says this:

> **"So sorry to have to do this, but as it's taken a lot more work than I had envisaged I will need to make a charge for some of the work undertaken. I hope this is acceptable to you."**

10. That is the first written communication which refers to the question of charging. It is, in my judgment, notable that it follows the Defendant having undertaken, as she says herself, a good deal of work in order to obtain the grant, and it is also notable that she says she would like to charge for <u>some</u> of the work undertaken.

11. The Defendant now seeks to make a charge of some £27,300, which, on any view, seems to be a substantial sum, given the size and lack of complexity of the estate. It is necessary to consider on what basis the Defendant says that she is entitled to charge that sum. The Claimants' case is simply that, although they were willing, in principle, to pay some remuneration as a matter of good faith, there was never any agreement to pay a particular sum, or an hourly rate or any clear understanding about the basis upon which charging might be made.

12. The Defendant's witness statement is relatively lengthy. I am bound to say the tone of it appears to me to be excessively combative. There is expressed in it almost a sense of outrage and an assertion of entitlement, but, at the same time, there is a marked lack of particularity concerning the vital elements the Defendant wishes to establish. The heart of her evidence is that in August 2016, that is some months before the grant was obtained, she had conversations with the Claimants which amounted to an agreement permitting her to charge for her work at a rate of £250, which she describes as her standard chargeable rate.

13. I pause to make two points. First there is something of a mystery about the Defendant. Contrary to the requirement of paragraph 18.1(3) of Practice Direction 32, she does not provide her occupation in her witness statement. The First Claimant describes her as an accountant, but that seems to be a description used in the most general sense. She certainly does not claim in her witness statement to have any professional qualification and none of the communications that are exhibited have any suggestion of her working from a professional address or being attached to a firm or being regulated or, indeed, having any qualification. The second point I pause to make is to say that I have very much in mind the requirements of paragraph 7.4 of Practice Direction 16. This is, of course, not a case where the Defendant has been

required to produce a formal defence or particulars of claim. Nevertheless, where, as here, a party seeks to rely on an oral contract, it is vital that proper particulars of the oral agreement are given, and that, in accordance with paragraph 7.4, requires the party to state by whom, to whom, when and where the relevant words were spoken. Furthermore, it is necessary to provide, where possible, the contractual words that are relied upon. It seems to me that the Defendant's evidence should be measured against this provision.

14. Paragraphs 27 to 29 and paragraph 32 provide the Defendant's evidence on the question of there being an agreement.

> **"27. The very first discussion around the basis of payment was raised in a round table discussion by the Claimants themselves as early as August 2016, after the surveyor debacle, when they requested that I do the professional work. At this meeting we had very clear and direct conversations about my hourly rate for that work to be undertaken. I proposed £250, my standard chargeable rate. They asked if I would lower it on account of my relationship with the family. This rate was lowered to £230, as referenced in my email of 24 November 2017. The outstanding point then was the administration time not provided for in the will. This is what my email of 13 January 2017 confirms, that I requested acceptance for charging as these hours were now extensive. They accepted this, as seen in their email to me of 3 October 2017, agreeing to payment being made. Their earlier email, of 26 July 2017, saying we needed to discuss fees, asked for a final amount. As the estate was still under HMRC investigation it was impossible for me to provide this, but reiterated the hourly rate of £250 and £50. There was a clear verbal agreement. This was recorded in my email of 24 November 2017, where I discounted the rate to £230, in line with their legal advice, and confirmed the £50.**
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> **28. In our discussions of August 2016, the Claimants asked that in order to speed up the process I take a week's vacation from my other professional commitments and dedicate my time to the estate to carry out the professional work involved, for which they agreed they would be charged. We came to this arrangement with an understanding that I would be paid in a manner commensurate with the professional hours committed to the estate. This is the first full week recorded at 40 hours.**
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> **29. I made the Claimants aware of both my hourly rate and the time being spent. At no point did the Claimants express disagreement with these terms, and requested that I commit two professional weeks to the work. The ex-post claim that the charges are excessive appear to me to be in bad faith and disingenuous. The Claimants are aware that there are ample unbilled hours on account of my respectful and previous relationship with the family. The Claimants are also aware that the value of these professional services is far greater than the costs that they incurred and savings made by me on**

their behalf. By way of example, I saved the estate £60,000 based on my negotiations with HMRC. HMRC had sought to increase the valuation of the home from £1,350 to £1,500. After my negotiations, the lower value was accepted.

…

32. We did not sign a contract but had a verbal agreement, as that was the basis of our initial relationship. To be clear, without such an agreement I would not have undertaken the professional tasks. There was no benefit in me doing so. That said, the First Claimant himself has expressed in writing his agreement to my charges on the basis that I was a friend and they wanted to ease the process for me."

15. The issue I have to decide is whether that evidence passes the Part 24 threshold. I have already made the obvious point that if, indeed, the Defendant is a professional person it would have been only too easy for her to have provided written confirmation of the basis upon which she intended to proceed. It is right, of course, that, as a matter of law, there is no obligation to provide written terms of business, but it seems to me that, as a professional matter, it is now entirely axiomatic that a person undertaking a professional service must provide terms of business, charging rates and a total that is intended to be charged or an estimate of intended fees at the outset. That is, of course, not itself a reason for disbelieving the Defendant's evidence, but it does provide, to my mind, a relevant backdrop.

16. Next, one has to have clearly in mind the written communication that is most proximate to the discussions that are said to have taken place in August 2016. As it appears to me, the email sent by the Defendant on 13 January 2017 is entirely inconsistent with the premise on which her evidence is based. In January 2017, after the grant had been obtained, she was merely saying that because more work than had been envisaged had been involved she would need to charge for <u>some</u> of the work undertaken and merely said she hoped that will be acceptable to the Claimants. It is impossible, in my judgment, to square that email from the Defendant to the Claimants with her assertion that there was an agreement made in August 2016.

17. It also seems to me that paragraph 27 of the Defendant's witness statement is verging on the incoherent. There is no logical chronological sequencing of the events she describes. It starts in August 2016, but then jumps to an email sent on 24 November 2017. That is, in fact, the last communication that pass between the parties. In that email, all the Defendant said was that she was proposing to charge at the rate of £230 and £50 for general administration. There is no indication in that email all those months later that there had been an agreement or, indeed, no indication that there was an entitlement or, indeed, an expectation to charge. The sum of £230 plainly, in my judgment, derives from a letter that the Claimants voluntarily disclosed to the Defendant, the letter being from their solicitors, a letter which would otherwise be privileged. The letter of 4 April 2017 provided advice about charging, and it seems to me that the reference to the amount the Defendant proposed to charge plainly stems from that letter.

18. The other communications between the parties in the emails are few and far between, but it is notable that there is no clear indication in any email from the Defendant about charging. After the January 2017 email the story picks up in July 2017 with the Claimants seeking to press the Defendant with her thoughts about a figure for charging. For example, on 6 September 2017 the Claimants say:

> **"Have you arrived at a proposed fee figure and is there any progress on the probate?"**

19. Their email of 3 October 2017, which is an important communication, expresses some degree of exasperation with the Defendant. They were concerned by then that a year and four months had passed since the deceased's death. The Defendant seeks to justify her position by reference to a paragraph in that email, which I should set out in full. The Claimants say:

> **"You have still not even proposed any figure for the fee you would like, notwithstanding the fact that legally an executor is not entitled to charge a fee for their services unless provision for that is made in the will itself, and we only agreed to this on the basis that you were a friend**
>
> **and we wanted to ease the process for you."**

20. It seems to me that that paragraph falls far short of amounting to clear evidence of a contractual agreement to pay fees to the Defendant.

21. Looking at the communications as a whole, it is quite impossible, in my judgment, to conclude that there was a meeting in August 2016 at which the matters referred to in paragraph 27 of the Defendant's statement were, in fact, discussed. It appears to me, in light of the documents and in light of the evidence as a whole, that the Court can safely conclude that the Defendant's evidence as to an agreement to charge is fanciful, and were this to be the hearing of an application for summary judgment the Court would be entitled to exercise its discretion to enter judgment in favour of the Claimants.

22. I conclude, therefore, that there was, as between the Claimants and the Defendant, no agreement about charging, not even, as Mr Edwards sought to persuade me, an agreement to permit charging on a reasonable basis, and there was no concluded understanding as to a basis of charging. There was merely a proposal by the Claimants that they would, subject to an amount being agreed, be willing to pay something. That, however, falls far short of being sufficient to enable the self-dealing rule to be put on one side.

23. Aside from the question of there being a contract, the onus, of course, being on the Defendant to establish such an agreement, Mr Edwards puts his client's case on two alternative grounds. First, he seeks to establish that there was an estoppel by convention; that there was throughout the period an understanding that fees would be paid. It seems to me, however, that, in light of the conclusions I have reached on the evidence and, in particular, that the Defendant's evidence is fanciful, there is insufficient evidence upon which an estoppel could be based, an estoppel requiring

evidence in clear terms. The alternative basis upon which Mr Edwards puts his case is that if remuneration is denied to the Defendant, the Claimants would be unjustly enriched to the value of the work she undertook. It seems to me that that does not, in fact, amount to an alternative basis upon which the Defendant should be or could be remunerated. The question of whether unjust enrichment might arise really turns on whether the self-dealing rule has been put to one side. If it has not, then there can be no question of the enrichment being unjust.

24. As a separate matter, and I think this is the way in which the Defendant puts it, the Court can have regard to the *Boardman v Phipps* approach. I have already summarised in brief terms the relevant principles. Whether the Defendant is, in fact, a professional in a real sense is not a matter she has condescended to provide evidence about. It can hardly be an omission, given that a description of her professional expertise would be central to her case. Nevertheless, she has undertaken services that another professional might have been paid to do, and she does provide evidence, which is not disputed, that a saving of some £60,000 to the estate was made as a result of her negotiations with HMRC.

25. Amongst other considerations the Court is required to have regard to the honesty of the Defendant. This is a matter which causes me some concern. I am in no doubt that her witness statement has not been prepared with anywhere near the care that is to be expected from a professional person (if indeed she is one or at least a person undertaking professional services) and a person who is acting as a fiduciary. I would expect the evidence to be provided in careful and measured terms. The Defendant's witness statement falls a long way short of those requirements. I have also concluded, without making any finding of honesty or the lack of it, that the Defendant's evidence is fanciful.

26. It seems to me that although the jurisdiction under the *Boardman v Phipps* principle is one that is to be exercised sparingly, the Court can have regard to the services provided and have regard to the possible unjustness of the Defendant having undertaken work for which the Claimants take the benefit. However, the relief which the Defendant invites the Court to provide is discretionary. Had the Defendant approached the Court with the considerations I have had in mind, clearly forming the basis of her evidence, the Court might have been willing to exercise its discretion in her favour, but it seems to me that, in light of the entirely unsatisfactory nature of her evidence, it would be wrong to exercise the Court's discretion in her favour, and I declined to do so.

27. The final issue I need to deal with concerns the very much subsidiary issue about whether the estate has incurred a penalty and whether it should be charged to the Defendant. The evidence that has been provided gives no indication that, in fact, a penalty has been charged by HMRC. There has been a charge for some interest, but that is by no means unusual, and there may well be good reasons for it. In the circumstances, I am not proposing to make any adjustment based on either there being a penalty or interest charged.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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