



Neutral Citation Number: [2022] EWCA Civ 880

Case No: CA-2021-003240

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY, TRUSTS AND PROBATE LIST (ChD)**  
**David Rees QC sitting as a Deputy High Court Judge**  
**[2021] EWHC 3079 (Ch)**

**In the Estate of Gladys Dulcie Townsend decd**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 June 2022

**Before :**

**LORD JUSTICE ARNOLD**  
**LORD JUSTICE LEWIS**  
and  
**LORD JUSTICE NUGEE**

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**Between :**

**JACQUELINE DA SILVA** **Claimant**

- and -

**(1) SANDRA HESELTON** **Appellant**  
**(2) PAUL ARMOUR and SARAH ISAAC AUSTRIE**  
**(as personal representatives of the Estate of Ronald**  
**Armour)**

**(3) JACQUELINE BOLAND**  
**(4) PETER BRUNTON** **Respondent**  
**(5) RITA BOLAND** **Defendants**

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**Aidan Briggs** (instructed by **Heseltons Solicitors**) for the **Appellant**  
**Michael Paget** (instructed by **Lee Bolton Monier-Williams LLP**) for the **Respondent**

Hearing date: 16 June 2022  
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**Approved Judgment**

*Remote hand-down:* This judgment was handed down remotely at 10.30am on 30 June 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## Lord Justice Nugee:

### *Introduction*

1. This second appeal concerns the effect of a charging clause in a will.
2. I will set out the clause in question straightaway. It is found in clause 11 of the will of Ms Gladys Townsend. The relevant part of this clause reads as follows:

“MY TRUSTEES shall have the following powers in addition to their powers under the general law or under any other provisions 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 done 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.”

(I have included in square brackets two typographical corrections which it is common ground should be made).

3. The question is whether this clause means that any of “my Trustees” (which includes her executors) who happens to be engaged in a profession or business can charge for all work done or time spent on the administration of the estate, irrespective of whether that had any connection with their profession or business (the wider view); or whether they can only charge for services rendered to the estate in the course of their profession or business (the narrower view). To take a simple example referred to in argument, suppose one of the executors were a dentist. It is difficult to envisage the circumstances in which they might provide any dentistry services to the estate. Can they nevertheless charge for their time spent on estate administration? On the wider view they can as they are engaged in a profession, but on the narrower view they cannot as the work done is not in the course of that profession.
4. The question arose because the current administrator of Ms Townsend’s estate, Mr Peter Brunton, (the 4<sup>th</sup> Defendant and Respondent) challenged the right of a former executor of the estate, Mrs Sandra Heselton (the 1<sup>st</sup> Defendant and Appellant), to charge the estate for her time. This issue originally came before Mr Stephen Lloyd sitting as a Deputy Master (“**the Deputy Master**”). He decided that the narrower view was correct, saying that the administration time spent had to be part and parcel of the relevant business. On the facts he held that Mrs Heselton had not satisfied him that her activities in administering the estate were done in the course of any business that she was conducting.
5. Mrs Heselton appealed. The appeal was heard by Mr David Rees QC, sitting as a

Deputy High Court Judge (“**the Deputy Judge**”). He dismissed the appeal. There was some debate before us as to whether his interpretation of the clause was quite the same as that of the Deputy Master, but he undoubtedly rejected the wider view, concluding that an executor could only charge for work done or time spent in the administration of the estate if that work fell within the scope of their profession or business in question. On the facts he held that the Deputy Master was amply justified in his conclusion.

6. Mrs Heselton now appeals again to this Court. Despite the well-argued submissions of Mr Aidan Briggs who appeared for her (but who did not appear in either of the Courts below), I agree with both the Deputy Master and the Deputy Judge that this charging clause only permits 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 if the time is spent or the work is done in the course of that profession or business. I would dismiss the appeal accordingly.

*Facts*

7. Ms Townsend’s will is dated 28 June 2001. It is obviously professionally drawn, but beyond that there is no evidence before us about the circumstances in which it was drafted or executed.
8. She appointed Mrs Heselton and Mr Ronald Armour to be her executors and trustees. Mrs Heselton’s address was given as an address in Harrow, Middlesex, but Mr Armour’s was given as Casa Ropa Chambers in Portsmouth in the Commonwealth of Dominica, and it appears that he was a Dominican lawyer. By her will Ms Townsend left a number of legacies in Pounds sterling and a number of legacies in East Caribbean Dollars, and dealt not only with her English estate but with property that she owned in Dominica. She left her residuary estate to Ms Jacqueline Da Silva (the Claimant).
9. Ms Townsend died on 1 July 2003. Probate was granted to Mrs Heselton and Mr Armour on 2 December 2004. A number of disputes arose, the details of which were not before us and do not matter, but among other things it appears that in 2015 Ms Da Silva as residuary beneficiary brought a claim seeking an order that Mrs Heselton and Mr Armour be removed as executors under s. 50 of the Administration of Justice Act 1985. On 2 June 2016 Deputy Master Bartlett made an order (consented to by Mrs Heselton) removing both of them and appointing Mr Brunton, an English and Welsh solicitor, as sole personal representative in their place.
10. In May 2019 Mrs Heselton’s solicitors provided Mr Brunton’s solicitors with a revised estate account. This contained a list of receipts and payments covering the period 1 July 2003 to 17 June 2016. One of the assets of the estate was the deceased’s residence in London, and this had been rented out. The gross rents received over the period were shown as £48,900, but this had been reduced by an administration charge made by Mrs Heselton of £300 per month, amounting in total to £43,350 (calculated as £300 a month for 144½ months).
11. On 3 June 2019 Mr Brunton brought an application challenging her entitlement to charge that sum. The evidence in support (given by Mr Henderson of Mr Brunton’s solicitors) said that she had never suggested that she was ever acting in a professional

capacity whilst executor.

12. Mrs Heselton gave evidence in answer by witness statement dated 5 June 2019. This said a number of things about her professional and business experience, but I do not refer to them here as it is more convenient to consider them in the context of the Deputy Master's judgment. She also filed a further witness statement on 16 August 2019. Again I will come back below to look at what she there said.

*The Deputy Master's judgment*

13. Mr Brunton's application was heard by the Deputy Master along with other matters and he gave an oral judgment on 28 August 2019. He rejected a submission on behalf of Mrs Heselton that the charging clause in the will had been tailor-made specifically for her, describing it as a perfectly standard charging clause of the type to be found in precedent books. That has not been disputed before us. On the question of construction he said this:

“8. I accept entirely that it is not restricted to a Trustee who is pursuing a profession such as a solicitor or accountant but extends to a person who is engaged in business. But it does seem to me that the business has to have some relevance to the matter of administering estates and, more to the point, that the administration time spent, for which it is sought to charge, should have been part and parcel of that business. It is trite law that a charging clause will be strictly construed.

...

10. So that is the ambit of the charging clause. The question is whether Mrs. Heselton has satisfied me that she was conducting a business and her activities in administering the estate for the period that she was an Executor were done in the course of that business.”
14. He then considered that question by reference to a careful analysis of the evidence given by Mrs Heselton in her two witness statements. So far as her first witness statement was concerned that evidence, and the Deputy Master's assessment of it, can be summarised as follows:

- (1) After employment with a firm of solicitors (AG Greenburgh & Co) from 1988 to 1991 Mrs Heselton had been “self-employed and engaged in business”, the proceeds of which enabled her to fund a law scholarship.

The Deputy Master's comment was that that, although of considerable interest, said nothing about the nature of the business.

- (2) Since 1992 what she described as “my debt recovery companies” had retained the firm of Greenburgh Heselton Solicitors (in which her husband was a partner with Mr Greenburgh), and later Heselton Solicitors (after the retirement of Mr Greenburgh).

The Deputy Master's comment was that she did not say what her interest in the debt recovery companies was, nor how that was relevant to administration.

- (3) She was also from 1992 the Practice Manager of both firms.

The Deputy Master's comment was that it became (presumably in the course of the hearing) extremely unclear whether she was employed, self-employed or simply helping out her husband.

- (4) In 2014 she had established the French Art Café and Gallery in Harrow, and her business provides studio and gallery space for artists.

The Deputy Master's comment was that the café and gallery were hardly apposite for current purposes.

- (5) The flat fee of £300 which she charged was "inclusive of all work transacted on behalf of the estate" and included legal costs incurred by her company to Heselton Solicitors.

The Deputy Master's comment was that there was virtually no detail there. There was no dispute she was entitled to recover legitimate expenses incurred by her; what he was concerned with was whether she was entitled to charge what solicitors called "profit costs" for the use of her time.

15. That was the extent of the relevant evidence in her first statement. The Deputy Master's conclusion was that there was nothing in that statement which would justify him in finding that she was entitled to charge.

16. He then considered her second statement. This included a statement that she had "been engaged in business and in the management of commercial and residential property since before Ms Townsend made her will." She advanced a contention that since Ms Townsend was appointing her as the only executor in England, and so the only one practically able to manage the property, she must have intended her to benefit from the charging clause. That was rejected by the Deputy Master on the basis that an administrator or executor is entitled to engage suitable professional people to deal with the administration of the estate, and in particular to manage property if there is property which requires managing.

17. He continued:

"13. ... Again, it will be noted that there is a remarkable lack of detail as to the business and management of commercial and residential property. Mr. Zaiwalla [counsel for Mrs Heselton] made a valiant effort to put in submissions on the nature and extent of that business, but Mrs. Heselton had ample opportunity to put in evidence and I was not prepared to entertain submissions that were not supported by one or other of those witness statements.

14. Therefore, in my judgment on this issue, Mrs. Heselton has not satisfied me that she was entitled to charge for her time in administering the estate and therefore she must account for the moneys which have been deducted apparently from the rents as shown in her accounts."

18. By his Order dated 4 September 2019 he therefore declared that Mrs Heselton whilst she was the (non-professional) executor of the estate between 1 July 2003 and 17 June

2016 was not entitled to charge the estate for her time expended pursuant to her duties as executor and in particular levy a standing monthly administration charge of £300. He also made various costs orders against her.

*Judgment of the Deputy Judge*

19. Mrs Heselton appealed with the permission of Birss J given after an oral hearing. The appeal was heard by the Deputy Judge and he handed down a reserved judgment at [2021] EWHC 3079 (Ch) on 17 November 2021.

20. The Deputy Judge dismissed the appeal. The first ground of appeal raised the question of construction of the charging clause and by far the majority of his judgment was taken up with the question of construction. The key reasoning for his decision can be found in the following passage:

“29. The clause applies to a person engaged in “any profession or business”. Those are, on their face wide words (as noted in the footnote from the *Encyclopaedia of Forms and Precedents* quoted above) and I accept that they are potentially capable of applying to a person who is engaged in any form of profession or business, even if the scope of that profession or business has no connection with the administration of estates. However, the ability of a person engaged in such a profession or business to charge under this clause is not unconstrained. They may only charge “all usual professional and other fees” and those “usual ... fees” must be for “work or business ... done or time spent by him ... in connection with the administration of my estate”.

30. It is the inclusion of those words “usual professional and other fees” which I consider to be key to the meaning of this clause. I consider that these words govern, not just the amount of the fee that can be charged, but the nature of the work for which a fee may be charged. The words “usual professional and other fees” require 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.

31. The natural meaning of the words used in the Will thus require one to look at the work or business done, and consider whether in the profession or business of the trustee in question a “usual professional or other fee” would be chargeable for such work. Thus:

- (1) A trustee, such as a solicitor, whose profession or business involves the general management or administration of trusts and estates, would be entitled to charge for all the work that they carry out in relation to the trust or estate;
- (2) A trustee whose profession or business does not involve the management or administration of a trust or an estate may charge for work carried out in relation to a trust or estate, but only if a charge for the particular work or business done would arise in the usual scope of their profession or business.

32. Thus, provided that 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, when carrying out the work in question, they are acting personally or otherwise not within the “ordinary course” of their business. However, there is always a prior hurdle to be overcome; the trustee must first demonstrate that the work in question is such that it would attract a “usual professional or other fee” from someone who is engaged in their profession or business.”
21. He expressed his conclusion again at the end of his judgment as follows:
- “44. Having regard to the natural meaning of the words used in the Will; to the need, where doubt exists, to construe the clause restrictively; and indeed to common sense, I conclude that a trustee or executor can rely upon the charging clause in the Will to charge for work done or time spent in the administration of the estate only if that work falls within the scope of their profession or business in question; that is to say if it is work of a type which would attract or incur their usual professional fees.”
22. He then dealt very briefly with the second ground of appeal which was that the Deputy Master was wrong to reject Mrs Heselton’s evidence. He dealt with this point as follows:
- “45. The Deputy Master concluded that on the evidence he was not satisfied that Mrs Heselton’s activities in administering the Deceased’s estate were done in the course of the businesses that she had identified. Given the extremely limited information that Mrs Heselton chose to provide to the court (a) about her businesses, and (b) the work that she carried out on behalf of the estate, his conclusion seems to me to be amply justified and there is no basis for me to interfere with it.”
23. By his Order dated 26 November 2021 he therefore dismissed the appeal with costs. He did however give Mrs Heselton an opportunity to put forward a claim to retain any of the sums previously claimed by her as administration charges on the basis that they represented out of pocket expenses or disbursements properly recoverable by her as executor.

*Grounds of appeal*

24. Mrs Heselton brings this further appeal with permission granted by Arnold LJ on 17 March 2022.
25. Three grounds of appeal are relied on, but the third simply seeks to challenge the costs orders in both lower Courts in the event that the appeal is otherwise successful. If an appellate Court allows an appeal it will normally revisit any costs orders below in any event, and Mr Briggs sensibly did not take up any time with advancing any separate argument under this ground. It is not necessary to say any more about it.
26. The other two grounds are as follows:



- (1) Ground 1 is that the Deputy Judge erred on the question of construction.
- (2) Ground 2 is that in the alternative the Deputy Judge wrongly concluded that the question whether the work done by Mrs Heselton had fallen within the scope of her profession or business had already been determined by the Deputy Master, when it had not been, and that the matter should have been remitted back to apply the test as formulated.

27. The majority of the argument was taken up with Ground 1 which raises a question of general principle and is what justified a second appeal.

*Ground 1 – construction of the charging clause*

28. Mr Briggs submitted that on the true construction of the clause it was enough for an executor (i) to be engaged in a profession or business and (ii) to have done work or spent time in the administration of the estate. If those two conditions were satisfied, such an executor was entitled to charge for their time at their usual hourly rate.

29. It is helpful to set out the clause again, with added numbering:

“[1] for any of my Trustees [2] who shall be engaged in any profession or business [3] to charge and be paid (in priority to all other dispositions herein) all usual professional and other fees [4] and to retain any brokerage or commission [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 this Will or any Codicil hereto [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.”

I will make some comments on the numbered parts in turn.

30. As to [1] all that needs to be said is that it is common ground that “my Trustees” is a defined term which refers to Ms Townsend’s executors and trustees, and therefore includes Mrs Heselton, and that it is not disputed that it is in principle capable of applying to work done by the executors in that capacity.

31. As to [2] Mr Briggs drew attention to the fact that the clause includes *any* profession or business. It was not therefore limited to a profession or business which was directly relevant to estate administration. I agree that the profession or business does not need to be one which includes the administration of estates as part of that business. Indeed this was common ground between Mr Briggs and Mr Michael Paget, who appeared for Mr Brunton. This however does not tell you whether the wider view or narrower view of the clause is correct.

32. To take an example used in argument, suppose one of the executors of an estate was in business as a self-employed builder, and the estate included a property which needed work to make it more readily saleable. Mr Paget accepted that the builder executor could do the work and charge his usual rates for it (which would include payment for his own time and labour, and hence “profit costs”, not just reimbursement for the cost of materials), and that it does not matter that the business

of being a builder has nothing to do with the administration of estates. I agree. It was suggested that the Deputy Master took a narrower view when he said (in his judgment at [8]) that the business “has to have some relevance to the matter of administering estates”. I am not convinced that he really meant to exclude a case like that of the builder executor – I suspect all he meant was that the business had to be a business of some relevance to the things that needed to be done in the course of administration – but since Mr Paget accepted that the clause could apply to the builder, I do not think it now matters.

33. Many similar examples could be suggested, such as an executor who is a surveyor and values a property for the estate; or, to take examples drawn from the decided cases, an executor who is a literary agent and exploits a testator’s literary estate (*re Orwell’s Will Trusts* [1982] 1 WLR 1337); or an executor who is in business as an art expert and is engaged by the estate to advise on the sale of the testator’s art collection (*re Wertheimer* (1912) 106 LT 590). All of these would be able to charge under the charging clause even on the narrower view despite the fact that being a surveyor or literary agent or art expert does not usually have anything to do with the administration of estates. What however this does not tell you is whether an executor who happens to be a surveyor or literary agent or art expert, or indeed a builder, could charge for work done or time spent on administration that had nothing to do with their respective professions or businesses.
34. There was some debate before us whether an employee could qualify as being a person engaged in business. Mr Paget submitted that an employee would not qualify, not least because an employee does not have a usual fee for work done or time spent, and as I understood it Mr Briggs was inclined to accept that. We do not need to decide the point. I think Mr Paget was probably right in his submission, but I would wish 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.
35. Reverting to the clause at [3], Mr Briggs accepted that “usual” governs both “professional” and “other” fees. I agree, and think that all that is meant is that an executor, whether engaged in a profession or business, can charge their usual fees. If they are a professional, those will be their usual professional fees; if they are in business but not in a profession, their usual fees will necessarily not be professional fees and will be other fees. But they still have to be their usual fees.
36. As can be seen from his judgment at [30]-[31] the Deputy Judge considered that this phrase was the key to the meaning of the clause (see paragraph 20 above). Mr Briggs submitted that in effect he was saying that the work done had to be work which attracted a usual fee in the profession or business in question, but the clause did not say this and this was wrong. But I agree with the Deputy Judge. Take the case of a professional. The clause allows an executor who is a professional to charge his usual professional fees for work done. To my mind the Deputy Judge was right to say that the natural meaning of those words is that a professional can charge his usual professional fees for work that he performs in the course of that profession. An executor who is a surveyor can therefore charge his usual professional fee for carrying out a valuation for the estate as that is work for which there will be a usual surveyor’s fee. But if he does other work which has nothing to do with being a surveyor – for example attending meetings at which the sale of the testator’s art collection is

discussed – he will not have a usual professional fee for this work as it is not surveyor’s work.

37. Mr Briggs pointed out that the executor is entitled to charge not only for “work done” but also for “time spent” and submitted that this means that a professional or person engaged in business can charge their usual hourly rate for time spent. But this does not seem to me the natural meaning of the words, and in fact seems a most improbable interpretation to put on the clause. First, many of those engaged in business do not have an hourly rate at all. Suppose that an executor runs a market stall selling fruit and vegetables. He is clearly engaged in a business but equally clearly does not have an hourly rate. What can he charge for time spent? Nothing at all? Or suppose an executor makes a very lucrative living buying and selling quoted securities. What is his hourly rate? Again he does not have one. That illustrates that such traders do not have “usual fees” for time spent. The same is true of many professionals who are remunerated on commission and the like. An art expert may charge commission at a percentage of sale prices (as the executor did in *re Wertheimer*), as may an estate agent, or an auctioneer; an architect may charge by reference to scale fees; and, more pertinently to the present case, someone offering property management services may charge a percentage of rents. In all such cases the professional does not have usual fees for time spent because in their profession they do not charge by the hour, and although they may have usual fees for work done in the course of their profession, that cannot be applied to work of a different type. On this interpretation the clause would appear to be unworkable for anyone without a usual hourly rate.
38. But even in the case of those who do have an hourly rate, they have an hourly rate for work done in the course of their profession or business. That is what they are being paid for. A plumber who charges by the hour for plumbing work has a usual hourly rate for plumbing work. He does not have a usual hourly rate for estate administration because it forms no part of his business. A dentist may charge his private patients by reference to an hourly rate, but that is an hourly rate for dentistry. He does not have a usual hourly rate for estate administration because it forms no part of his dentist’s practice.
39. This incidentally means that I do not accept one submission that Mr Paget made. He suggested that if the builder executor carried out building work for the estate, he could then charge not only for that but for all other work done or time spent on estate affairs. That would be a very odd result, distinguishing between the “lucky builder” who happened to carry out some minor repair work and the “unlucky builder” who did not. For the reasons I have given, I do not think this is right. A builder may have a usual hourly rate for building work, and can charge his going rate for such work; he does not have a usual hourly rate for estate administration work, and in my judgment cannot charge for it, whether he has carried out building work or not.
40. In summary I agree with the Deputy Judge that this part of the clause does indeed indicate what the clause is aimed at. It 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 is self-evident. If a professional or person engaged in business provides 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. On the other hand, it makes no obvious sense for the estate to pay an executor for work that they carry out in which they have no relevant professional skill or business experience. Of course a testator can provide whatever they like by way of remuneration to their executors, but it would seem an eccentric thing for a testator to do to provide that their executors should be remunerated if they happened to be engaged in a profession such as dentistry or a business such as market trading that was of no conceivable relevance to the administration of the estate but not, for example, if they were a senior employee (or even a judge), however relevant their experience. Mr Briggs suggested that it might have been intended to compensate someone engaged in a profession or business as their time and work can be attributed a value; but for reasons already given not all those so engaged can have a value attributed to their time or their work, and in any event it seems odd not to attribute a value to others whose time may be equally valuable and who may have equally (if not more) relevant experience.

41. The view I have come to is determinative of this ground of appeal and I can deal with the remaining parts of the clause quite briefly. No issue arises over [4] which does not apply to Mrs Heselton; nor over [5] save for the point made by Mr Briggs, which I have already referred to, that the clause covers time spent as well as work done. It may be noted however (although this is more relevant to Ground 2) that there was no evidence at all before the Deputy Master of what time had been spent or work done by Mrs Heselton in the administration of the estate. Nor is there any difficulty over [6] which permits charges to be made for work done or time spent “in connection with” the administration of the estate. That I think is wider than if the clause had merely referred to time spent “in the administration of the estate” and serves to confirm that the builder can charge for building work if the work is connected with the administration of the estate (that is, preparing the estate assets for sale), whereas it might be more doubtful if such work could be said to be in the administration of the estate.
42. I should add something on [7] and [8] though. Mr Briggs treated these as if they were a single phrase (what he called the *Chapple* extension for reasons explained below). But I think they are two separate phrases and they do different things. That in [7] is 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. Suppose for example an executor is a surveyor whose practice consists of valuing commercial property. If he values the testator’s residence for sale, this part of the clause confirms that he can charge even though valuing residential property is not what he ordinarily does. Mr Briggs submitted that a professional cannot have a usual professional fee for work outside the ordinary course of his profession, but this example shows that he can. If the surveyor charges for valuations by the hour, he can charge his usual professional hourly rate; if he charges a percentage of the value, he can do that too.
43. The part of the clause in [8] is designed to do something different, which is to avoid the argument that a professional cannot charge unless it was strictly necessary for him to be employed. It appears from the authorities that such a provision was first drafted as a reaction to the decision in *Harbin v Darby* (1860) 28 Beav 325. That was not in fact cited to us, but concerned a will with a very simple charging clause which

provided that Mr Harbin (a solicitor who was one of the executors) should be “at liberty to charge for his professional services, as if he had not been appointed an executor and trustee of this my will”. The Taxing Master disallowed items on Mr Harbin’s bill such as attendances on paying premiums on policies, attendances on auctioneers on the sale of estate assets, attendances on creditors to pay their debts, and attendances on legatees to make payments on account of their legacies. That was on the basis that Mr Harbin was not entitled to charge for work done or services rendered which might have been done by an executor himself in a lay capacity. Sir John Romilly MR dismissed an appeal saying (at 327):

“When, therefore, a solicitor is appointed executor, and is authorized to charge for his professional services, the Court necessarily makes a distinction between those things which properly belong to his office of executor, and those which relate to his character of solicitor.”

44. In *re Chapple* (1884) 27 Ch D 584 Kay J had to consider a rather more expansive charging clause but took a similar view of it. The clause permitted one of the executors who was a solicitor:

“to make the same professional charges, and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given and bestowed by him in or about the execution of the trusts and powers of my said will or the management and administration of my trust estate, real or personal, as if he, not being himself a trustee or executor hereof, were employed by the trustee or executor.”

Kay J rejected the submission that this entitled him to charge professional charges for what a lay executor could do himself, saying that an executor would not employ, and ought not to employ, a solicitor to do things which he could properly do himself, and that the clause only permitted charges for something for which he had been properly employed.

45. It appears from his judgment that by then Mr Wolstenholme had drafted a precedent which appeared in his book on the Conveyancing Acts. This included the words:

“including all business of whatever kind not strictly professional, but which might have been performed or would necessarily have been performed in person by a trustee not being a solicitor”.

(This was why Mr Briggs referred to “the *Chapple* extension”). As Kay J pointed out however no such words were in the will before him. Some years later as Kay LJ he was party to the decision of this Court in *re Fish* [1893] 2 Ch 413, which concerned a charging clause which contained these very words, and when counsel sought to rely on *Harbin v Darby* he commented (at 418):

“Mr. Wolstenholme’s form, from which the clause here is taken, was intended to avoid that decision.”

46. That sufficiently explains the origin and purpose of this extension to the clause. It allows an executor who is a solicitor to charge for his time when acting in the administration of the estate without having to draw the distinction drawn by Sir

Samuel Romilly MR between things which a lay executor could do himself and things which could only be done by a solicitor. As put by the Deputy Judge in his judgment at [31(1)] an executor, such as a solicitor, whose profession or business involves the general management or administration of trusts and estates, would be entitled to charge for all the work that they carry out in relation to the trust or estate (see paragraph 20 above). But as he says at [31(2)] it does not permit a person who is not providing services in the course of their profession or business to charge. I agree.

47. A similar extension has now in effect become the default position by statute, namely s. 28 of the Trustee Act 2000. This provides as follows:

**“28. Trustee’s entitlement to payment under trust instrument.**

- (1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if—
  - (a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and
  - (b) the trustee is a trust corporation or is acting in a professional capacity.
- (2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.
- (3) Subsection (2) applies to a trustee of a charitable trust who is not a trust corporation only—
  - (a) if he is not a sole trustee, and
  - (b) to the extent that a majority of the other trustees have agreed that it should apply to him.
- (4) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of—
  - (a) section 15 of the Wills Act 1837 (gifts to an attesting witness to be void), and
  - (b) section 34(3) of the Administration of Estates Act 1925 (order in which estate to be paid out).
- (5) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with—
  - (a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

(6) For the purposes of this Part, a person acts as a lay trustee if he—

(a) is not a trust corporation, and

(b) does not act in a professional capacity.”

By s. 35 this applies to executors (with appropriate modifications).

48. It can be seen that the effect of s. 28(2) is that where there is a professional charging clause in a will, it is (subject to any inconsistent provision in the will) extended in the same way as Mr Wolstenholme’s clause to include work that could be done by a lay executor. But under s. 28(1)(b) this only applies at all if the executor is “acting in a professional capacity”, as defined in s. 28(5) and this requires the executor to be acting “in the course of a profession or business”. That means that a dentist, for example, who would not be acting in the course of his profession when acting as executor, would not be acting in a professional capacity and would not benefit from the extension in s. 28(2). As I have explained above the same is in my view true of the clause in the present case.
49. There was some argument as to whether any assistance in construing the clause could be obtained from the fact that s. 28, which came into force on 1 February 2001, had been in force for some months before Ms Townsend executed her will, and whether the charging clause in her will was similar to s. 28 or deliberately drafted to be wider. I do not myself think that any inference can safely be drawn at all. We do not even know when the will was drafted, let alone whether clause 11, which confers a variety of miscellaneous powers on “my Trustees”, was consciously drafted in the knowledge of s. 28, or was copied from an existing will or precedent without any thought being given to the provision in s. 28. In those circumstances I think it would be mere speculation to infer anything.

#### *The authorities*

50. We were referred to a number of authorities, most of which I have already dealt with. Authorities on the construction of charging clauses in other wills need to be handled with care because of the principle that every question of construction turns on the wording of the clause in question, such that slight differences in wording can make a difference. For that reason, and because it is appropriate to look at the clause in this will with fresh eyes and without being overly influenced by what other judges have said about other clauses in other cases, some of them now quite old, I have primarily approached the construction of the clause by considering its meaning for myself rather than going first to the authorities.
51. Nevertheless, as the authorities demonstrate and as both counsel accepted, clauses similar to the one before us have been in use for a long time and it helps to promote legal certainty and predictability if similar clauses are given similar interpretations

where possible. It is therefore reassuring to find that the construction which I have placed on the clause is the same as that adopted in one of the cases in relation to a clause in very similar form.

52. The case is *Clarkson v Robinson* [1900] 2 Ch 722 (a case originally identified by the Deputy Judge himself). The testator appointed five executors and trustees, three of whom were professionals (an architect, a chartered accountant and a solicitor), the other two being described merely as gentlemen, but in fact being one of his managers, and his steward. After directing that the solicitor executor should be solicitor to the estate and to his trustees and executors, the will continued with a charging clause as follows:

“And also that he and any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to the management and administration of my estate and carrying out the trusts, powers, and provisions of this my will, whether in the ordinary course of his profession or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person.”

The similarity with the clause in Ms Townsend’s will (including provisions corresponding to those parts I labelled [7] and [8]) is evident.

53. Buckley J held that this clause did not entitle a trustee to charge for time and trouble spent outside their profession. He reached that view with regret and, as Mr Briggs pointed out, without the benefit of any argument to that effect as the adult beneficiaries were in favour of the trustees being paid, and counsel for the infant beneficiaries did not wish to argue against it. Nevertheless his decision (at 724f) was as follows:

“It appears to me that the words in that clause “and be paid all usual professional or other charges for any business done” mean “and be paid all charges usual in the profession or business for any business done.” Then, lower down, I think that the words “whether in the ordinary course of his profession or business or not” mean whether in the ordinary course of his profession or business or not in the ordinary course of his profession or business, or, to express it in another way, in the course of his profession or business, whether in the ordinary course thereof or not in the ordinary course thereof. I think that is made more plain by what follows: “and although not of a nature strictly requiring the employment of a solicitor or other professional person.” It appears to me that under this clause you must see whether the work done is done in the profession or in the business of the trustee or executor who is seeking to charge for it; and if it be work done in the course of that business, then, notwithstanding that he is a trustee or executor, he is entitled to the charge usual in his profession, if it be a profession, or usual in his business, if it be a business. You are not to see whether the work has been done in the ordinary course of his profession or business; you are to see whether in fact it has been done in the course of his profession or business. You are not to inquire whether the trustees employed him, or whether he was employed by the trustees in the ordinary course of



business and was entitled to charge; you are simply to see whether in fact, in the course of his business, he did work for which it is usual to make a charge. You are not to consider whether the business was such as strictly to require his employment; you are to see whether in fact he did the work. It seems to me that to satisfy this clause you must find out whether the work was done in the course of his profession or business, although not necessarily in the ordinary course, nor strictly required.”

At 726 he said:

“I have looked anxiously to see whether I could find in this clause any words which went to shew that a trustee was to be paid for his time and trouble outside his profession or business as distinguished from being paid for work done in the ordinary course or outside the ordinary course of his profession or business, and I have not found any, and counsel have not been able to assist me in finding any.”

Finally at 727 he said:

“The contention that has been put forward is this: that the trustees under this clause are entitled to be paid for work done and time and trouble given in and for the management of this estate, and carrying out the trusts, powers, and provisions of the will, whether done in the course of their profession or business or not. I regret to say I cannot find that in the clause. The clause is addressed to the case of trustees or executors who are solicitors or other persons engaged in any profession or business, and it seems to me that the construction at which I am invited to arrive would reduce it to this—that if a person who was not engaged in any profession or business was appointed a trustee and gave time and trouble to the estate he would not be paid; but if a person was engaged in a profession or business, then he would be paid for everything he did whether in his profession or business or not. I confess I do not think that that is a sensible construction to be given to the words.”

54. As can be seen, all of that is entirely in line with the view I have expressed above, and with the judgment of the Deputy Judge. Mr Briggs struggled to suggest how it could be distinguished but submitted that it was wrong. For the reasons I have given I do not think it was.
55. Mr Briggs relied on *re Fish* where a testator appointed his solicitor Mr Gosnell as one of his executors and trustees, and the will contained a charging clause as follows:

“And I declare that the said H. C. Gosnell, and every other person to be hereafter appointed a trustee of my will who may be a solicitor and professionally employed in matters relating to the trusts of my will, shall be entitled, and is hereby authorized to retain and receive out of the trust premises, his usual professional costs and charges, as well by way of remuneration for business transacted by him or his partner or partners personally, or by his or their clerks or agents (including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed in person by a trustee not being a solicitor), as costs and charges out of pocket in the same manner

as if the said H. C. Gosnell, and every other such person as aforesaid, had not been a trustee or trustees hereof, but had been employed and retained by the trustees hereof as a solicitor in the matter of the trusts.”

It was argued, relying on *Harbin v Darby* and *re Chapple*, that a power to charge for professional services did not permit a solicitor trustee to charge for what a trustee not a solicitor could do personally. Since the clause followed Mr Wolstenholme’s precedent which was designed to counter this very argument, it is not perhaps surprising that this contention failed both before Wright J and on appeal to this Court.

56. Wright J said that the clause allowed Mr Gosnell to make professional charges for all business though not professional (see at 416). On appeal Lindley LJ said (at 420) that Mr Gosnell was entitled to charge not only for his professional services but for his trouble as a trustee, although the ground on which he did so was that the argument to the contrary (which was that a legacy to Mr Gosnell was intended to compensate him for his trouble as trustee) was an impossible one as the clause applied to any trustee who was a solicitor. Bowen LJ (at 422f) said that he agreed with Lindley LJ who had put effectively all that he could desire to say on the point. Kay LJ (at 424f) said that it had been argued that Mr Gosnell was only entitled to charge for such work as was properly solicitor’s work, but he did not think that contention well founded:

“I think that the meaning and intention of the clause is to give the solicitor trustee power not only to charge for work which is the proper work of a solicitor done for a client, but also to charge for work which he would be bound to do as trustee or which he might do as trustee, as though it were professional work.”

57. I agree that that is the effect of the clause (see paragraph 46 above). But it has long been the case that solicitors routinely act as trustees and executors as part of their practice. So the conclusion that solicitors under a clause like this can charge for their time spent acting as trustee is not inconsistent with the construction I prefer that professionals can only charge for work carried out in the course of their profession. Nothing in *re Fish* indicates that a dentist, or a builder, whose profession or business does not include acting as a trustee, would be entitled to charge for doing so.

#### *Conclusion on Ground 1*

58. In my judgment the Deputy Judge was entirely right. I would endorse his conclusion (in his judgment at [44] (see paragraph 21 above)) that:

“a trustee or executor can rely upon the charging clause in the Will to charge for work done or time spent in the administration of the estate only if that work falls within the scope of their profession or business in question; that is to say if it is work of a type which would attract or incur their usual professional fees.”

I do not think the last part of this conclusion (“that is to say...”) alters or qualifies the statement in the first part of it that work can only be charged for if it falls within the scope of the executor’s profession or business. As I read it, the last part is simply a summary of the reasons why he reached that conclusion. So read, I do not think it differs in any substantive way from the Deputy Master’s conclusion (in his judgment

at [10] (see paragraph 13 above)) that:

“The question is whether Mrs. Heselton has satisfied me that she was conducting a business and her activities in administering the estate for the period that she was an Executor were done in the course of that business.”

59. I agree with both of them and would dismiss this ground of appeal.

*Ground 2 – remittal for further findings*

60. I can deal with Ground 2 very shortly. Mr Briggs’ only point was that the test adopted by the Deputy Judge as to whether work was chargeable was different from the test adopted by the Deputy Master and hence the Deputy Judge should have re-evaluated whether the evidence met his test but did not do so.

61. As I have just explained I do not think this is right. The test adopted by the Deputy Master, as Mr Briggs accepted, was whether Mrs Heselton had established that she was conducting a business and that her activities in administering the estate were done in the course of that business. The Deputy Master answered that No, and it is not suggested that that was not a conclusion open to him on the very limited evidence that was before him.

62. That test to my mind is indistinguishable from the test adopted by the Deputy Judge that an executor can only charge for work done or time spent in the administration of the estate if the work done falls within the scope of their profession or business in question. Mr Briggs submitted that the Deputy Judge was adopting a different test, namely whether the work was such as to attract usual professional or other fees. But I do not think the Deputy Judge thought this was any different. Given that Mrs Heselton had not satisfied the Deputy Master that her activities in administering the estate were in the course of any business of hers, it must follow that the work was not such as to attract her usual business charges either.

63. I would dismiss this ground of appeal as well, and dismiss the appeal.

**Lord Justice Lewis:**

64. I agree.

**Lord Justice Arnold:**

65. I also agree.