



Case No: SC-2020-BTP-000918

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 29/11/2021

Before:

COSTS JUDGE ROWLEY

Between:

Peter Ian Brealey
- and -
Shepherd & Co

Claimant

Defendant

John Meehan (instructed by **Jones & Co**) for the **Claimant**
Malcolm Goodwin (instructed by **Shepherd & Co**) for the **Defendant**

Hearing date: **4 October 2021**

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Costs Judge Rowley:**

1. These proceedings concern a beneficiary's challenge to the legal costs incurred in the administration of the estate of his late mother. A detailed assessment hearing was listed on 3 February 2021 and further hearings have taken place on 10 May 2021 and 4 October 2021. This is my second reserved judgment in this case. The first concerned the applicability, or otherwise, of the Court of Appeal decision in Tim Martin Interiors Ltd v Akin Gump LLP [2011] EWCA Civ 1574.
2. Having handed down that decision following the hearing in May, the detailed assessment took place on 4 October. By the end of the day allowed for that assessment, we had reached the last substantive general point of dispute. There remain a number of individual items which are challenged depending upon the parties' reactions to this judgment.
3. Following my first reserved judgement, the parties served amended points of dispute and replies. General point 5 of the amended points of dispute concerns the involvement of Mr Shepherd. He was the senior partner of Shepherd and Co at the time and was named as one of the executors and trustees of the will (together with the deceased's brother Peter Hayward).
4. The point of dispute concerns the fees raised by Mr Shepherd as a professional executor. It is common ground that the will does not contain a charging clause. It is in dispute as to whether or not the beneficiaries have consented to the executor raising such a charge.
5. On the basis that there is neither a charging clause nor an agreement with the beneficiaries, the claimant says that Mr Shepherd is not entitled to charge for acting in his capacity as executor. To the extent that he dealt with the day-to-day administration of the estate as a solicitor, he would be entitled to charge for this, but the points of dispute make reference to the original reply to the points of dispute which highlighted the difference between Mr Shepherd as one of the executors of the estate and his then partner Ms Sibley, who was dealing with the day-to-day administration. The reply stated that the two roles were very different and there had been no duplication therefore when both Mr Shepherd and Ms Sibley were in attendance at the same time. Other examples of this differentiation are also cited in the points of dispute.
6. The claimant says that, on the basis Mr Shepherd was acting as an executor, the costs that are claimed for his work must be struck from the bill. If, however, the sums claimed in the bill relate to Mr Shepherd's work as a solicitor, then the original response in the points of reply need to be explained.
7. The defendant's reply to this point of dispute begins by indicating that this point had not been raised previously in the original points of dispute. It also refers to the fact that the executors are not party to the proceedings. The reply argues that Mr Shepherd's appointment was a personal appointment irrespective of him being a solicitor and that both executors were entitled to be reimbursed for their expenses incurred in the fair execution of the trust. Additionally, the executors were entitled to retain the defendant firm to do work on behalf of the joint executors.
8. The reply goes on to say that, both Mr Hayward and the beneficiaries were aware that Mr Shepherd was charging for his fees and acting in the administration of the estate and

Approved Judgment

those fees were approved by both executors. That state of affairs existed for more than seven years to the knowledge of the claimant.

9. Finally, the reply refers to the House of Lords decision in Boardman v Phipps [1967] 2 AC 46 which is cited as an authority for the proposition that where a party acts openly undertaking a fiduciary duty they are entitled to be paid a reasonable fee for their work and / or skill.

Preliminary matters

10. Mr Meehan of counsel, who appeared on behalf of the claimant, began his submissions by disputing the suggestion that this was the first time that the point regarding Mr Shepherd's involvement had been raised. Mr Goodwin, who appeared for the defendant, maintained the defendant's position but it is not something which seems to me to weigh at all heavily. The point was clearly before the court and the defendant was not disadvantaged in any way. I need say no more about it.
11. Mr Meehan also challenged the defendant's comments regarding the personal nature of the appointment of Mr Shepherd. By his skeleton, he suggested that the defendant was attempting to say that if Mr Shepherd was treated as being essentially a lay executor, then he could instruct himself as a solicitor to do work and charge for it in that fashion. Mr Meehan described that as being a legal fiction. When Mr Goodwin made his submissions, it did not seem to me that he really pursued this point and, in any event, if it is as described by Mr Meehan, it seems to me to be a bad one. There is nothing to say that Shepherd and Co could not charge for the legal work involved, subject of course to its reasonableness. The issue is entirely whether Mr Shepherd can claim for his work as an executor. In this context it is irrelevant whether he ought to be categorised as a professional executor or a lay executor so as to instruct the solicitors.

Submissions

12. Mr Meehan drew a distinction between the work of an executor and the work in administering the estate. He referred to a practice note from the Law Society from September 2020 called "Appointment of a professional executor" and which, under the heading "Providing information about executor fees", said the following:

"It should be clear whether the amount quoted is for the work involved in administering the estate or whether it is simply the fee for acting as executor and supervising others doing the necessary work."
13. The retainer documentation provided in accordance with my order dated 7 June 2021 made it clear, in Mr Meehan's submission, that the only work for which Mr Shepherd could charge would be for legal work in administering the estate and not in the role of executor. There was no mention whatsoever of Mr Shepherd's role as an executor in the retainer nor any fees that he might charge in that respect.
14. Since there was no charging clause in the will enabling Mr Shepherd to charge as a professional executor, then the fees could only be claimed if they had been agreed by all of the beneficiaries. Mr Meehan referred to the case of Gavriel & Anor v Davis

Approved Judgment

[2019] EWHC 2446 (Ch), a decision of Chief Master Marsh. At paragraph 3 of his judgment, he set out the issue as follows:

“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 the 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.

15. At paragraph 8 Chief Master Marsh continued:

“8. The principles that are in play are not in doubt... 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...”

16. In Mr Meehan’s submission the facts of Boardman were very unusual. The share dealing that had been carried out was unauthorised but very profitable. There was no conflict between the trustee and the beneficiaries in Boardman which was not the same situation here. The fees charged by the defendant would be paid from the estate funds for the beneficiaries and as such would be entirely detrimental to them.

17. But if the court were to entertain any application for fees to be paid under the Boardman jurisdiction, then a formal application supported by evidence would be required. Mr Meehan supported this proposition via a reference in a commentary, to the case of Re Barbour’s Settlement Trusts [1974] 1 W.L.R 1198. No such application has been made

Approved Judgment

here and so there was no material on which the discretion of the court might be exercised

18. Moreover, the discretion was to be used sparingly and in exceptional circumstances and no such circumstances were present here. The estate was worth approximately £900,000 and most of that was based on the sale of a single property. The administration could be provided by any reasonable fiduciary without incurring the fees claimed here and which equated to around 15% of the estate.
19. In response to these submissions, Mr Goodwin began by referring to a costs order made against the claimant elsewhere which included some of Mr Shepherd's fees and which had been paid by the claimant as part of a compromise. Mr Goodwin suggested that this implied consent by the claimant to the fees in principle of Mr Shepherd as an executor.
20. Mr Goodwin also submitted that the claimant was well aware of Mr Shepherd's role in administering the estate. If he was concerned about the costs being incurred, it was surprising that the claimant did not raise the point at any time during the seven years of the administration. It was not a straightforward administration in Mr Goodwin's submission, and there was constant dialogue with the beneficiaries.
21. On the question of consent, Mr Goodwin referred to sections 28 and 29 of the Trustee Act 2000. In particular, section 28(2) which says that a trustee may be treated as being entitled to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee. There are certain conditions that must be fulfilled. One is that the will, as in this circumstance, does not make an inconsistent provision i.e. specify that the trustee is not to receive any remuneration. Another condition is that the trustee must not be a sole trustee and finally, the majority of the other trustees need to agree that this provision should apply to the professional trustee.
22. Under section 29(2), a trustee who acts in a professional capacity is entitled to receive reasonable remuneration out of the trust funds:

“if each other trustee has agreed in writing that he may be remunerated for the services.”
23. Mr Goodwin relied on these provisions and to the signing off by Mr Hayward of the Shepherd and Co invoices to demonstrate an agreement in writing for Mr Shepherd to be remunerated for his services as an executor.
24. The Act requires there to be more than one executor. In the case of Gavriel, there had only been a single executor administering the estate and as such, Mr Goodwin submitted, that case had no bearing here. He also submitted that the retainer letter clearly showed that Mr Shepherd would be charging fees and there was no doubt that it was contractually appropriate for the executors to have instructed Shepherd and Co.
25. Mr Goodwin's final point came back to the overarching application of the case of Tim Martin to these proceedings. The claimant was complaining about the acts of the executors who are not a party to these proceedings. If there were any issues regarding their actions, then that should be a matter between the executors and the beneficiaries and not the solicitors instructed by the executors. It was a matter for another place.

Approved Judgment

26. In reply, Mr Meehan made further submissions regarding the Trustee Act. He had only dealt with it cursorily in his original submissions on the basis that the defendant's reply to the point of dispute had made reference to sections 31 and 35 of the Act and not to sections 28 and 29. (Section 35 simply confirmed that personal representatives administering an estate were in the same position as trustees acting for any other beneficiary. Section 31 concerned trustees' expenses rather than their own charges.)
27. Mr Meehan's general attack on the defendant's reliance on the Trustee Act was that it could not be sufficient for the defendant to cobble together alleged approval by the other executor via the signature on invoices and a retainer letter which did not refer to Mr Shepherd claiming fees for dealing with the estate as an executor. At most, the retainer letter was authority for him to act in administering the estate as a solicitor. Mr Meehan did not accept either that the invoices had really been approved. There was simply an indecipherable signature on the invoices. In Mr Meehan's submission, this did not show whether fees have been incurred as an executor or as a solicitor. There was no contemporaneous written authority to act as an executor. Indeed, some of the invoices did not even have any signature on them at all.
28. Mr Meehan also referred me to the will itself. The full wording of the first paragraph is as follows:
- “1. I APPOINT my brother **PETER ANTHONY HAYWARD** and **ROBIN PETER SHEPHERD** Solicitor and the partners at the time of my death in the firm of Shepherd and Co or the firm which at that [time] has acceded to and carries on its practice to be the Executors and Trustees to this Will and I express the wish that one and only one of those partners (or if the appointment of Robin Peter Shepherd fails for any reason to take effect then two and only two of them) shall prove the Will and act initially in its trusts”
29. Mr Meehan specifically challenged the entitlement under the Trustee Act on the basis that no approval had been obtained from Mr Smyth, the other partner at Shepherd and Co at the time of Mrs Brealey's death. Mr Meehan described the need for the non-professional trustees' approval as a whole to charges for remuneration as being an important safeguard as to the levels of fee charged.

Decision

30. I reserved this judgment, in part because we had, in any event, reached the end of the court day. But the main reason was because the majority of the fees claimed (I was told 70%) relate to fees charged by Mr Shepherd as executor. As such, it was a particularly important issue for the parties and is likely to be crucial in the future conduct of these proceedings.
31. It might be thought, given the significance of the fees charged by Mr Shepherd, that he might have given a witness statement to explain the arrangements in this case. But he has not and therefore there is no explanation of, for example, why there was no charging clause in the will of Mrs Brealey. It seems to me that I have to conclude that this was the intention of Mrs Brealey on the basis that she should be taken to have put her name

Approved Judgment

to a deed which accurately reflected her intentions. As a starting point therefore, it would seem that Mrs Brealey did not expect her executors to charge for their services.

32. It is always possible that the provisions of the Trustee Act were in the mind of Mr Shepherd (who, as I understand it, drafted the will) and that, under the Act, silence in the trust instrument was not necessarily prejudicial to a charge being made by Mr Shepherd as a professional executor. But if that were so, then the arrangements needed to be compliant with the provisions of that Act.
33. The wording of the appointment provision in the will is clear that it intends there to be at least three executors and trustees to the will. Indeed, if Shepherd and Co had expanded into a multi-partner practice by the time of Mrs Brealey's death, then there would have been rather more executors and trustees under the terms of the appointment clause. If Mr Shepherd had predeceased Mrs Brealey, then two of the partners in Shepherd and Co were to prove the will. As matters turned out, only Mr Shepherd needed to do so. But proving the will as a matter of probate does not, as I understand it, affect the number of executors. It certainly has no effect on the need for their agreement.
34. Section 28 requires a majority of the "other trustees" to agree that the professional trustee would be entitled to receive payment in respect of services. Based on the will, there must have been at least two "other trustees" and the agreement of Mr Hayward could not amount to a majority even if, as actually happened, there was only one other partner in Shepherd and Co at the relevant time.
35. Moreover, section 29 requires agreement in writing from every other trustee. I have considerable doubt that the approval of the invoices by Mr Hayward really amounts to an agreement in writing to pay Mr Shepherd's fees as an executor. But, in any event, there is simply nothing before the court to suggest that the other trustee has ever signed anything to reflect agreement as required by this provision of the Act.
36. As such, I find that the circumstances of this case do not satisfy the provisions of the Trustee Act and, as such, are not of any assistance to the defendant.
37. There is no charging provision in the will and there is no agreement by the beneficiaries to Mr Shepherd charging fees as an executor. The fees have not been approved by the other executors within the terms of the Trustee Act and therefore the only route left for Mr Shepherd would be an application of the Boardman jurisdiction. Having looked at the decision of Re Barbours Settlement Trusts, it seems to me that the requirement for a formal application supported by evidence was rather stronger in that case than it would be here. Nevertheless, reference to the Boardman jurisdiction is essentially an appeal to the court to exercise its inherent jurisdiction and that automatically requires there to be material put before the court on which to exercise that discretion.
38. The extent of the material before the court here appears to amount to little more than a suggestion of some form of estoppel acting upon the claimant having paid Mr Shepherd's fees in other proceedings and the fact that the claimant was aware of Mr Shepherd's involvement during the administration of the estate.
39. I do not see that the first aspect can possibly support a discretion which is to be used sparingly, particularly given the lack of any real information in respect of the point raised. Similarly, the fact that the claimant knew of Mr Shepherd's involvement cannot,

Approved Judgment

without more, justify a charge to the estate. If the testator has no charging clause in her will, then it is up to the professional executor to demonstrate why fees should be paid rather than for the beneficiaries to prove that they should not.

40. For these reasons, I find that the claimant's challenge at general point 5 is to be upheld in principle.
41. I have described the guidance of the Court of Appeal in Tim Martin as overarching these proceedings. That decision essentially limits the challenges that can be brought by third parties such as the claimant here to the solicitors costs being either (a) ones which relate to work done outside the terms of the retainer and as such should never have been paid by the executors under that retainer or (b) ones which would only be allowable as against the client on the basis of a "special arrangement."
42. It seems to me quite clear that the charges rendered by the solicitors for Mr Shepherd's time as an executor fall into at least one of category (a) or category (b). They are not within the retainer documentation and cannot be brought into the retainer by any of the other routes put forward by the defendant here. To the extent that they are payable by the executors, that will only be by way of a special arrangement and as such is no defence to a challenge by a third party such as the claimant.
43. Consequently, in my judgment, the fees of Mr Shepherd in his role as executor rather than solicitor, are to be disallowed on this assessment. Any fees which are claimed as work done by Mr Shepherd as a solicitor will, as referred to in the claimant's submissions recorded at paragraph 6 of this judgment, require an explanation at the detailed assessment hearing.