Neutral Citation Number: [2024] EWCA Civ 303

Case No: CA-2023-000121

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Cavanagh
[2022] EWHC 3229 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2024

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
SIR NICHOLAS PATTEN

- -

Between:

PETER IAN BREALEY	**Claimant/ Respondent**
- and -	
SHEPHERD & CO SOLICITORS	**Defendants/ Appellants**

- -
- -

Rupert Cohen (instructed by **Kain Knight Costs Lawyers**) for the **Appellants**
Andrew Williams and John Meehan (instructed by **Jones & Co Solicitors**) for the **Respondent**

Hearing date: 20 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 26 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Sir Nicholas Patten:

1. This is a second appeal by the defendant firm of solicitors against an order of Costs Judge Rowley dated 29 November 2021 which was made in third-party assessment proceedings brought by the claimant, Mr Peter Brealey ("Mr Brealey"), pursuant to section 71(3) of the Solicitors Act 1974 in relation to the administration of his late mother's estate.

2. In those proceedings Mr Brealey has challenged the entitlement of one of the executors, Mr Robin Shepherd ("Mr Shepherd"), to charge fees for the time spent by him in the administration of the estate. Mr Shepherd was a partner in the defendant firm until his retirement in November 2018. In order to explain the genesis of the claim and how it has been formulated a brief summary of the relevant factual background is necessary.

3. The claimant's mother, Mrs Ann Brealey, died on 15 April 2014. By clause 1 of her will dated 21 March 2014 (which was drawn up with the assistance of Mr. Shepherd) she appointed her brother Mr Peter Hayward ("Mr Hayward") and Mr Shepherd as executors of the will together with "the partners at the time of my death in the firm of Shepherd & Co". It is common ground that the effect of clause 1 was to appoint as a third executor Mr Edward Smyth ("Mr Smyth") who was the only other partner in Shepherd & Co at the relevant time.

4. After making small gifts of personal chattels clause 3 of the will divided Mrs Brealey's residuary estate between her son, Mr Brealey, (as to 30%) and her daughter-in-law and grandchildren who received the remaining 70% in equal shares. The executors were given conventional powers in relation to the sale and investment of the estate but the will contain no express provision entitling her solicitor executors to charge for their own time spent in the administration of the estate nor any specific direction in relation to the instruction of Shepherd & Co.

5. Probate of the will was granted to Mr Hayward and Mr Shepherd on 23 June 2014 with power reserved to the other executor Mr Smyth. The value of the estate was certified as £878,680.

6. The main asset in the estate was Mrs Brealey's home, Park House, where the claimant also lived. He refused to move out thereby necessitating legal proceedings brought by the executors in order to obtain possession. There was also a dispute about the recovery of a loan of £40,000 which Mrs Brealey had made to her son. In order to deal with these matters and also more generally with the administration of the estate the executors entered into various retainers with Shepherd and Co. The terms of the first and principal retainer are set out in a letter to Mr Hayward from Shepherd & Co. (signed by Mr Shepherd) which is dated 30 May 2014. It relates to the obtaining of the grant of probate, the completion of the relevant forms for inheritance tax purposes, and more generally "the administration of the Estate and the distribution of the funds under the direction of the Executors and Trustees".

7. Separate retainers were subsequently entered into in respect of the repayment of the loan and the recovery of possession of Park House. The various letters of engagement explained that the fees charged by Shepherd & Co. would be calculated by reference to the time spent and gave details of the charging rates that would apply. Mr Shepherd

was to be the partner responsible for the day-to-day supervision of the instructions but he was to be assisted by other solicitors and trainee solicitors within the firm.

8. Most of the work carried out by Shepherd & Co. was done between 2014 and 2019. The fees billed totalled £153,507.38 of which a significant proportion related to time spent by Mr Shepherd up to his retirement in 2018. Mr Smyth took no part in the administration of the estate and retired from the defendant firm in July 2014. On 16 September 2019 Shepherd & Co. submitted 91 invoices for the work which they had carried out. The invoices were addressed either to Mr Hayward or to Mr Shepherd and Mr Hayward and it is not in dispute but they were approved by Mr Hayward.

9. The present dispute began in October 2019 when Mr Brealey issued a claim as a third-party for an assessment of the various bills delivered the previous month. The basis of the claim was not further particularised in the claim form and on 14 November 2019 an order was made by consent requiring Shepherd & Co. to provide a breakdown of their costs and for the claimant to serve points of dispute after service of the breakdown. We were not provided with copies of these further pleadings but it is apparent from an earlier judgement of Costs Judge Rowley that the claimant was then making a broad challenge to the level of costs claimed and to the approach taken by the defendant firm to the administration of the estate. This brought into focus the scope of any permissible challenge to fees in a claim under section 71(3) of the Solicitors Act and in particular whether the decision and reasoning of this court in **Tim Martin Interiors Ltd v. Akin Gump LLP** [2011] EWCA Civ. 1574, a case concerning a claim under section 71(1) of the Solicitors Act, also applied to a claim by a third party under section 71(3).

10. The significance of this issue for the present case was that in **Tim Martin** this court held that the court's power to reduce the quantum of the fees claimed was limited to cases where those fees either fell outside the scope of the agreed retainer or were only allowable on the basis of a special arrangement within the terms of what is now CPR 46.9 (3) (c). If applicable to a claim under section 71(3) this would mean that Mr Brealey could not challenge the defendant firm's fees simply on the basis that they were arguably excessive in amount having regard to what was required for the proper administration of the estate. The Costs Judge would be restricted to applying a kind of blue pencil test in order to disallow only such fees as fell within one of the two categories mentioned above.

11. In a judgement handed down on 10 May 2021 Costs Judge Rowley held that the reasoning in **Tim Martin** was equally applicable to a claim brought under section 71(3) and that the blue pencil test must be applied. As we now know the Costs Judge was wrong about this. In **Kenig v. Thomson Snell & Passmore LLP** [2024] EWCA Civ. 15 this court decided that the reasoning in **Tim Martin** was not applicable to a claim brought under section 71(3) so that a beneficiary in the position of Mr Brealey could mount a more extensive challenge to the fees based on whether it was reasonable and necessary for the work charged for to have been carried out.

12. None of these issues is before us because the defendant firm has not challenged the decision of Costs Judge Rowley on the section 71(3) point as part of the second appeal. But the decision of the Costs Judge on the scope of the challenge permissible under section 71(3) has led directly to the issues which are under appeal.

13. Following his judgement on the **Tim Martin** issue the Costs Judge allowed the parties to serve amended points of dispute and replies as a result of which the question emerged as to whether Mr Shepherd was entitled to charge professionally for his time spent on the administration of the estate in the absence of an appropriate charging clause in Mrs Brealey's will. The precise scope of the new challenge in terms of the fees which are claimed is less than clear although that will ultimately be a matter for the Costs Judge rather than for this court. It seems to be conceded by Mr Brealey that it was reasonable for the executors to have engaged the defendants to deal on their behalf with the disputes about the loan and possession of the house. There also seems to be no challenge to Shepherd & Co. charging for the work carried out by Mr Shepherd in connection with the administration of the estate more generally on the basis presumably that it was reasonable for the executors to instruct solicitors to carry out this work. What seems to be in issue is whether the fees claimed can properly include a charge by Mr Shepherd for acting as an executor during the period when the administration of the estate (for which he was responsible and for which he also charged) was being dealt with by Ms Sibley, another partner in the firm. The defendant's pleaded response to the charge of duplication of costs was that the role of executor (carried out by Mr Shepherd) and the work of administration carried out by Ms Sibley were very different. The resolution of this dispute and any examination of whether the distinction made is realistic must be matters for the Costs Judge and not for us. What we are concerned with on this appeal is the issue of principle as to whether Mr Shepherd is inhibited from charging for his time spent as an executor by the absence of any form of charging clause in Mrs Brealey's will.

14. In the absence of a charging clause Shepherd & Co. must rely either on the provisions of section 29 of the Trustee Act 2000 or in the alternative on the court exercising its inherent jurisdiction to permit Mr Shepherd to be remunerated for his time and services out of the estate. The provisions of section 29 are the result of the recommendations contained in the report of the Law Commission on Trustees' Powers and Duties (Law Com. No. 260) which was published in 1999.

15. Section 29 provides:

> "(2) Subject to subsection (5), a trustee who—
>
> (a) acts in a professional capacity, but
>
> (b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,
>
> is entitled to receive reasonable remuneration out of the trust funds for any services that he provides to or on behalf of the trust if each other trustee has agreed in writing that he may be remunerated for the services.
>
> (3) 'Reasonable remuneration' means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee ....
>
> ...

> (4) A trustee is entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.
>
> (5) A trustee is not entitled to remuneration under this section if any provision about his entitlement to remuneration has been made—
>
> (a) by the trust instrument, or
>
> (b) by any enactment or any provision of subordinate legislation."

16. The term "acts in a professional capacity" in section 29(2) is defined in section 28(5) as follows:

> "(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."

17. Section 35 deals with personal representatives. Section 35 (1) provides:

> "(1) Subject to the following provisions of this section, this Act applies in relation to a personal representative administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries."

18. The term "personal representative" has the same meaning as in the Trustee Act 1925 ("TA 1925"): see section 39(1). The relevant definition is contained in section 68(9) TA 1925 which provides:

> "'*personal representative'* means the executor, original or by representation, or administrator for the time being of a deceased person;"

19. It is not in dispute that Mr Shepherd acted in a professional capacity (within the meaning of section 28(5)) in relation to the services he provided. But in order to take advantage of the provisions of section 29(2) he has to establish that "each other trustee has agreed in writing" to his being remunerated for those services. Mr Cohen on behalf of the defendant firm relies on two classes of document as constituting the necessary agreement in writing. Although not a formal agreement as such he points to

the fact that Mr Hayward countersigned the retainer letters and the invoices and submits that these should be treated as written confirmation of an agreement that Shepherd & Co. should be remunerated for Mr. Shepherd's services such as to satisfy the statutory purpose behind the requirements contained in section 29(2). In its report the Law Commission accepted that there were strong arguments in favour of remunerating professionally qualified trustees who might otherwise refuse to take on the burden of administering an estate or would simply appoint professional agents to do so potentially at a greater cost. The Law Commission however rejected a proposal to introduce a general statutory charging clause as a default power because of the need for transparency and the prevention of abuse. It was thought that such a default power would encroach too far upon the general principle that a trustee should not profit from his or her trust and that a settlor (and by extension a testator) needed to be aware that a professional trustee would be remunerated and on what terms. The balance between these considerations and the desirability of encouraging professionals to act as trustees was struck by what is now the requirement for express agreement between trustees or personal representatives contained in section 29 (2).

20. One of the issues expressly touched on in the report is whether some kind of implied power could override any inference to be drawn from the fact that a settlor or testator had included some provision in the form of a gift or legacy to reward the trustee or executor for acting as such or had simply made no provision (as in this case) for the trustees or executors to be remunerated for their services. To avoid difficulties of this kind the Law Commission rejected the inclusion of an implied power and recommended instead that a professionally qualified trustee or executor could be remunerated for their services if there was agreement by the trustees or executors generally following a consideration of the relevant circumstances. This would obviate the need to draw inferences from the other provisions of the settlement or the will and would allow the trustees or executors to override the absence of any charging clause. In its report the Commission said:

> "7.10 To meet these concerns, the Commission has decided to adopt a modified approach. One option that was put forward in the Consultation Paper, not in relation to trusts generally, but only as regards charitable and pension trusts, was that the trustees collectively should have power to authorise one (or more) of their number to charge for his or her professional services to the trust. The trustees would then have to determine in each case whether it was appropriate to allow any of their number to be remunerated. In doing so they would need to consider all the circumstances — including the nature of any benefit which the testator or settlor had conferred upon the particular trustee or trustees in question. The trustees would not be obliged to apply any rigid rule of construction in making their decision, but would exercise their discretion in the interests of the trust.
>
> 7.11 This approach has additional advantages. The Commission considers that, as a matter of principle, in the absence of an express charging clause, trustees should actively consider whether one of their number should be remunerated.

> Before permitting any trustee to charge for his or her services, the trustees as a whole would have to consider whether this would be to the advantage of the trust. They would need to consider, for example, whether that trustee is the most appropriate person to provide particular services to the trust (and, if so, whether he or she should reasonably be expected to do so free of charge), or whether it would be better to employ an agent. Nevertheless, the Commission does not think that this approach would be suitable where the trustee in question is a trust corporation. In addition, it would not be appropriate in cases where there is a sole trustee which is not a trust corporation, because the safeguard of collective scrutiny of the trustee's actions could not operate."

21. Putting aside for the moment the question whether either the retainer letters or the invoices (or a combination of both) can properly be treated as constituting the necessary agreement in writing for the purposes of section 29 (2), the defendant firm must first overcome the difficulty that Mr Smyth, who was also an executor under the will, was not a signatory to any of these documents or party to any other kind of agreement relating to the remuneration of Mr Shepherd.

22. Mr Cohen has sought to overcome this difficulty by arguing that the reference to "each other trustee" in section 29 (2) should be read as referring only to those trustees or executors who have taken an active part in the administration of the trust or the estate. Mr Smyth was, on the evidence, completely inactive. He was not a proving executor; he took no part in the administration of and did not intermeddle in Mrs Brealey's estate; and he retired from practice only three months after Mrs Brealey's death. All of this is confirmed in a witness statement which Mr Smyth made on 7 October 2022 in which he also disclaimed and renounced his office as executor.

23. Mr Cohen pointed to the absurdity which he said would follow in a case like the present where the will nominated as executors all of the partners in a firm of solicitors only one or two of whom had either proved the will or taken an active part in the administration of the estate. In the case of a large firm it could prove practically impossible to obtain the signatures of all the executors to an agreement and most of those concerned would be able to make little or no contribution to any debate as to whether remuneration of the active trustees was appropriate. Section 29 (2) should, he says, be interpreted as requiring the consent only of those who have been active. He referred us to various authorities in which the liabilities of executors who have neither proved nor intermeddled has been held to be very limited and the distinction between executors of that kind who have not lost the right to renounce and those who have either proved or intermeddled is, he submits, central to any consideration of the meaning of "trustee" in section 29(2).

24. In terms of the statutory provisions Mr Cohen also places some reliance on section 35(1) of the 2000 Act which as mentioned refers to a personal representative "administering the estate". The emphasis, he says, is on what the executor has done rather than on the executor's status as such.

25. Attractively as these submissions were made I am not able to accept them. I agree with Cavanagh J. who on the first appeal held that the Costs Judge was right to

construe section 29(2) as requiring the consent of all of the current executors: see [2023] EWHC 3229 (KB). The difficulties which Mr Cohen envisages might flow from the appointment of all the partners in a large firm of solicitors as executors are, I think, a remote scenario. Most firms of solicitors will in practice require a charging clause to be contained in a will as a condition of accepting an executorship and the likelihood that a will would appoint numerous partners in a large firm as executors seems to me to be unrealistic. But whether or not the requirements of section 29(2) are likely to create difficulties in some cases the principle behind the legislation is not in doubt. Its purpose is to provide a safeguard for the trust or estate in relation to the use of trust property to recompense a trustee or executor for his or her professional services. Consistently with this the requirement is for consent to be given by all ("each other") of the trustees or executors who by virtue of their appointment owe the beneficiaries a fiduciary duty in relation to the assets under their control. In the case of a trustee section 29(2) is unqualified and must refer to any and all persons who are trustees at the relevant time. There is nothing in the statutory language or in the report of the Law Commission to suggest that the word "trustee" should be given some kind of restricted meaning. The passage from paragraph 7.11 of the Commission's report which I quoted earlier refers in terms to the trustees as a whole having to consider whether or not to permit one of their number to be remunerated.

26. An executor like a trustee derives his title and authority from the instrument appointing him. The property of the estate vests in him from the moment of the testator's death when the will takes effect. Like Cavanagh J. on the first appeal I do not regard section 35(1) as having the effect of limiting the class of personal representatives to whom the provisions of section 29(2) apply. The words relied on by Mr Cohen are not words of limitation. As Cavanagh J. said in [82] of his judgement the purpose of section 35(1) is simply to make clear that the 2000 Act applies to wills and estates in the same way and to the same extent as it does to trusts. As the application of section 29(2) to trustees is unlimited there is nothing in section 35(1) which can restrict its scope in relation to personal representatives.

27. Mr Cohen's other argument for making good the absence of Mr Smyth as a party to the alleged agreements was that by virtue of section 5 of the Partnership Act 1890 Mr Shepherd is deemed to have acted as Mr Smyth's agent for the purpose of the section 29 agreements so as to make Mr Smyth a party to those agreements. This point was not pursued with any great enthusiasm by Mr Cohen and I am not persuaded by it. The agency created by section 5 is expressly one for the purpose of the business of the partnership. The requisite agreement between executors under section 29(2) is not obviously an agreement made as part of the partnership business of the solicitor executor or trustee. It is an agreement between trustees or executors to allow a professional trustee to reimburse himself out of the trust estate. But more importantly section 29(2) requires the written agreement of each of the trustees or executors for that purpose. That is a statutory requirement which cannot be overridden and is not complied with by any agency created under section 5 of the Partnership Act. The Costs Judge was therefore right in my view to reject the defendant firm's argument that it had the benefit of a section 29(2) agreement in respect of its fees.

28. If my Lords are in agreement with me that the absence of Mr Smyth's signature from the documents relied on as agreements for the purposes of section 29(2) is fatal to the defendant firm's case under that section then it is unnecessary for this court to express

any concluded view as to whether those documents are capable of amounting to an agreement in writing for those purposes. Nor is it necessary to decide the separate issue of whether the necessary agreement can be given retrospective effect. Shepherd & Co. contend that there was retrospective agreement in respect of Mr Shepherd's fees in the form of a breakdown of costs prepared for the proceedings which Mr. Hayward signed in November 2019. But the absence of Mr Smyth's signature to the breakdown precludes it from being an agreement in writing which satisfies the requirements of s.29(2). To succeed on this appeal Shepherd & Co. must therefore show that the Costs Judge erred in principle when he refused to exercise the court's inherent jurisdiction so as to allow Mr Shepherd to be remunerated for his services out of the estate.

29. The reasons given by the Costs Judge for declining to exercise the court's inherent jurisdiction are set out in [37] to [39] of his judgement:

> "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, 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."

30. One of the difficulties in the case is that neither Mr Shepherd nor Mr Hayward provided any evidence for the hearing before the Costs Judge as to why the will did not contain a solicitor's charging clause; whether this was in accordance with Mrs Brealey's instructions; and the circumstances which justified Mr Shepherd being remunerated for his services as an executor. At the hearing of the first appeal

Shepherd & Co. sought leave to rely on witness statements from Mr Hayward and Mr Smyth but Cavanagh J. refused to admit Mr Hayward's statement because it did not satisfy the conditions set out in **Ladd v. Marshall** [1954] 1WLR 1489. He did, however, admit Mr Smyth's statement but this, as I have already explained, did not contain any information pertinent to the exercise of the court's inherent jurisdiction to allow Mr Shepherd to recover his fees. The judge said that Mr Hayward's statement would also have been of very limited relevance on this issue beyond confirming that he was aware of and approved of what Mr Shepherd had done and expected him to be paid for those services. These were matters of which the Costs Judge was well aware when making his own decision.

31. The Costs Judge took as his starting point that in the absence of evidence from Mr Shepherd about the reasons for the absence of a charging clause he ought to conclude that the will represented Mrs Brealey's intentions and that she did not expect her executors to charge for their services. Mr Cohen does not criticise the judgement in this respect. His challenge is directed to what follows in [39] quoted above where the Costs Judge refers to the inherent jurisdiction being one which is to be used sparingly. This description of the power comes from a passage in the judgement of Upjohn J. in **Re Worthington** [1954] 1 WLR 526 at p.528 where he said that the jurisdiction of the court to allow remuneration to trustees "should only be exercise sparingly and in exceptional circumstances".

32. What could be said to justify a conservative approach to the remuneration of trustees and other fiduciaries under the court's inherent jurisdiction is the undoubted principle that the office of trustee is gratuitous. A trustee is entitled to be indemnified out of the trust assets for the costs and expenses he has properly incurred in the course of his trusteeship. But he is not, without more, entitled to payment for his own time and trouble. Underpinning this rule is the long-established equitable principle that a trustee must avoid conflicts between duty and interest. In **Boardman v. Phipps** [1966] UKHL 2 the House of Lords held that this rule should be applied strictly so as, as Lord Cohen put it, to keep trustees up to the mark. The application of the rule that a trustee or other fiduciary should not profit from his trust does not depend upon proof of bad faith or dishonesty. It is simply a mechanism to avoid all possible conflicts (actual or potential) between the trustee's personal interests and his duties as a trustee. As Lord Herschell noted in **Bray v. Ford** [1896)] AC 44 at pp. 51-2 (another case about a solicitor trustee charging for his professional services);

> "It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary duty being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed

> from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing."

33. **Boardman v. Phipps** was a case where a trust included a minority holding in a private company which had considerably underperformed. The solicitor to the trust and one of the beneficiaries entered into negotiations with the other shareholders as agents for the trustees to explore a possible acquisition of the company but the trustees ultimately declined to purchase a controlling interest. The solicitor and the beneficiary then proceeded, with the knowledge and consent of the trustees, to acquire a controlling interest using information which they had obtained whilst acting for the trust. The company's performance was considerably improved and the shares were later sold at a profit. Wilberforce J. held that this had been obtained by the use of information derived from the defendants' agency for the trustees and was trust property. The defendants were therefore accountable to the trust for the profit made subject to a generous allowance for the time and trouble taken by them in the acquisition of the controlling interest and the improvement of the value of the company. His decision was upheld by the House of Lords.

34. In **Guinness Plc v. Saunders** [1990] 2 AC 663 the House of Lords considered whether an allowance of the kind permitted in **Boardman v. Phipps** was appropriate in the case of a company director who had been paid some £5.2 million by the board of directors for his services in connection with the takeover of The Distillers Company Plc. The payment was not authorised by the articles of association of Guinness and its receipt was a breach of fiduciary duty because the director had failed to disclose to the board of the company his interest in the agreement. The House of Lords held that the director must account for the payment and declined to allow him to recover anything by way of an allowance for his services since to do so would be inconsistent with the articles of the company. The decision is important for what it says about the exercise of the court's inherent jurisdiction to remunerate trustees but the decision depended very much on the context in which it was made. At page 694 Lord Templeman described the power as one exercisable "in exceptional circumstances". Lord Goff of Chieveley said (at page 701):

> "It will be observed that the decision to make the allowance was founded upon the simple proposition that 'it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it.' Ex hypothesis, such an allowance was not in the circumstances authorised by the terms of the trust deed; furthermore it was held that there had not been full and proper disclosure by the two defendants to the successful plaintiff beneficiary. The inequity was found in the simple proposition that the beneficiaries were taking the profit although, if Mr. Boardman (the solicitor) had not done the work, they would have had to employ an expert to do the work for them in order to earn that profit.
>
> The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly

> provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to the extent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees."

35. Cases of this kind are useful illustrations of the rationale for the strict rule about the making of profits by a trustee. But the circumstances in which the court is asked to exercise its inherent jurisdiction to reward trustees for their services will vary from cases of secret profits (as in **Boardman v. Phipps**) to altogether more routine cases where the scope for a possible conflict of interest with duty will be much more limited. Mr Cohen relies in particular on the decision of this court in **Re Duke of Norfolk's Settlement Trusts** [1982] Ch 61 ("Re. Norfolk") which concerned the development by the Norfolk trustees of part of their Strand estate. The deed of settlement provided for the trustees and the trust company to be remunerated in accordance with its standard scale of fees at the date of the settlement but the development involved the trustees in work on a scale and of a kind that could not have been contemplated when the trustees accepted office. They sought additional remuneration under the court's inherent jurisdiction to compensate them for the additional work which they had carried out. Walton J. refused the application but it was granted by this court on appeal. After reviewing all the relevant authorities Fox L.J. held that the judge had taken too narrow a view of the inherent jurisdiction. He said (at pages 78-79):

> "As to principle, it seems to me that if the court has jurisdiction, as it has, upon the appointment of a trustee to authorise remuneration though no such power exists in the trust instrument, there is no logical reason why the court should not have power to increase the remuneration given by the instrument. In many cases the latter may involve a smaller interference with the provisions of the trust instrument than the former. Further, the law has not stopped short at authorising remuneration to a trustee only if he seeks the authority at the time when he accepts the trusts. That, in my view, appears from the observations of Lord Langdale M.R. in *Bainbrigge v. Blair*, 8 Beav. 588, and from *In re Masters, decd.* [1953] 1 W.L.R. 81 in which it is clear that Danckwerts J. would have been prepared to make the order which he did (and which authorised payment of remuneration to an administrator who had taken a grant some years previously) under the inherent jurisdiction.
>
> I appreciate that the ambit of the court's inherent jurisdiction in any sphere may, for historical reasons, be irrational and that logical extensions are not necessarily permissible. But I think that it is the basis of the jurisdiction that one has to consider.

> The basis, in my view, in relation to a trustee's remuneration is the good administration of trusts. The fact that in earlier times, with more stable currencies and with a plenitude of persons with the leisure and resources to take on unremunerated trusteeships, the particular problem of increasing remuneration may not have arisen, does not, in my view, prevent us from concluding that a logical extension of admitted law and which is wholly consistent with the apparent purpose of the jurisdiction is permissible. If the increase of remuneration be beneficial to the trust administration, I do not see any objection to that in principle.
>
> As to authority, I do not find in the English authorities any decision which positively excludes any inherent jurisdiction to increase remuneration, unless it be *Robinson v. Pett*, 3 P.Wms. 249. But that was a case of a renouncing executor who was expressly given a legacy for his trouble if he did renounce. Lord Talbot L.C. said that he was unable to give him any more. I do not think *Robinson v. Pett* really touches the present case. On the other hand, Lord Eldon L.C.'s order in *Marshall v. Holloway*, 2 Swan. 432, seems to have increased the benefit given by the will, and in *In re Barbour's Settlement Trusts* [1974] 1 W.L.R. 1198 Megarry J. did not really doubt that, upon an application in proper form and supported by appropriate evidence, the court would have had jurisdiction to increase the remuneration of the corporate trustee.
>
> I conclude that the court has an inherent jurisdiction to authorise the payment of remuneration of trustees and that that jurisdiction extends to increasing the remuneration authorised by the trust instrument. In exercising that jurisdiction the court has to balance two influences which are to some extent in conflict. The first is that the office of trustee is, as such, gratuitous; the court will accordingly be careful to protect the interests of the beneficiaries against claims by the trustees. The second is that it is of great importance to the beneficiaries that the trust should be well administered. If therefore the court concludes, having regard to the nature of the trust, the experience and skill of a particular trustee and to the amounts which he seeks to charge when compared with what other trustees might require to be paid for their services and to all the other circumstances of the case, that it would be in the interests of the beneficiaries to increase the remuneration, then the court may properly do so."

36. The argument before Cavanagh J. and to some extent before us has centred on whether the effect of the decision in **Re. Norfolk** has been to remove the requirement to show exceptional circumstances as a precondition to the exercise of the inherent jurisdiction. Mr Cohen's principal submission is that the test is simply whether the remuneration applied for is necessary for the good administration of the trust or in this

case the estate. The Costs Judge therefore misdirected himself, it is said, when he referred to the jurisdiction as one which is to be exercised sparingly. Instead he ought to have concentrated on whether it was reasonable in all the circumstances for Mr Shepherd to be remunerated for his services as executor as to which (Mr Cohen submits) the evidence is all one way.

37. The jurisdiction of the court which we are considering on this appeal may, as I indicated earlier, fall to be exercised in a variety of different circumstances. At one end of the scale there will be cases where an allowance is made by way of a qualification to the trustee's duty to account for a secret profit or for money received in breach of trust or fiduciary duty. **Boardman v. Phipps** is an obvious example. At the other end of the spectrum will be less controversial cases where the circumstances do not involve any breach of duty and where the focus of the court will be whether the remuneration sought is consistent in all the circumstances with the good administration of the trust. In **Re. Norfolk** Walton J., having referred to the jurisdiction as being exceptional and only exercisable sparingly, refused to sanction additional remuneration for the Norfolk trustees on the ground, inter alia, that in no case had the court ever altered the general level of remuneration fixed by the trust instrument after the trusteeship had been unconditionally accepted. The illogicality of this argument was what is referred to in the passage from Fox L.J.'s judgement quoted earlier.

38. It is however clear from his judgement that a significant consideration in deciding whether to authorise additional remuneration is the principle that a trusteeship is gratuitous and that the interests of the beneficiaries must be protected. Although the question can ultimately be expressed as whether the allowance can be justified in the interests of the good administration of the trust, a decision on that question necessarily involves a consideration of all relevant circumstances which in this case would include the reasons why no charging clause was inserted into the will; the basis upon which Mr Shepherd accepted the office of executor; and whether in the light of there being no objection to the reimbursement of legal expenses incurred on other aspects of the administration of the estate an allowance for the time spent by Mr Shepherd as executor should also be made.

39. In deciding how to balance the rival considerations in any particular case the court is not in my view constrained to choose between what I shall refer to as the exceptional circumstances test and a test based only on considerations of good administration. These statements of principle derived from the earlier cases are not when properly analysed inconsistent with each other and there is nothing in the judgements in **Re. Norfolk** to suggest otherwise. The established principle that the office of a trustee or executorship is gratuitous absent an express authorisation of remuneration in the trust deed or will coupled with the obvious duty of any fiduciary to prefer the interests of the beneficiaries over his own means that any exercise of the inherent jurisdiction to authorise remuneration will necessarily be an exception to the underlying rule. The jurisdiction is exceptional in that sense and must be justified having regard to the consideration of all the relevant circumstances including the need to protect the interests of the beneficiaries and to ensure the good administration of the trust or the estate. For the same reason the jurisdiction is one to be exercise sparingly in the sense that it is not an unfettered discretion but one to be exercised compatibly with the considerations I have mentioned. The different outcomes in cases like **Guinness plc**

v. Saunders as opposed to **Re. Norfolk** are not based on a difference of principle but rather on the different circumstances in play in those cases. In many if not most cases the interests of the beneficiaries and the good administration of the trust should go hand-in-hand. But the scale of and circumstances in which the remuneration is sought will still need to be justified to the court if it is to exercise its jurisdiction in favour of the applicant.

40. The Costs Judge ruled that he could not exercise the inherent jurisdiction in favour of allowing Mr Shepherd to be remunerated as executor in the absence of any real information to explain the lack of a charging clause and why Mr Shepherd should be remunerated in the way and to the extent contended for. His reference to the jurisdiction being exercised sparingly was made to emphasise the need for it to be justified by a properly evidenced application. We are asked to set his decision aside on the basis of a misdirection. But in my view the judge's decision is not open to challenge on that ground. It was a permissible exercise of his judicial discretion to rule that in the absence of any evidence filed by Shepherd & Co. to support the application he was not able to accede to it. That was a decision properly open to him and is not one with which this court can interfere. I would therefore dismiss the appeal.

Lord Justice Coulson:

41. I agree.

Lord Justice Newey:

42. I also agree.