



Neutral Citation Number: [2022] EWHC 1348 (Ch)

Case No: PT-2020-000722

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8/6/2022

Before:

MASTER CLARK

Between:

(1) KATHRYN MARY CLEVELY
(2) JENNIFER ANNE ARNOLD

Claimants

- and -

(1) JANET MARY ATKINSON
(as personal representative of the estate of
Barbara Frances Campbell deceased)
(2) TIMOTHY WILLIAM MACLEAR CAMPBELL
(3) JOHN MICHAEL CAMPBELL

Defendants

Georgia Bedworth (instructed by **Excello Law Limited**) for the **Claimants**
The **Second Defendant** in person
The **Third Defendant** attending in person (but not participating)

Hearing dates: 13, 14 October 2021, 8 February 2022

Approved Judgment

I direct that this approved judgment, sent to the parties by email at 10am on 8 April 2022, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This Part 8 claim concerns whether, and if so, to what extent, the second defendant, Timothy Campbell, is entitled to payment (either by way remuneration or reimbursement of expenses) in respect of the work done by him whilst acting as:
 - (1) the director of a family owned company, Jarman Properties Limited (“the Company”);
 - (2) the executor of the estate of his mother, Barbara Campbell (“the mother”).

Parties and the claim

2. The claimants, Kathryn (“Kate”) Clevely and Jennifer (“Jenny”) Arnold, and the second and third defendants, Timothy (“Tim”) and John Campbell are siblings. They are the adult children of Michael Campbell (“the father”), who died on 28 November 2011 aged 99, and the mother, who died 6 months later on 3 June 2012, aged 89. I refer to each of the children by the names they use for each other, for the sake of clarity and without intending any disrespect.
3. Tim and John were appointed executors under the mother’s will dated 22 August 2003 (“the Will”). Tim obtained a grant of probate (with power reserved to John) on 7 December 2012; and a grant of double probate was made to John on 23 August 2016. The mother’s residuary estate is divided equally between the 4 children under the Will.
4. The first defendant, Janet Atkinson (“the administrator”), is a solicitor who was appointed by an order dated 8 February 2017 (implementing a judgment of Chief Master Marsh) as an independent administrator of the mother’s estate in place of Tim and John, who were removed.
5. All the assets of the estate have now been realised. The administrator holds a balance of £265,254.24 for distribution.

Factual background

6. The events giving rise to the claim begin before the death of either parent.
7. At that stage, the father owned 88 of the 90 shares in the Company, which was a property investment company. The mother owned 1 share and Tim owned 1 share. The 3 shareholders were all directors of the Company, and the mother was the secretary.
8. The Company’s articles provided, so far as relevant:
 - “76. The remuneration of the directors shall from time to time be determined by the company in general meeting ... The directors may also be paid all travelling, hotel and other expenses ... in connection with the business of the company.
 - 84 (1) A director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall declare the nature of his interest at a meeting of the directors in accordance with section 199 of [the Companies Act 1948].

- (2) A director shall not vote in respect of any contract or arrangement in which he is interested, and if he shall do his vote shall not be counted in the quorum present at the meeting ...

and these prohibitions may at any time be suspended or relaxed to any extent, and either generally or in respect of any particular contract, arrangement or transaction, by the company in general meeting.

- (3) A director may hold any other office or place of profit under the company (other than the office of auditor) in conjunction with his office of director for such period and on such terms (as to remuneration and otherwise) as the directors may determine and no director ... shall be disqualified by his office from contracting with the company either with regard to his tenure of such other office or place of profit or as vendor, purchaser or otherwise, nor shall any such contract or any contract entered into by or on behalf of the company in which any director is in any way interested, be liable to be avoided, or shall any director so contracting or being interested be liable to account to the company for any profit realised by any such contract or arrangement by reason of such director holding that office or of the fiduciary relation thereby established.

- ...
(5) Any director may act by himself or his firm in a professional capacity for the company, and he or his firm shall be entitled to remuneration for professional services as if he were not a director ...”

9. The father also owned a commercial (retail) property, 8 Cranbourne Street, Brighton, which was let out. This was transferred to the mother before his death.
10. Tim’s account of the early background is not challenged. His father involved him in his estate planning from 1981/82. In 1997, when the father was 85 years old, Tim took over the day to day running of his property business, handling all aspects of it including rent reviews, dilapidations, marketing, new leases, valuations, repairs and improvements. This continued until his parents died. Kate referred to him as “Pa’s legs”, because, whilst the father was mentally capable, he found it difficult to get around. Tim did not receive any payment for these tasks. His parents helped him in other ways, including financially. He was also able to fit in the work around his normal day to day work for his own property consultancy, Tim Campbell Associates Limited (“TCAL”), from which he derived his income.
11. His parents continued to look after their own financial affairs until 2008. However, in late 2008 and early 2009 Powers of Attorney in Tim’s favour were registered.
12. In late 2008, the Company’s assets comprised 2 investment properties (16 Brewers Lane, Richmond TW9 1HH and 3 Hawarden Grove, London SE24 9DQ) and cash balances of about £½ million. Tim looked into his parents’ financial affairs, and in particular their tax mitigation planning, and obtained advice from the family accountant, Gareth Rees, of PB Associates. On the basis of that advice, Tim considered that urgent measures were needed to mitigate the effect of IHT. He prepared a paper

for his brother and sisters entitled “Board Papers – Sibling Board Meeting 9 December 2008”

13. This is a comprehensive document setting out full details of the assets in the father’s estate, the IHT position on his and the mother’s death, and various ways of limiting the IHT liabilities by using available exemptions. It included the following:

“[The Company] is currently an Investment Company. The proposal is that it should henceforth become a Trading Company. In order to do this, [the Company]’s main source of income should not be the income from its properties but should be from trading activities – i.e. development, property services, etc. Paper Three goes into more detail about this.

If the Revenue accept [the Company] as a Trading Company, there would not be any IHT payable on the value of the [Company] shares and the capital gains in the shares i.e. the shares would transfer at the then current value, wiping out any historic gain.”

14. The Paper Three referred to was not in the evidence before me. The “Board Papers” do not include any reference to remuneration for the work involved in the Company’s proposed new activity of property development.
15. The meeting took place at Simpsons in the Strand, a London restaurant, on 9 December 2008, and was attended by all 4 siblings. There is no written record of the meeting, but it was common ground that all agreed that, given the father’s advanced age, steps should be taken urgently. The first step taken was to transfer cash of £120,000 to each of the siblings as potentially exempt transfers (PETs) for IHT purposes.
16. The next step was to acquire a property that could be developed. In January 2009, Tim began looking for properties. He investigated in detail 4 properties, which were in Greenwich and Kent: and settled on a property called Scarletts in Kent in September 2009. This comprised a main house (which was listed), an oast house and some adjoining land, and a plot known as the Coach House. Tim’s evidence is that he discussed with his siblings invoicing the Company for his property search work, and that they agreed that he could invoice a total of £15,000 plus VAT = £17,250 (referred to in evidence as “finder’s fees”). Kate and Jenny had no recollection of this discussion, but I place limited reliance on that evidence, since, as set out below, their memory was patchy in a number of respects. The evidence includes a General Notice of Interest dated 1 October 2009, pursuant to s.185 of the Companies Act 2006, setting out Tim’s interest in TCAL. The finder’s fees are shown as being paid to TCAL in the Company’s accounts for y/e 8 April 2010; and these accounts are shown as having been approved at an AGM (attended by all 3 shareholders) held on 7 January 2011.
17. Tim’s evidence, which I accept, is that, in early 2009, it was discussed and agreed with his parents that a separate office should be set up for the Company to support its position that it was a trading company, by having a proper commercial operational base; and that that base should be TCAL’s office at Kings Hill in Kent. This, he said, was implemented in March 2009. The Company’s accounts from 2010 onwards record sums paid to TCAL in respect of rent and utilities.

18. The Company bought Scarletts in January 2010, and the Coach House in about October 2010, paying a total of £1,046,500.
19. In July 2010, the Company sold 3 Hawarden Grove to Tim for the sum of £450,000. £200,000 of this sum was provided by the release of a loan to the Company initially made by the parents to the Company, the benefit of which they had transferred to Tim.
20. In 2010, the tenant at 8 Cranbourne Street was experiencing financial difficulties, leading to delays in paying rent and not fulfilling their repair obligations, together with a drainage problem. Tim negotiated new arrangements with the tenant to remedy these matters. The drainage problems continued, and required investigations which revealed asbestos, which was then required to be removed as soon as possible. He then negotiated the surrender of the lease by the existing tenant, and the grant of a new lease in early 2012 to Scribbler, a national greetings card retailer, who took up occupation in March 2012. Tim's siblings were aware of this work and its importance in maintaining the parents' income.
21. Between January 2010 and March 2014 the Company carried out at the Scarletts site a programme of demolition, drainage, ground works, building stabilisation works, landscaping, development design and town planning. Tim was wholly responsible for arranging and supervising this work.
22. In the period from 1 April 2011 to 25 August 2011, Tim invoiced the Company for "planning, development and project management services" at £5,000 per month, making a total of £25,000. Tim's evidence, which I accept, is that he mentioned the invoices to his father, but not the amount, and did not provide him with copies of them. The Company's accounts for the year ending 8 April 2012 record £25,000 in consultancy fees paid to Tim, and that he is a director. Those accounts are recorded as having been approved at an AGM held on 6 January 2012 attended by Tim and his mother.
23. On 28 November 2011, the father died. The principal assets in his estate were his shares in the Company and his half share in the matrimonial home, 29 Hillside Street, Hythe, Kent CT21 5EW, the other half being held by the mother.
24. On 4 January 2012, Tim emailed his siblings:

"We also need to review my remuneration because I am spending an awful amount of time on all of this, Scarletts, sorting out Cranbourne, developing ideas to shelter from IHT, other JP matters and probate."
25. Kate replied the same day, copying in Jenny and John:

"Thanks Tim and of course you must be paid for your time. We all know you've put in huge amounts of effort sorting this out."
26. Jenny also replied the same day:

“I SO agree you should have remuneration for the tremendous amount of work you have done and are doing for JP- absolutely no doubt at all. My only worry is where it is coming from?”

27. Following this exchange, it appears that Tim put forward proposals (but the evidence did not include any documents recording them). John replied on 18 April 2012:

“As requested Jenny, Kate and I have now discussed the whole JP and Scarletts scenario and taken into account your opening proposals. ... What follows ... is our collective view.

...

Before we start however we all want to acknowledge what a superb job you have done in converting JP from an investment company into a trading company and saving us all a huge amount of tax – about £600,000. We would like to acknowledge that alone by giving you £60,000 as a “bonus”.

We do want to acknowledge what you have done Tim, but feel that 50% of the net profit from Scarletts is quite steep. We are each prepared ... to allow you to take 32.5% and each of us only 22.5% each.

...

With regard to the demise of your own business, that’s a very difficult situation. The brutal truth is that nobody forced you to neglect your business, it was a decision you made yourself.

...

Now we must address your need for a salary. ... we are not totally dismissing the idea of a salary but funding is problematic and because of this we are unable to support the idea of a salary in perpetuity so to speak.

...

We are willing in principle to support a salary for a limited time so that you can achieve the next phase of planning, but it HAS to be for a limited period with a clearly defined purpose.

...

In summary therefore:-

1. We agree to your receiving a £60,000 bonus on its inheritance tax saving.
2. When Scarletts is sold you will receive 32.5% and we will receive 22.5% of the total dividend payment.
3. We need to talk about a salary because we don’t really know how we can fund it, though we are not against it with certain caveats in place.”

28. There is no evidence that Tim replied to that email. In April 2012, Tim put TCAL into voluntary liquidation. He cross-examined Jenny on the basis that his work on the Scarletts project and Cranbourne Street had given rise to financial difficulties which led to TCAL’s insolvency.
29. Following the grant of the lease of 8 Cranbourne to Scribbler in early 2012, Tim began marketing it for sale as an investment. An offer was accepted in mid 2012.

(emphasis added)

35. His sisters responded supportively on the same day. Kate emailed “your input into sorting JP/Ma and Pa out has been invaluable”. Jenny emailed “I know you need a living (don’t we all) and I think Kate and I are very much behind you.” There was then a meeting of the 3 siblings (Tim, Kate and Jenny) in London at the BFI on the South Bank on 29 March 2013. The following day Tim wrote to his sisters:

“I’m glad our discussion worked out OK in the end, although it worries me that you were thinking badly of me for a few days after receiving my email.”
36. On 31 March 2013, Tim again emailed his sisters: “I want to explain how I propose to pay myself for the years of toil associated with trading JP... I propose I take over the land south of Furnace Lane as payment”. He referred to their upcoming meeting to which he would be bringing details of various matters, including “expenditure to date on administering the estate”.
37. That further meeting (of all 4 siblings) took place at 29 Hillside Street on 4 April 2013, at which Tim produced a document entitled “JMC and TWMC Family Loans”. This sets out monies received by Tim, including loans from his sisters (later repaid from the estate account), share sale proceeds, payments of the closing balances on his father’s and mother’s bank accounts, and rent from Cranbourne Street. There was no evidence as to the discussions at that meeting, but no one suggests that agreement was reached as to the amount Tim should receive.
38. On 10 March 2014, HMRC accepted that the Company’s shares were subject to business property relief. The 89 shares in the mother’s estate were valued for probate at £1,011,396. This resulted in an IHT saving of £404,558.40 (40% of the value).
39. In April 2014, the building works at Scarletts were completed, and in June or July that year it was put on the market at £1.9 million. At that point, the market for large country houses deteriorated as result of the uncertainty caused by Brexit, a threatened mansion tax and significant increases in stamp duty land tax.
40. Around the same time, Tim decided that John should receive on account of his entitlement to the mother’s estate the other half of 29 Hillside Street. He presented this as a *fait accompli* to his sisters. They were unhappy with this decision, and considered it unfair. Kate, in particular, had recently separated from her husband, and had anticipated receiving one quarter of the sale proceeds of 29 Hillside Street to enable her to refurbish a house in London she was buying. This was the beginning of the breakdown in the relationship between Tim and his sisters.
41. On 10 March 2015, John wrote to his sisters proposing that Tim receive as remuneration 50% of the tax saved on the mother’s estate, and the enhanced value on Scarletts. He also set out that Tim had paid himself £188,808 from the executor account (though he did not set out sums Tim had received from the Company).
42. Jenny and Kate replied on 18 March 2015 agreeing that Tim should receive 50% of the “upside” on Scarletts “on condition that the affairs of the estate are concluded by the

end of 2015". They did not agree to his having 50% of the tax saving, which they said should be shared equally between the siblings.

43. In April 2015, the Coach House and land associated with it were sold for £440,000.
44. On 16 March 2016, Knight Freeman valued Brewers Lane at £375-420,000. On 23 August 2016, a grant of double probate was made to John.
45. In December 2016, the claimants brought a claim under s.50 of the Administration of Justice Act 1985 to remove Tim and John as executors. On 8 February 2017, Chief Master Marsh decided that they should be removed, and replaced by the administrator.
46. Scarletts itself was finally sold in March 2017 for £1 million. The total realised from the Scarletts site (including salvage materials and the Oast House) was £1,630,500. The gross profit on Scarletts was therefore £584,000: it was bought for £1,046,500. However, the project overall made a loss of £45,000.
47. On 19 May 2017, Brewers Lane was sold by the Company for £500,000.
48. In June 2017, John proposed putting the Company into liquidation, asking the administrator to mediate on Tim's drawings and wind everything up. Tim executed a declaration of solvency preparatory to this course. The claimants' solicitors agreed to appointing a bookkeeper to carry out the bulk of the audit work. However, the administrator did not agree to this course. She required, and Tim provided, an undertaking not to put the Company into liquidation.
49. The administrator also instructed James Mackie of MHA MacIntyre Hudson to review "the documents relating to [the Company] and also of its director's conduct and the interaction of both with the estate." Mr Mackie's report ("the MHA report") is undated (but shown in the bundle index as dated 22 January 2018) and its appendices (other than B) are not included. Various adjustments to it suggested by Tim were accepted in Mr Mackie's email dated 27 September 2019.
50. On 1 October 2018, the Company was placed into voluntary liquidation. The net sum distributable to shareholders was £1,133,684.30, of which the administrator's share (89/90) was £1,121,087 and Tim's share (1/90) was £12,596.
51. On 18 April 2019, counsel instructed by the administrator, Stephen Schaw Miller, produced an Updated Note on dividing the estate. This contains a detailed analysis of the factual and legal issues, and concludes by suggesting mediation as a sensible course, which unfortunately was not followed.
52. On 1 May 2019, in response to the structure suggested by counsel for resolving the issues between the parties, Tim produced a "Road Map towards understanding the estate financials and agreeing Final Distributions" ("the Road Map"). Considerable progress was made in following this.
53. In particular, 3 relevant dates were identified for valuing the distributable estate; and those values agreed between the parties:

Date	Significant event	Net value of estate after tax & expenses	Beneficiaries' share of estate
Dec 2008	Tax planning commences	2,056,264	514,066
3 June 2012	Date of death of the mother	1,973,015	493,253.75
Aug/Sep 2019	Date of agreement as to then current value of net estate		
	(1) Before deducting costs of administration and sums received by Tim	2,771,479	692,870
	(2) After deducting costs of administration & sums received by Tim	2,283,063	570,765

54. However, in late 2019, regrettably relations between the parties broke down again.

55. This claim was issued on 17 September 2020. The relief sought includes:

- “(a) directions to [the administrator] as to what final distribution should be made to the beneficiaries of [the mother] ..., in particular
- (i) a declaration that [Tim] is required to bring into account all payments made to him after [the mother’s] death from [the Company] or [the mother’s] estate as payments made on account of his entitlement to a share of the residuary estate, save for agreed out of pocket expenses
 - (ii) a declaration that [Tim] is not entitled to remuneration for his work as director of [the Company]
 - (iii) a declaration that [Tim] is not entitled to remuneration for time spent acting as executor of [the mother’s] estate
 - (iv) a declaration that [Tim] is not entitled to an allowance for work carried out as either director of [the Company] or as executor of [the mother’s] estate in converting the Company from an investment company to a trading company as part of a so-called tax mitigation scheme ...
 - (v) alternatively, if such an allowance is to be made, that such allowance be quantified
 - (vi) a declaration as to what amount, if any, [Tim] has received in excess of his entitlement
- (b) Directions as to the amount of final distribution due to [Kate and Jenny] and a direction that such distribution be made.”

56. The administrator and John each filed acknowledgments of service stating that they did not intend to defend the claim.

Witnesses

Claimants

57. The claimants’ written evidence comprised:

- (1) Kate’s first witness statement dated 15 September 2020 (“Kate 1”);
- (2) Kate’s second witness statement dated 21 May 2021 (“Kate 2”);
- (3) Jenny’s first witness statement dated 20 May 2021 (“Jenny”).

58. Both Kate's and Jenny's witness statements understate the extent of their knowledge of and involvement with the work done by Tim, to an extent that is plain from the contemporaneous documentary evidence, particularly emails passing between the parties.
59. By way of examples, in Kate's evidence:
- (1) In Kate 1, she refers to the decision to try to convert the Company into a trading company, without any mention of her involvement in that decision or the Simpsons meeting in December 2008. However, in Kate 2, she accepted that the Simpsons meeting (set out by Tim in his evidence) had taken place, and that all 4 siblings had in fact agreed that the steps set out in the "Sibling Board Meeting" document (discussed at the Simpsons meeting) should be taken.
 - (2) At para 12 of Kate 2, she states that she did not recall other discussions as to how tax might be saved, like gifts out of income. This is set out in the "Sibling Board Meeting" document; and in cross-examination, Kate accepted that obtaining relief on gifts out of income was discussed and agreed at the Simpsons meeting.
 - (3) At para 15 of Kate 2, Kate sets out that there were family discussions about the other siblings being involved. In cross-examination she accepted that the family would not have wanted John to be involved (other than in a purely practical way) because he had a bad track record in business.
60. By way of examples, in Jenny's evidence:
- (1) At para 7 of Jenny 1 she says she did not agree to Tim being paid. As is apparent from the above, she accepted the principle of payment on numerous occasions;
 - (2) At para 9 of Jenny 1 she says that Tim had not mentioned that he was suffering financial difficulties or that his work on the Scarletts project was impacting his other work – it is apparent from the email of 18 April 2012 that Tim told her about this, as she accepted in her oral evidence, though "it was not top of my list";
 - (3) At para 12 of Jenny 1 she says that the first occasion on which she became aware of what Tim was paying himself was when she received the email from John in March 2015. This was plainly incorrect: Tim's email of 22 March 2013 (set out above) includes "pay already taken, say £200,000".
61. What emerges from their evidence as a whole is that having agreed that the Scarletts project should go ahead, and Tim being happy to run it on his own, Kate and Jenny were also happy for him to do so, and did not seek to become involved in it to any significant extent. Contrary to their written evidence, they were provided with considerable amounts of information by Tim, but did not always engage with it. For example, at para 34 of Kate 2, she states that she first knew about Tim having paid himself money from the estate when she read John's email of 10 March 2015. However, she accepted that Tim's email of 22 March 2013 stated that he had already taken £200,000 and that she "just did not pick up on it at the time."
62. Most importantly, despite the claimants' position in the claim being that Tim is not entitled to any remuneration, as noted above, they both accepted in cross examination that the principle of payment was agreed, albeit that the amount was not.

Tim

63. Tim's evidence consisted of:

- (1) his first witness statement dated 26 October 2020 (“Tim 1”);
- (2) his second witness statement dated 30 April 2021 (“Tim 2”).

64. Tim has acted in person throughout this claim. His witness statements are a mixture of factual evidence and argument. He gave his evidence honestly and did his best to help the court. In the light of the deficiencies in his sisters’ recollection, I consider his evidence to be generally more reliable than theirs.

Issues

65. Following Kate and Jenny’s oral evidence, their counsel realistically accepted that an allowance is to be made for Tim’s remuneration, although they do not accept that he is entitled to treat the entirety of the sums retained as remuneration. The primary remaining issues were therefore:
- (1) the amount received by Tim (over and above lifetime gifts totalling £320,000, which are not challenged);
 - (2) the amount of Tim’s out of pocket expenses;
 - (3) the legal basis on which Tim’s entitlement to remuneration is based;
 - (4) the appropriate amount of that remuneration.

Legal principles

Director’s remuneration

66. The general legal principles are well established. A director occupies a fiduciary duty in relation to the company, and owes duties as such. Their position was explained in *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18A:

“A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.”

67. Although directors are not strictly speaking trustees of a company’s assets, they are considered and treated as trustees of the company’s property which comes into their hands or is under their control. Thus, they owe a fiduciary duty to the company to apply its assets only for the proper purposes of the company: *Selangor United Rubber Estates v Craddock (No.3)* [1968] 1 WLR 1555, 1575.
68. A director does not have a right to be remunerated for any services performed for the company except as provided by its constitution or approved by the company’s members. This rule is an aspect of the general principle that a director is not allowed to make a profit unless expressly permitted. See *Palmer’s Company Law*, para 8.901 and the cases cited there.
69. In *Guinness v Saunders* [1990] 2 AC 663, a director (Mr Ward) was paid £5.2 million in remuneration for “advice and services” provided in relation to a (successful)

takeover bid, and was a percentage of the ultimate value of the bid. That payment was not authorised by the board of directors. The agreement for his services was entered into by a committee of 3 of the directors (including Mr Ward himself). It was held that under the relevant article (article 91) only the board as a whole could authorise the payment and therefore Mr Ward could not retain it.

70. Mr Ward argued that he was nonetheless entitled to be awarded an amount by way of quantum meruit or equitable allowance for his services, which the company accepted were valuable. The quantum meruit claim was rejected on the grounds that the implied agreement it required had, under article 91, to have been entered into by the board. The claim for an equitable allowance was rejected on the ground that the court would not usurp the functions conferred on the board by the articles to decide whether a director should receive remuneration: p689F-H. The decision in *Boardman v Phipps* [1967] 2 AC 46, that in exceptional circumstances remuneration may be awarded to a trustee, was distinguished on the grounds that in the case of a director, the relevant power was conferred on the board by the articles.
71. A similar result was reached in *Re Richmond Gate Property Co* [1965] 1 W.L.R. 335, where again a director's claim to payment on a quantum meruit basis was rejected because, under the articles, his entitlement was only to such remuneration as the directors determined. This, it was held, excluded his claim on a quantum meruit basis, and, since the directors had not determined that any remuneration should be paid to him, he was not entitled to any.
72. As to approval by the members, the position is governed by the so-called *Duomatic* principle from the decision in *Re Duomatic Ltd* [1969] 2 Ch 365, in which Buckley J stated:

“where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.”
73. More recently, Neuberger J (as he was) described the *Duomatic* principle in wider terms:

“The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.”
74. For the *Duomatic* principle to apply, it is necessary to show that everyone entitled to vote on the question applied his or her mind to it and decided in favour of the step taken: *Sharma v Sharma* [2013] EWCA Civ 1287 at [52]. The agreement may be “express or by implication, verbal or by conduct, given at the time or later, but nothing

short of unqualified agreement, objectively established, will suffice”: *Schofield v Schofield* [2011] EWCA Civ 154, [2011] 2 BCLC 319 at [32].

Executor’s remuneration

75. Again, the general principles are well established. An executor is not entitled to remuneration for personal time and trouble in the execution of their duties. This applies whether or not the representative is deserving, and whether or not their actions have benefited the estate or have been prejudicial to their own affairs. See *Williams, Mortimer & Sunnucks* (21st edn), para 51-02.
76. This principle extends to a representative who is the registered holder of the deceased’s shares in a company. If the control that those shares give them enable them to obtain a remunerated post (such as that of director or managing director) in that company then, although the remuneration they receive from the company is for work done in their post for the company, they are prima facie liable to account for it because they obtained it by virtue of the estate’s shareholding: *Williams*, para 52.43 citing *Re Llewelin’s Will Trusts* [1949] Ch. 225. It does not, however, in my judgment, apply where the directorship and any remuneration agreed to be paid are obtained before the executorship, since the executorship has not been used to obtain the benefit.
77. In addition, the court has a power, under its inherent jurisdiction, to authorise remuneration of a personal representative for services in connection with the estate. Both *Williams* at para 51-09 and *Lewin on Trusts* (20th edn) at para 20-049 cite *Re Worthington* [1954] 1 W.L.R. 526 as authority for the proposition that this power is to be exercised sparingly and in exceptional circumstances.
78. However, in more recent cases, the court has taken a less strict approach where the fiduciary has carried out substantial work and/or used their skill and labour to benefit the beneficiary. As to the principles applicable to this balancing exercise, I have been assisted by the illuminating analysis of Lord Goldsmith QC (sitting as a Deputy Judge of the High Court) in *Badfinger Music v Evans* [2002] EMLR 2. I derive the following propositions from that decision:
 - (1) In general, a fiduciary is not entitled to be remunerated for their work except that which was agreed in the trust instrument/will or by the beneficiaries: *Guinness plc v. Saunders* [1990] 2 A.C. 663;
 - (2) The general rule is not inflexible, but admits of exceptions.
 - (3) Examples of cases where trustees or fiduciaries were held entitled to remuneration, notwithstanding that they had previously no agreement either in the trust instrument or from the beneficiaries for such remuneration include:
 - (i) *Boardman v. Phipps* [1967] 2 A.C. 46 - solicitor who was held to have exploited information in the nature of trust property and was held liable to account for the profits, but subject to receiving a proper allowance “on a liberal scale” in respect of his work and skill in obtaining the benefit for the beneficiaries;
 - (ii) *Marshall v. Holloway* (1820) 2 Swans 432 - prospective and retrospective allowance given to trustee of will trusts to compensate him for time and effort expended on the trusts;

- (iii) *O'Sullivan v. Management Agency* [1985] Q.B. 428 - allowance given to manager and associated companies for skill and labour in promoting compositions and performances of the plaintiff, although the agreements had been set aside as in restraint of trade and for undue influence;
 - (iv) *Foster v. Spencer* [1996] 2 All E.R. 672 - trustees of cricket club land allowed allowance for past services in relation to efforts to sell the cricket club ground and to obtain another site;
 - (v) *Redwood Music v. Chappell & Co. Ltd* [1982] R.P.C. 109 - music publishers who had unwittingly infringed the copyright in a song held entitled to a liberal allowance for their skill and labour.
- (4) There is no single statement of principle which would cover all cases in which an exception is appropriate except that the justice of the individual case has to be considered on the facts of that case: *O'Sullivan* at p468;
- (5) The existence or absence of a conflict of interest on the part of the fiduciary is a very important consideration which might in certain cases be determinative, but it is not the only consideration: *Bray v. Ford* [1986] A.C. 44;
- (6) Remuneration is not restricted only to cases where the personal conduct of the fiduciary could not be criticised: *O'Sullivan*;
- (7) Other factors which may be relevant are whether the transaction was of a special character calling for the exercise of a particular kind of professional skill or where the services could only realistically be supplied by the fiduciary: *Phipps v. Boardman* [1964] 1 W.L.R. 993 , *Bainbrigge v. Blair* (1845) 8 Beav. 588 , *Re Worthington* [1954] All E.R. 677 and *Marshall v. Holloway* (1820) 2 Swans 432 applied.
79. As to the level of remuneration allowed on this basis, this is a discretionary decision and depends on the facts of the particular case. The size of the fund is an obvious factor. The cost of employing outside professional help, and the amount of time spent are all relevant. In the end, however, the judge must try to assess what is reasonable in all the circumstances: *Foster v Spencer*.

Discussion and conclusions

Amount received by Tim

80. One of the unusual features of this claim arises from the fact that, although it challenges Tim's entitlement to the sums received by him, the relief sought does not include a claim for an account, and Tim has not produced an account.
81. The sums received by Tim are not therefore listed in a single comprehensive document, and the evidence before the court does not include the relevant primary documents, such as bank statements which would show those sums. The evidence as to sums received is therefore to a degree fragmentary and incomplete.
82. The main evidence before the court is the MHA report. This, as corrected by MHA's agreement in their email of 27 September 2019 referred to above, shows:
- (1) total payment received by Tim from the HSBC Executor account = £197,532

(2) total payment received by Tim from the Company's NatWest account = £105,924.

These sums total £303,276.30. To this must be added various payments from miscellaneous sources including rent from Cranbourne Street (paid into Tim's personal account pending the grant of probate to him), closing balances on bank accounts in the parents' names and proceeds of sale of shares held by the mother. Tim has agreed this figure in the amount put forward by the claimants' solicitors: £78,266.67. On this basis, the total received by Tim is £381,543.

83. This is approximately equal to the total of £380,330 shown in Tim's document produced in November 2019 and entitled "Timeline of TC Annual Payment and Expenses": 2010 to 2017". On 29 November 2019, Tim agreed to accept the MHA figure as the sum received by him. I therefore find that this is the sum he received.
84. The claimants' position in their counsel's opening skeleton argument was that Tim had received £453,338.36 (excluding lifetime gifts of £320,000). Their reasoning is not however set out in their witness statements or the skeleton argument itself. It can be gleaned from the email dated 14 October 2019 from the administrator's firm (Osbornes) to the claimants' solicitors, Tim and John. This sets out that the claimants' position that Tim received a substantial sum referable to "supplier invoices". I assume that this is reference to a print out dated 6 November 2013 from the electronic day books of the Company which is headed "Supplier Invoices (Detailed)" and which lists invoices dated from 5 June 2009 to 30 December 2011.
85. These "supplier invoices" were considered by Mr Mackie, who on 19 November 2019 confirmed to Osbornes that the sums listed were within the figure of £105,924 received by Tim from the Company's bank account. In the absence of countervailing evidence or argument, I so find.
86. In her closing skeleton argument, the claimants' counsel submitted that 4 additional sums were to be added to the total of £381,543:
- (1) the "finder's fees" totalling £17,250 (£15,000 plus VAT) invoiced by TCAL between April and October 2009 (see para 16 above);
 - (2) a loan by the Company to Tim recorded in its accounts for the year ended 8 April 2011 as £38,387, and reduced to £14,586 by 8 April 2012; but not, it is said, taken into account in the MHA report;
 - (3) the difference between the loan recorded as £14,586 at 8 April 2012, and the payments thereafter recorded as having been made of £7,500;
 - (4) the "consultancy fees" totalling £25,000 invoiced by Tim between April 2011 and July 2011 (see para 22 above).
87. As to items (1) and (4), they are listed in the "supplier invoices", and for the reasons stated above, within the £381,543 total received by Tim. As to the loan by the Company to Tim, the Company's final accounts to 2 June 2020 prepared by the joint liquidators (also at MHA) do not show any loans due from Tim to the Company. The clear inference to be drawn is that his loan was fully repaid.
88. I therefore reject the submission that these additional items are to be added to the £381,543 received by Tim.

Out of pocket expenses

89. The principle that Tim is entitled to reimbursement of proper out of pocket expenses was not disputed. These were agreed at £30,000 on the last day of the trial.

Legal basis of Tim's entitlement

Payments from JPL

90. Tim's primary case is that he was authorised by the Company under the *Duomatic* principle to undertake the work on the family's affairs, including but not exclusively to changing the Company into a trading company.
91. It is clear that all the family including the mother and father, as shareholders of the Company, agreed that the Company should be converted into a trading company, and that Tim should carry out all or the majority of the work. Tim, as a quantity surveyor, had the most relevant experience, was a director of the Company, and had been managing his parents' business and affairs for some years. Kate's occupation in her witness statement is described as "arts PR and tour Booker"; and Jenny's as "choreographer". Neither of these occupations confer expertise relevant to property development. In addition in early 2013, Jenny was dealing with breast cancer; and in spring 2014, Kate was undergoing the difficult separation and divorce from her husband referred to above. Understandably these matters limited, in any event, the time they could give to the Scarletts Project. In addition, as noted above, Kate and her sister had concerns about John being involved with the father's affairs, because historically he had been bad with money. As set out in Tim's email of 22 March 2013 (and not disputed by Kate) he asked John twice if he wanted to work with him on the Company's affairs and John refused on both occasions.
92. In his untitled document dated 9 March 2016, Tim sets out that his work overseeing his father's interests from 1997 to 2008, and that it was undertaken entirely by him and without remuneration. He seeks payment for work done by him in implementing the tax mitigation strategies agreed following the meeting in December 2008.
93. There is no evidence that the parents expressly agreed that Tim should be paid for the Scarletts project. However, it is clear that they agreed that he should carry out the work for the Scarletts project, that it was qualitatively different from the work Tim had previously carried out as director, both as to the nature of the work and the time needed to be spent doing it; and that this qualitative difference was known to all the members of the family. Tim submitted that his parents could not reasonably have assumed that he did not expect to be paid for this work, and in fact assumed he would repay himself from the proceeds of the Scarletts project. I accept Tim's evidence that his parents knew that he was having to borrow money to support himself and cash in his pension because the work on the Scarletts project was taking up so much of his time. I also accept that he told them when he and TCAL invoiced the Company, although not the amounts invoiced. I accept that the parents knew and consented to the principle of Tim paying himself, both as the project went along and at its completion when funds became available to do so.
94. This is sufficient, in my judgment, to satisfy the *Duomatic* principle. I find therefore that the Company by its members approved Tim carrying out the Scarletts project and that he should be paid for doing so. As to the basis of payment, this must in my judgment be a fair and reasonable sum.

95. It is not therefore necessary to consider whether Tim has a quantum meruit claim. The decisions in *Guinness v Saunders* and *Richmond Gate* are clear authorities for the principle that a quantum meruit claim by a director is precluded where the articles provide for the board or the members of the company to determine his remuneration. However, in both those cases, no decision at all was made by the board members. In this case, the board members decided, albeit informally, that Tim should carry out the work. It is therefore arguable (though not necessary for me to decide) that Tim is also entitled to recover on a quantum meruit basis.
96. Accordingly, I reject the claimants' counsel's submission that the only basis on which Tim is entitled to remuneration from the Company is the "just allowance" basis.
97. As to determining what amounts to fair and reasonable payment, the following factors are in my judgment relevant, though none are of themselves determinative:
- (1) the actual time spent by Tim on the project;
 - (2) the time that should reasonably have been spent;
 - (3) what it would have cost to obtain the same services commercially;
 - (4) that the Company was a family company, so that Tim would not reasonably be making a profit over and above the value of the work done by him;
 - (5) the anticipated and actual tax benefit resulting from the changed tax status of the Company;
 - (6) the anticipated profit and actual profit on the sale of Scarletts;
 - (7) the fact that Tim was working to achieve a benefit in which he would share one quarter.

Payments from the estate

98. The position is different however in respect of the estate. Contrary to Tim's submissions, the *Duomatic* principle is confined to companies. The only basis on which Tim is entitled to recover in respect of work done as executor is on the "just allowance" basis.

Quantification

99. At my direction, Tim filed a document showing for his closing submissions a table/spreadsheet that set out:
- (1) the heads of remuneration/payment to which he claimed to be entitled;
 - (2) the amount he claimed in respect of each head, and the total.
100. This document is annexed to this judgment and is discussed in detail below.
101. Tim's position in that document was that he was entitled to the following sums:
- (1) remuneration received: £320,000;
 - (2) expenses received: £60,000;
 - (3) sums effectively paid to himself from his own resources (pension drawdown and borrowing from Abbey) as remuneration: £111,000;
 - (4) sums said to be owed by the Company to him (and for which he submitted a proof in the liquidation): £15,000.
102. Tim's total claim was therefore for £446,000. He also produced an Excel spreadsheet showing what is said to be the percentage of his time spent on Company and estate

matters for the period 2009 to 2017. The total time spent equates to 5.95 years over that 9 year period. The daily rate claimed is £326, which equates to an annual rate of £74,980 (5 days a week, 46 weeks a year).

103. This material was in substance evidence, sought to be adduced after close of evidence, and in circumstances where Tim kept no written record of the time spent by him. As evidence of time actually spent by Tim, it is inadmissible. I treat it however as his submissions as to what would be reasonable time to spend on the matters identified.
104. As noted above, the amount for expenses was agreed on the last day of the trial at £30,000, leaving a revised total claimed of £416,000.
105. The claimants' position is that the only work for which Tim is entitled to remuneration is that on the Scarletts project, which, on a just allowance basis, would be £50,000.

Work done for the Company

106. I turn to consider quantifying Tim's remuneration for the work done for the Company by reference to the factors set out at paragraph 97 above.
107. Tim claims for work done for the Company under the following heads (calculated using the rate set out in paragraph 102 above):
 - (1) Property search - £14,621 (45 days);
 - (2) Scarletts project - £386,409 (5.153 years)
 - (3) General property management - £10,347 (32 days);
 - (4) General financial and corporate management - £11,959 (37 days).
108. As to (1) and (2), both these heads of work relate to the Scarletts project and so fall within the work approved by the Company under the *Duomatic* principle. The total claimed under these heads is £401,030, representing 5.35 years at the rate claimed by Tim.
109. Head (3) includes the work done in relation to Brewers Lane, including negotiating with the sitting tenant to obtain a price of £500,000, which was significantly higher than previous valuations.
110. Head (4) is, in my judgment, the ordinary work of a director of a type which Tim was carrying out without remuneration before the Scarletts project was embarked upon.
111. Thus, both heads (3) and (4), in my judgment, are work which fell within Tim's general duties as a director, was carried out by him without payment when his parents were alive, and in any event, absorbed relatively small amounts of his time each year. They are not within the scope of the approval given by the parents (and falling within the *Duomatic* principle), which only related to the work needed for the Scarletts project.

Actual time spent and time that should reasonably have been spent

112. Although Tim did not keep records of the time spent by him, it is clear from the email correspondence with his siblings that from January 2010 (when Scarletts was acquired) to March 2014 (when the development was completed) considerable amounts of time were spent by him, including, but not limited to, frequent visits to the site. 2011 to

2013 were particularly intense years, requiring Tim's experience and expertise in relation to construction projects.

113. Once the development had been completed, I do not consider that the project required the high level of involvement which Tim appears to have allocated to it, or the same level of expertise. By this stage, some of the tasks could have been carried out by other members of the family: for example, attending the site for viewings, and keeping it clean and tidy (and, as stated in Tim's evidence, free of cobwebs). Tim's own business no longer existed, but that could not of course justify treating his work for the Company as a full-time job.
114. In my judgment, on an inevitably broad brush basis, given the absence of detailed records of the work done or the time spent on it, the work done in relation to the Scarletts project, including both the building project and the tax mitigation associated with it should not reasonably have exceeded 4 years of full-time work.

Commercial cost of services provided and discount to reflect family arrangement

115. There was no evidence from either side as to the amount which would have been payable to someone carrying out Tim's role. In those circumstances, the court again has to do the best it can by reference to the available evidence and on a broad brush basis. Tim's proposal of £90,000 per annum in his email of 22 March 2013 is in my judgment plainly too high. I also consider the annual rate of £75,000 pa he seeks in his closing written submissions to be too high. In 2015 and 2016, Tim was paying himself from the Company's account, £1,000 a week, £200 per day, £52,000 pa. In my judgment, this is an indication of the maximum level of appropriate payment. Neither side addressed me on whether the remuneration should be calculated as gross or net of tax; and there was no evidence as to whether Tim had already paid tax on the sums already received by him.

Anticipated and actual tax benefit resulting from the changed tax status of the Company

116. Tim's "Road Map" sets out that the tax mitigation strategy was intended to save the family about £600,000 of inheritance tax. This figure is consonant with the email discussions between the family members during the Scarletts project. This is an important (and limiting) part of the context in which Tim's fair and reasonable remuneration is to be determined. It cannot have been intended that the Company would pay £446,000 to achieve a benefit of £600,000, leaving it with only a net tax benefit of £154,000, in addition to exposing itself to the vagaries of the property market.
117. As to the actual benefit, it was common ground that the business property relief obtained as a result of the alteration of the Company's status was £404,558. However, in circumstances where the Company (and the family) agreed that Tim should embark on the project, a fair and reasonable remuneration is not in my judgment to be reduced by the reduced BPR in fact obtained.

Anticipated and actual profit on the Scarletts project

118. The primary focus of the agreement reached at the Simpsons meeting was the conversion of the Company's tax status, and not the profit to be made on the venture. Although Tim was challenged in cross examination as to the reasons why the project made a loss, I have accepted his evidence as to the reasons why it did: the market for

large country houses deteriorated for a number of reasons. Again, for the reasons given in paragraph 117 above, what is fair and reasonable remuneration should not in my judgment be affected by the loss on the project.

Tim as a beneficiary

119. The fact that the work Tim was carrying out was for his benefit as well as that of his siblings is in my judgment a limiting factor on the level of remuneration that would be fair and reasonable.

Conclusions on remuneration for work done for the Company

120. Doing the best I can on the limited material available, in my judgment, the fair and reasonable remuneration to which Tim is entitled from the Company is to be calculated at an annual rate of £45,000. This reflects the fact that not all of the work done by him required any specific expertise. Applying this rate to the 4 years which I have held is the reasonable amount of time to have spent on the project makes a total of £180,000 (4 x £45,000). Since Tim held one share in the Company, he is to be treated as bearing 1/90 of this, so that the amount to which he is entitled is £178,000. His expenses agreed at £30,000 are in addition to that.

Work done for the estate

121. The position is different in respect of work done for the estate in his capacity as personal representative. The only basis on which Tim would be entitled to remuneration would be if the work done justified a “just allowance”.

122. Tim’s heads of work for his role as executor are (again, at a daily rate of £326) are:

- (1) Executor duties - £9,298 (29 hours);
- (2) Development of IHT saving strategies (including calculations as to payments out of income) - £6,936 (21 hours), of which £3,374 claimed for 2009-2011 – pre-death;
- (3) 8 Cranbourne Street - £6,561 (20 hours).

Executor duties

123. This work comprises the ordinary administration of the estate, in which no special skill was involved and does not justify a just allowance.

Development of IHT saving strategies

124. The evidence is that the IHT saving strategies were developed by Tim in conjunction with the family accountant, Mr Rees, while the parents were alive. The work done by Tim in this regard is not such as to give rise to the inference that he was to be paid for it. Insofar as it was done before the death of the parents, there is no basis for an entitlement to payment. Insofar as work was done after their death, dealing with IHT is part of normal executor’s duties, and does not give rise to an entitlement to a just allowance.

8 Cranbourne Street

125. The work done by Tim at Cranbourne Street between 2010 and June 2012 was similar in character to work done by him without payment in earlier years. There is no evidence that his parents expressly agreed that he should be paid for this work, and no basis for concluding that they impliedly did so. It was completed before the mother died, and cannot form part of his claim for executor’s remuneration.

Conclusions on remuneration for work done for the estate

126. In my judgment therefore Tim is not entitled to remuneration in respect of the heads of work claimed by him in relation to the estate of his parents.

Final remarks

127. I conclude by noting the time, expense and energy which the parties, and consequently the court, have expended on the factual and legal issues in this claim, which are disproportionate to the amounts in dispute. This is a paradigm of a dispute which the parties could have and should have resolved by consensual means.