Case No: QA-2021-000278

Neutral Citation Number: [2022] EWHC 3229 (KB)
IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM MASTER ROWLEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before :

MR JUSTICE CAVANAGH
sitting with
COSTS JUDGE BROWN
as Costs Assessor

- -

Between :

Shepherd & Co Solicitors	**Appellant**
- and -	
Mr Peter Ian Brealey	**Respondent**

- -
- -

Rupert Cohen (instructed by **Shepherd & Co, Solicitors**) for the **Appellant**
John Meehan (instructed by **Jones & Co, Solicitors**) for the **Respondent**

Hearing date: 12 October 2022

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JUDGMENT

Mr Justice Cavanagh:

1. This is an appeal against the judgment of Master Rowley, sitting as a Costs Judge, dated 29 November 2021. The judgment was handed down in third party assessment proceedings that were brought by the Respondent, a beneficiary of the estate of his mother, Mrs Ann Brealey, pursuant to section 71(3) of the Solicitors Act 1974. In that judgment, Master Rowley held that the Appellant was not entitled to be paid the fees that had been levied by the name-partner in the Appellant, Mr Robin Shepherd, for work that he had done in his capacity as executor of the estate of Ann Brealey. The

Respondent had accepted that Mr Shepherd was entitled to charge for work done by him in relation to the day-to-day administration of the estate, but said that, in the absence of a charging clause in his mother's will, Mr Shepherd was not entitled to charge for acting in his capacity as an executor. Master Rowley held that any fees which are claimed as work done by Mr Shepherd as a solicitor in relation to the administration of the estate will require an explanation at the next stage of the detailed assessment hearing (which has yet to take place).

2. Master Rowley had previously dealt, in a judgment dated 7 June 2021, with the permissible scope of the challenges that could be mounted in third party assessment proceedings such as these, in light of the judgment of the Court of Appeal in **Tim Martin Interiors v Akin Gump LLP** [2011] EWCA Civ 1574 ("**Tim Martin**"). The judge held that "The limited "blue-pencil" test approach referred to in **Tim Martin** prescribes the extent of the challenges that can be raised by the claimant to the defendant's bills of costs in these proceedings." (judgment, para 39).

3. For convenience, I will refer to the Appellant as the Defendant, and to the Respondent as the Claimant.

4. I will first summarise the facts and the judgment of Master Rowley dated 29 November 2021, and I will then set out the relevant statutory provisions. I will then deal with the issues which arise in this appeal, in the following order:

   (1) Should the appellate court admit witness statements from Mr Anthony Hayward, another executor of the will, who was Mrs Brealey's brother (and so, the Claimant's uncle), and from Mr Edward Smyth, the only other partner in Shepherd & Co, apart from Mr Shepherd, at the time that the will was executed?;

   (2) Ground 1: Did Master Rowley misapply the test in **Tim Martin** and/or did the judge err in failing to take into account the fact that the charges sought for the time of Mr Shepherd are sought by the Defendant firm, not by Mr Shepherd himself?;

   (3) Ground 2 (referred to as 2(1) in the grounds of appeal): Was the judge wrong not to conclude that the Defendant was entitled to payment for the time spent by Mr Shepherd in his capacity as executor, pursuant to section 29 of the Trustee Act 2000, because the only other executor, Mr Hayward, had agreed in writing to his remuneration?;

   (4) Ground 3 (referred to as 2(2) in the grounds of appeal): Should the judge have exercised the court's inherent jurisdiction to permit the recovery of the fees for the time spent by Mr Shepherd, given what was said to be the unjustified windfall that would otherwise accrue to beneficiaries as a result of the unremunerated services of Mr Shepherd? The Defendant submitted that the judge misdirected himself in law, by finding that the jurisdiction should only be exercised sparingly and in exceptional circumstances. In the alternative, the Defendant submitted that the judge's decision not to exercise the court's inherent jurisdiction was wrong; and

   (5) Ground 4 (referred to as ground 3 in the ground of appeal): If, contrary to the Defendant's primary submissions, the judge was right to disallow Mr Shepherd's fees when acting in the capacity as executor, should the disallowance be restricted

to the profit the Defendant made on Mr Shepherd's time, and not the cost of providing the service for which charge is sought? This ground was not advanced before Master Rowley. (The Appellant contends that this ground was advanced before Master Rowley inasmuch as it is subsumed within Ground 3, but in my judgment this is a new point, or a new refinement, which was taken for the first time on appeal.)

5. I have been assisted by Costs Judge Brown, as Costs Assessor. The Defendant was represented by Mr Rupert Cohen, and the Claimant by Mr John Meehan. I am grateful to both counsel for the conspicuously clear and helpful way in which they made their submissions, both orally and in writing.

Events after the judgment was circulated in draft

6. Before going further, I should refer to events that took place following circulation of my judgment in draft. In the normal way, I invited counsel to suggest corrections. Mr Cohen, counsel for the Defendant, responded by making further written submissions on three matters of substance. These written submissions from Mr Cohen, which included reply submissions in response to submissions filed by Mr Meehan, ran to some 17 pages in total and included detailed analysis of case-law authority. The Defendant's further submissions addressed three issues:

(1) They sought to persuade me that I was wrong to find that Master Rowley had been right to find, for the purposes of Ground 3, that the court's inherent jurisdiction to permit the recovery of the fees for the time spent by Mr Shepherd as executor should be exercised sparingly and in exceptional circumstances;

(2) They sought to persuade me that I was wrong to treat the appeal on Ground 3 as being an appeal against an evaluative judgment of a judge, rather than as an appeal on a point of law; and

(3) They sought to persuade me that I was wrong to regard Ground 4 as a new point which had been raised for the first time on appeal.

7. Mr Cohen acknowledged that, as the Court of Appeal made clear in **Egan v Motor Services (Bath) Ltd** [2007] EWCA Civ 1002; [2008] 1 All E.R. 1156, attempts to reargue the issues in the case once the judgment has been circulated in draft were appropriate only in the most exceptional circumstances, for example, where counsel feels that the judge (i) had not given adequate reasons for some aspect of his decision, or (ii) had decided the case on a point which was not properly argued or has relied on an authority which was not considered. Mr Cohen submitted that these circumstances applied to the present case. In particular, he said that I had failed to deal with a judgment that had not been mentioned in his skeleton argument but upon which he had focused in his oral reply submissions, namely **Perotti v Watson** [2001] All ER (D) 73 (Jul); [2001] Lexis Citation 1695. He said that this case was authority for the proposition that the court's inherent discretion to permit the recovery of a trustee's fees, even if no provision had been made for them in the trust instrument, was a broad discretion, or at least was not one that should only be exercised sparingly and in exceptional circumstances.

8. On behalf of the Claimant, Mr Meehan submitted that there were no exceptional circumstances that would make it appropriate for me to reconsider or redraft my judgment and went on to make submissions in the alternative as to why, if I was prepared to do so, the outcome should be the same.

9. I respectfully wholeheartedly endorse the sentiments expressed by the Court of Appeal in **Egan**, and by the Court of Appeal in the earlier case of **Robinson v Fernsby** [2003] EWCA Civ 1820, in which the Court deprecated the practice of counsel taking the opportunity afforded by the invitation to draw the court's attention to typographical and similar errors to make submissions on further arguments of substance. The very helpful and sensible practice of circulating the judgment in draft is not designed to give the losing side a chance to change the judge's mind. If there are errors or weaknesses in the judge's judgment, the remedy is to apply for permission to appeal.

10. In my view, the third matter that has been raised by Mr Cohen is simply an attempt to reargue a point on which he has been unsuccessful. I have not therefore addressed it in any detail in this judgment, save to the extent that I have added an observation in parentheses at paragraph 4(5) above.

11. As for the first and second matters, these are the ones to which **Perotti v Watson** relates. They are essentially different ways of making the same point, namely that the judge had erred in law in considering the exercise of the inherent jurisdiction, because he had approached it on the basis that it should be exercised only sparingly and in exceptional circumstances.

12. As it happens, I had not overlooked this point, when preparing the first draft of this judgment. I had considered **Perotti v Watson,** but had come to the view that, notwithstanding what is said in that judgment, the judge in this case was right to take the view that the inherent jurisdiction should only be exercised sparingly and in exceptional circumstances. I originally took the view that it was not necessary specifically to deal with **Perotti v Watson** in my judgment. However, in light of Mr Cohen's sustained submissions in reliance upon the case, and upon reconsideration, I accept that it is necessary to deal with the issue of the correct test to apply to the exercise of the inherent jurisdiction in greater detail than I had originally provided. I have, therefore, substantially revised and expanded the relevant section of my judgment, below, in order to address the issue in greater detail.

The facts

13. Ann Brealey's will was executed on 21 March 2014. It had been drawn up by Mr Shepherd. Paragraph 1 of the will stated as follows:

> "1. I APPOINT my brother PETER ANTHONY HAYWARD and ROBIN PETER SHEPHERD Solicitor and the partners at the time of my death in the firm of Shepherd and Co or the firm which at that [time] has acceded to and carries on its practice to be the Executors and Trustees to this Will and I express the wish that one and only one of those partners (or if the appointment of Robin Peter Shepherd fails for any reason to

> take effect then two and only two of them) shall prove the Will and act initially in its trusts"

14. The will did not make specific provision for payment to be made to Mr Shepherd for acting in the capacity of executor. Mr Shepherd had acted for Mrs Brealey once before, but he was not a friend of Mrs Brealey and her family and did not have a close relationship with her. At the time when the will was executed, the only other partner in the firm was Mr Smyth.

15. In the will, Ms Brealey gave 30% of her residuary estate to the Claimant and the other 70% to her daughter-in-law and her grandchildren.

16. Ann Brealey died on 15 April 2014. The main asset in the estate was a property, Park House. At the time when Mrs Brealey died, the Claimant was living in the property. He refused to move out and the executors commenced legal proceedings to obtain vacant possession of the property so that it could be sold. The executors also took steps for the recovery of monies which had been loaned to the Claimant by Mrs Brealey.

17. The Defendant firm entered into a number of retainers with the executors of Mrs Brealey's estate. The principal retainer was dated 30 May 2014 and was concerned with the administration of the estate. The other retainers were concerned with the steps that were taken to obtain possession of Park House and to recover the loan monies from the Claimant.

18. The principal retainer stated that the Defendant was "engaged to apply for a Grant of Representation from the Probate Court" and to "attend to the administration of the Estate and the distribution of the funds under the direction of the Executors and Trustees". It was agreed that the Defendant would be paid by reference to a Time Element which was based on the time spent by the fee earner in question and a Value Element which was based on the value of the assets in question.

19. The retainer was on the Defendant's standard terms and conditions of business, which provided:

> "Our charges will be calculated mainly by reference to the time actually spent by the solicitors and other staff in respect of any work which they do on your behalf. This will include meetings with you and perhaps others, reading and working on papers, correspondence, preparation of any detailed costs calculation, and time spent traveling away from the office when this is necessary. We charge for writing letters and making and taking telephone calls, in units of one tenth of an hour. We review the level of our charges regularly and will endeavour not to exceed our estimate unless we have first discussed this with you. We will normally confirm any revised estimate to you in writing."

20. The principal retainer stated that Mr Shepherd would be responsible for the day-to-day control of the matter, and would supervise the file, but that he would from time to time be assisted by Mr McCullagh, a solicitor, and others in the firm. The principal retainer set out the charging rates for Mr Shepherd and others.

21. Mr Hayward signed the principal retainer.

22. The process of administering Mrs Brealey's estate was complicated and long-drawn-out, largely because it had been necessary to bring possession proceedings against the Claimant and because he challenged or disputed various decisions that were taken by the executors in relation to the estate. The administration of the estate is largely complete. In the most recent draft of the Estate Accounts, the gross value of the estate is £1,018,023.77. The fees of the Defendant were £153,507.38. This is approximately 15% of the value of the estate.

23. Most of the work that was charged for by the Defendant was done between 2014 and 2019. The majority of the fees were charged for time spent by Mr Shepherd. Mr Shepherd retired from the Defendant firm in November 2018. Prior to Mr Shepherd's retirement, other fee earners assisted him in the administration of the estate and, following Mr Shepherd's retirement, the estate has continued to be administered by the Defendant.

24. All of the time that was spent by Mr Shepherd on the estate was done with the approval of his co-executor, Mr Hayward. Some 91 invoices were rendered by the Defendant during the period from mid-2014 to mid-2019. They were addressed to "Mr Hayward" or to "Mr Shepherd and Mr Hayward". The great majority of the invoices were signed by Mr Shepherd and contain the following wording, "invoice placed on file at the express request of the Lay Personal Representative who receives the amount charged in the Administrative Accounts." The invoices were not signed by Mr Hayward, but it is clear that Mr Hayward was aware of this arrangement and was satisfied with it.

25. Mr Smyth retired three months after Mrs Brealey's death. He played no part whatsoever in the administration of the estate and if, which is disputed, he was an executor, he took no steps as executor.

The proceedings and the judgment of Master Rowley dated 29 November 2021

26. On 14 October 2019, the Claimant commenced a claim for a third party assessment of the Defendant's costs pursuant to section 71 of the Solicitors Act 1974. The parties entered a consent order on 14 November 2019 which provided for the procedure laid down in CPR 46.10 to be followed. This made provision for the Defendant to serve a breakdown of costs, following which the Claimant would serve Points of Dispute and then the Defendant would serve Replies. The Defendant duly served a breakdown of costs (entitled "the Bill of Costs") which was some 150 pages long. The breakdown of costs itemised the constituent costs of every invoice – identifying the fee earner and describing the activity for which the fees were charged.

27. The front of the breakdown of costs was indorsed with signed declarations by Mr Shepherd and Mr Hayward that each, being an executor, "hereby approves the Bill of Costs produced by Shepherd & Co". Though neither the breakdown of costs, nor the declarations, is dated, it is clear that the declarations must have been signed some considerable time after the consent order dated 14 November 2019.

28. The Claimant served Points of Dispute, and the Defendant duly served Replies. At this stage, the Claimant was running conventional points about time spent and grade

of fee earner. Master Rowley, the judge assigned to the assessment, duly listed a hearing to determine whether the Claimant had the right to raise challenges of that nature (essentially "quantum" challenges) given the decision in **Tim Martin**. As stated above, in his judgment on 7 June 2021, Master Rowley held that the effect of **Tim Martin** was to impose limitations on the type of challenges that could be made by a third party beneficiary to costs in circumstances such as these. Master Rowley summarised his ruling as to the effect of **Tim Martin** at paragraph 41 of his second judgment, dated 29 November 2021, as follows:

> "I have described the guidance of the Court of Appeal in **Tim Martin** as overarching these proceedings. That decision essentially limits the challenges that can be brought by third parties such as the claimant here to the solicitors costs being either (a) ones which relate to work done outside the terms of the retainer and as such should never have been paid by the executors under that retainer or (b) ones which would only be allowable as against the client on the basis of a "special arrangement."

29. There was no appeal against the ruling of Master Rowley as regards the meaning and effect of the **Tim Martin** judgment.

30. Following his judgment of 7 June 2021, Master Rowley ordered that the parties serve updated Points of Dispute and Replies. In the Claimant's amended Points of Dispute, at Point 5, the Claimant raised for the first time in clear terms the contention that, in light of the absence of a charging clause in the will, Mr Shepherd was not entitled to charge for acting in his capacity as executor.

31. This was the issue that was dealt with by Master Rowley in his second judgment, dated 29 November 2021, which is the judgment that is appealed against. The judgment followed a hearing on 4 October 2021.

32. The judge noted that there was no charging clause in the will and that Mr Shepherd had not provided a witness statement for the court. He said, at paragraph 31, that:

> "It seems to me that I have to conclude that this was the intention of Mrs Brealey on the basis that she should be taken to have put her name to a deed which accurately reflected her intentions. As a starting point therefore, it would seem that Mrs Brealey did not expect her executors to charge for her services."

33. Master Rowley then said that it was clear from the wording of the will that it was intended that there would be at least three executors and trustees to the will: Mr Hayward, Mr Shepherd, and anyone who was a partner in Shepherd & Co. It was true that only Mr Shepherd was required to prove the will, but proving the will as a matter of probate does not affect the number of executors (paragraph 22).

34. Master Rowley found that the Defendant could not rely on the provisions of the Trustee Act 2000, because sections 28 and 29 require the written agreement of the other trustees for remuneration to be paid to a trustee/executor. If Mr Hayward was

the only other trustee, he had not provided any such written agreement. In any event, however, there were three trustees (Mr Shepherd, Mr Hayward, and his partner) and so a majority authorisation would have required the written approval of Mr Smyth, the other partner in the firm, in addition to the approval of Mr Hayward. Mr Smyth had not given any such written approval. (paragraphs 35 and 36). (I should add that, at paragraph 21 of the judgment, the judge said that the requirement is that "a majority" of the other trustees approve the remuneration of a trustee, but this was obviously a slip, and in the next paragraph he set out the text of section 29(2), which refers to the requirement that all of the other trustees give their agreement.)

35. The judge said that, in these circumstances, the only potential route left to authorise the payment of Mr Shepherd's fees for work done qua executor would be to rely upon the inherent jurisdiction of the court to authorise such payment where it would otherwise be inequitable for the beneficiary to take the benefit of the executor's efforts without paying for the skill and labour that produced it. Master Rowley referred to this as the "**Boardman** jurisdiction", after **Boardman v Phipps** [1967] 2 AC 46. He said that an appeal to the court's inherent jurisdiction would require evidence to be placed before the court, and that had not happened in the present case. He further said that the fact that the executors had paid Mr Shepherd's fees in other proceedings was not enough. Similarly, the fact that the Claimant knew of Mr Shepherd's involvement cannot, without more, justify a charge to the estate. Master Rowley said, at paragraph 39:

> "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."

36. Finally, Master Rowley held that the challenge brought by the Claimant to the Defendant's costs came within the permissible scope of challenge, as laid down by **Tim Martin**, because it was one that related to work that was done outside the terms of the retainer and so should never have been paid for by the executors under that retainer, or because it would only have been allowable as against the client on the basis of a "special arrangement". (paragraph 42).

The relevant statutory provisions

Section 71(3) of the Solicitors' Act 1974

37. Section 71(3) of 1974 Act provides that:

> "(3) Where a trustee, executor or administrator has become liable to pay a bill of a solicitor, then, on the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill, the court may order—
>
> (a) that the bill be on such terms, if any, as it thinks fit; and
>
> (b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the, be

made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit."

Sections 28 and 29 of the Trustee Act 2000

38. Section 28 provides, in relevant part:

> "28 **Trustee's entitlement to payment under trust instrument.**
>
> (1) Except to the extent (if any) to which the trust instrument makes inconsistent provision, subsections (2) to (4) apply to a trustee if—
>
> (a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and
>
> (b) the trustee is a trust corporation or is acting in a professional capacity.
>
> (2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.
>
> (3) Subsection (2) applies to a trustee of a charitable trust who is not a trust corporation only—
>
> (a) if he is not a sole trustee, and
>
> (b) to the extent that a majority of the other trustees have agreed that it should apply to him."

39. Section 28 has no application to the present case, because there was no provision in the will, the trust instrument, entitling Mr Shepherd to receive payment out of the estate.

40. Section 29 provides, again in relevant part:

> "(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."

41. Section 31(1) of the 2000 Act deals with Trustees' expenses. Section 31(1) provides that:

> "31 **Trustees' expenses.**
>
> (1) A trustee—
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,
>
> expenses properly incurred by him when acting on behalf of the trust."

Sections 5 and 8 of the Administration of Estates Act 1925

42. The parties also referred in their arguments to sections 5 and 8 of the Administration of Estates Act 1925. These provide:

> "5 **Cesser of right of executor to prove.**
>
> Where a person appointed executor by a will—
>
> (i) survives the testator but dies without having taken out probate of the will; or
>
> (ii) is cited to take out probate of the will and does not appear to the citation; or
>
> (iii) renounces probate of the will;
>
> his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his

> real and personal estate shall devolve and be committed in like manner as if that person had not been appointed executor.
>
> ….
>
> 8. **Right of proving executors to exercise powers.**
>
> (1) Where probate is granted to one or some of two or more persons named as executors, whether or not power is reserved to the others or other to prove, all the powers which are by law conferred on the personal representative may be exercised by the proving executor or executors for the time being and shall be as effectual as if all the persons named as executors had concurred therein.
>
> (2) This section applies whether the testator died before or after the commencement of this Act."

The correct approach to appeals on costs issues

43. On behalf of the Claimant, Mr Meehan emphasised that an appellate court should give considerable weight to the decision of a Costs Judge on a costs matter, and should be slow to interfere with it.

44. He cited the well-known statement of Wilson LJ in **SCT Finance v Bolton** [2002] All ER 434 (CA), at paragraph 2. Wilson LJ said:

> "This is an appeal…in relation to costs. As such it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs…For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

However, that statement was made in relation to an appeal against a judge's general discretion in relation to the assessment of costs under CPR 44.3(1). The present appeal is not concerned with such an assessment. Rather, Grounds 1, 2 and 4 raise points of law. As such, the appellate court must itself seek to identify the right answer to the points of law, whilst bearing in mind that appropriate deference should be shown to the expertise of a specialist judge such as a Costs Judge. Ground 3 is, in part, a challenge on a point of law and, in part, a challenge to a judge's evaluative judgment (akin to the exercise of a discretion). As regards the latter, the scope for intervention by an appellate court is narrower, not because the subject-matter is costs, but because the grounds upon which an appellate court can set aside a discretion, or similar, exercised by a first-instance judge are relatively narrow.

Should this court admit the witness statements from Mr Hayward and Mr Smyth?

45. The Defendant seeks leave to rely upon two short witness statements, both dated 7 October 2022, from Mr Hayward and Mr Smyth. The Claimant submits that I should not admit these statements.

46. The test for the admission by an appellate court of witness statements that were not before the first instance court is that set out by the Court of Appeal in **Ladd v Marshall** [1954] 1 WLR 1489. The questions for the court are:

(1) Could the evidence have been obtained with reasonable diligence for use at the trial?;

(2) Is the evidence such that, if given, it would probably have an important influence on the outcome of the case, though it need not be decisive?; and

(3) Is the evidence such that it is presumably to be believed, such that it is apparently credible, though it need not be incontrovertible?

47. Mr Meehan also pointed out that the statements were only served on the Claimant's legal advisers a few days before the hearing. In the circumstances of this case, this is not a reason to exclude them. The Claimant's advisers have had sufficient time to consider them, and will not have been surprised by their contents. The nature of the evidence is not such that, if there had been more time, the Claimant could have produced evidence of his own to gainsay them. A feature of the two statements is that they are short and, they do not say anything particularly new or surprising.

48. I will consider them in turn, starting with Mr Smyth's statement.

49. Mr Smyth's statement says two things. First, he says he has not from and including the date of death of Mrs Brealey intermeddled in her estate, nor has he done any deed or action to accept the office of executorship with power reserved or trusteeship from and including the date of her death of the Testator to the date of his statement. Second, he said that if the will was effective to impose some office or responsibility on him, whether as executor or trustee, then he disclaims and renounces any such office or responsibility and undertakes to take all necessary steps to make that action effective at law insofar as this witness statement is not sufficient.

50. As for the first point, for what it is worth, this satisfies the requirements of the **Ladd v Marshall** test. It is credible evidence, and it is at least potentially relevant to a central matter that has been argued before me, namely whether Mr Smyth was an executor at the material time – this is potentially relevant to the argument based on section 29 of the Trustee Act 2000. I accept that the Defendant cannot properly be criticised for failing to put this evidence before Master Rowley at the hearing in October 2021, because the status of Mr Smyth as an executor was only raised for the first time by the Claimant's counsel during the course of oral argument at the hearing itself. I say that this evidence satisfies the **Ladd v Marshall** test "for what it is worth" because I am not sure that it advances matters very significantly. As I read the judgment of Master Rowley, he and counsel proceeded on the basis that Mr Smyth had not taken any positive steps as executor and had had no involvement in the administration of the estate. Indeed, as the judge was aware, he retired from the firm some three months after Mrs Brealey died. This part of Mr Smyth's statement, therefore, does no more than confirm the position as it was assumed to be.

51. As for the second point made in Mr Smyth's statement, I think it is in the interests of justice to admit it also, even though, as I will explain later in this judgment, I do not think that it assists the Defendant's case. Nonetheless, it is at least potentially relevant to the section 29 argument.

52. Accordingly, I admit and have taken account of the statement of Mr Smyth.

53. Mr Hayward's statement, however, is in a different position. The Defendant was aware well in advance of the hearing before Master Rowley on 4 October 2021 that there was an issue as to whether Mr Shepherd and/or the Defendant were entitled to recover fees incurred by Mr Shepherd when acting in his capacity as executor. This was stated to be the position by Master Rowley at paragraph 10 of his judgment of 29 November 2021. It would have been obvious well in advance of the hearing that a statement of Mr Hayward would have been potentially relevant to this issue, but no such statement was placed before the court. Accordingly, whilst the contents of this statement satisfy the second and third criteria of the **Ladd v Marshall** test, they do not satisfy the first criterion.

54. For this reason, I decline to admit Mr Hayward's statement. However, I have read it de bene esse and I should observe that I do not think that the Defendant is disadvantaged in any way by the exclusion of this statement. This is because the contents of the statement effectively reflect the factual position that was already clear, by inference, from the material before Master Rowley. It was clear from the documentary evidence before the Master that, at all material times, Mr Hayward was aware of, and approved of, Mr Shepherd's activities, and intended and expected that he would be paid for the entirety of his services, whether in the capacity of executor or as administrator of the estate. There was no suggestion that, whatever the position in law might be, Mr Hayward ever regarded Mr Smyth as a fellow executor. Nor was there any suggestion that Mr Shepherd was a friend of Mrs Brealey. In so far as Mr Hayward's statement states that he believed that his sister expected that Mr Shepherd would be paid for his services as executor, this is speculation. Accordingly, in my judgment, the main part of Mr Hayward's statement simply confirms the factual basis upon which the hearing before Master Rowley was conducted. To the event that it consists of speculation, it would not assist the court, even if it was admitted.

Ground 1: Did Master Rowley misapply the test in Tim Martin and/or did the judge err in failing to take into account the fact that the charges sought for the time of Mr Shepherd are sought by the Defendant firm, not by Mr Shepherd himself?

55. The **Tim Martin** case was different from the present case in that it was not a case involving a third party costs application by a beneficiary under a will or a trust, made pursuant to section 71(3) of the Solicitors' Act 1974. Rather, it was concerned with an application, made under s71(1) of that Act, by a person other than the party chargeable with the bill for the purposes of section 70 who has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill. The **Tim Martin** case was concerned with a borrower who defaulted on a mortgage. The borrower challenged the costs that had been paid by the bank to the solicitors who acted for the bank in relation to the steps were taken to enforce the mortgage, and which were then recovered from the borrower by way of contractual indemnity. The borrower claimed that the solicitors' costs had been inflated and the bank had no

particular incentive to control the solicitors' costs, as the bank knew that they would be paid by the borrower. The solicitors contended that the court had no power to review the costs that had been paid to the bank or to order the solicitors to pay to the borrower any amounts that the court considered should not have been paid, or were overpaid.

56. In its judgment in **Tim Martin**, the Court of Appeal held that the scope of a challenge by a third party under section 71(1) was severely limited. Lloyd LJ, who gave the judgment of the Court, summarised the position at paragraph 95 of the judgment:

> "The effect of my conclusions as regards both quantification and payment is that a third party assessment under section 71 is of limited use to a third party. As regards quantification it only allows the costs judge to follow what might be called a blue pencil approach. He can eliminate (a) items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability, here as mortgagor, and (b) items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR rule 48.8(2)(c) [now rule 46.9(3)(c)]. He cannot either eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under s 70."

57. In **Tim Martin**, some of the solicitor's fees were "foreign to the mortgage relationship" (judgment, paragraph 67) on the basis that they were fees incurred in relation to bankruptcy proceedings. The Court of Appeal held that the borrower was entitled to challenge these fees. They came within category (a) in paragraph 95 (See, also, paragraph 83).

58. At the hearing on 10 May 2021, which led to the first judgment of Master Rowley, 7 June 2021, Mr Meehan had argued that **Tim Martin** only applied to proceedings under section 71(1) of the 1974 Act, and not to proceedings under section 71(3). Master Rowley rejected this submission: see judgment of 7 June 2021, at paragraphs 27 and 28. There was no appeal against this ruling and so the question whether the **Tim Martin** ruling applies to proceedings under section 71(3) has not been an issue that I have needed to address in this appeal. I must proceed on the basis that **Tim Martin** applies to proceedings under section 71(3).

59. Applying the ruling in **Tim Martin** to the present case, this means that it is not open to the Claimant to challenge fees that were properly incurred by the Defendant for work done for the benefit of the estate, on the basis that the Claimant believes that the charges were excessive, or that too much time was spent on a particular piece of work, unless the charges could have been challenged on that basis by the client, under section 70. However, the Claimant is entitled to challenge some of the Defendant's fees on the basis that the fees were not incurred for work that the estate was liable to pay for. Therefore, the issue becomes whether the Defendant was entitled to charge the estate for work done by Mr Shepherd in his capacity as executor, as opposed to work done by Mr Shepherd or others in the Defendant firm in the administration of the estate. In his skeleton argument, Mr Cohen put the point

slightly differently, saying that the only challenge which the Claimant is permitted to run is to argue that the estate is not liable to reimburse the executors for their liability to the Defendant. I do not consider that this is any different in substance to the issue as I have defined it. As Mr Meehan put it in oral argument, the key point is whether a third party beneficiary on a detailed assessment under section 71(3) can challenge costs authorised by a professional executor in circumstances in which it is alleged that the executor had no authorisation for the expenditure.

60. The Claimant says that Mr Shepherd's firm is not entitled to recover fees charged for his services as executor, whereas the Defendant says that the estate was liable to pay the firm for the fees that were earned by Mr Shepherd for work done in his capacity as executor, just as it was entitled to recover the fees that were incurred for the work done by him in relation to the administration of the estate. This is the matter that was addressed by Master Rowley in his second judgment.

61. Some at least (the Claimant may say much) of the work done by Mr Shepherd was in his capacity as executor, giving instructions, and taking strategic decisions along with his fellow executor Mr Hayward, and this can be distinguished from work that was done by Mr Shepherd and his colleagues as administrators. I do not understand it to be seriously in dispute that a distinction can be drawn between work that is done by a professional solicitor executor qua executor and qua administrator. In any event, it is clear, in my judgment, that there is such a distinction. The Law Society recognises such a distinction in its Practice Note of 3 September 2020 titled "Appointment of a Professional Executor." The Practice Note states:

> "It should be clear whether the amount quoted is for the work involved in administering the estate or whether it is simply the fee for acting as executor and supervising others doing the necessary work."

62. However, it may well be that it is sometimes difficult to identify whether a particular piece of work was done qua executor or qua administrator, but that is not a matter for this judgment. This is a matter that will have to be addressed in the next stage of the detailed assessment hearing, if I dismiss the appeal.

63. In the first ground of appeal, Mr Cohen submitted that paragraph 42 of Master Rowley's second judgment demonstrates that the judge fell into error because he focused on the terms of the retainer between the executors and the Defendant firm, rather than on whether the executors can turn to the estate to indemnify them for their liability to the Defendant. Another way of putting this latter question is whether the estate is liable for the work for which charges are being levied.

64. I agree with Mr Cohen that the issue is whether the sums charged by the Defendant for Mr Shepherd's work qua executor was outwith the liability of the beneficiaries of the estate (to adopt the language used by the Court of Appeal in **Tim Martin**). This question cannot be determined by reference to the language or scope of the retainers that were entered into between the executors and the Defendant. It depends upon the terms of the will, and upon whether there is any other route in law by which the estate became liable to pay the Defendant for Mr Shepherd's services in his capacity as executor (such as section 29 of the Trustee Act 2000, or the **Boardman** jurisdiction). However, in my judgment it is clear from the judgment of Master Rowley dated 29

November 2021 that he had this well in mind. He addressed the right issues in the judgment, namely the significance of the absence of a charging clause in the will, and the questions whether a right to payment arose as a result of section 29 of the Trustee Act 2000 or the **Boardman** jurisdiction.

65. The judge said the following at paragraphs 41 and 42 of his judgment:

> "41. I have described the guidance of the Court of Appeal in **Tim Martin** as overarching these proceedings. That decision essentially limits the challenges that can be brought by third parties such as the claimant here to the solicitors costs being either (a) ones which relate to work done outside the terms of the retainer and as such should never have been paid by the executors under that retainer or (b) ones which would only be allowable as against the client on the basis of a "special arrangement."
>
> 42. It seems to me quite clear that the charges rendered by the solicitors for Mr Shepherd's time as an executor fall into at least one of category (a) or category (b). They are not within the retainer documentation and cannot be brought into the retainer by any of the other routes put forward by the defendant here. To the extent that they are payable by the executors, that will only be by way of a special arrangement and as such is no defence to a challenge by a third party such as the claimant."

66. The reference to the "retainer" in paragraph 42 was, with respect to the judge, simply a slightly infelicitous shorthand for legal obligations owed by the estate to pay the costs of the solicitors that had been retained. However, in my judgment, it is clear that this was what he meant. In paragraph 41, the reference to the "retainer" in the context of **Tim Martin** is plainly a reference, not to a solicitor's retainer, i.e. the contract between the solicitor and the client, but to the scope of the obligations that govern the liability of the third party (here the estate and the beneficiaries) to pay the fees of the solicitors. It is clear, in my view, that the judge used the word "retainer" in paragraph 42 in the same sense. The judge used the word "retainer" in a similar manner at paragraph 12 of the first judgment of 7 June 2021. Even if I am wrong, and the judge was referring to the terms of the retainer contracts between the executors and the Defendant firm, this does not give rise to a reason why the judge's judgment should be set aside. As I have said, it is clear from the body of the judgment that the judge asked himself the right questions as regards whether the estate and the beneficiaries were liable to pay the costs incurred by Mr Shepherd when acting as executor.

67. I should add that I do not agree with Mr Cohen that it is clear from the principal retainer documentation that the intention was that the executors would be liable for the work done by Mr Shepherd in his capacity as an executor. In fact, the principal retainer is silent on the matter. It states that the executors will be liable for the work done by Mr Shepherd and his colleagues on the administration of the estate but it does not expressly state that this also applies to work done by Mr Shepherd as executor. But this does not matter. As Mr Cohen submitted, the question whether the estate was

liable to pay for the work done by Mr Shepherd as administrator did not depend upon the terms of the retainer agreed between executors and solicitors.

68. Mr Cohen also submitted that Master Rowley erred in law in that he failed to take into account the fact that the charges sought for the time of Mr Shepherd were sought by the Defendant firm, not by Mr Shepherd himself. This was not a case in which an executor was instructing himself to carry out work. Rather, the two active executors, Mr Hayward and Mr Shepherd, were giving instructions to the Defendant firm to carry out work for the estate. In my judgment, and with respect to Mr Cohen, there is nothing in this point. If the Defendant was entitled to recover costs from the estate for the work that was done by Mr Shepherd in his capacity as executor, it was because he was a partner in the firm. In other words, any right for the Defendant firm to recover the charges levied in respect of Mr Shepherd's work as executor is contingent upon, and resulted from, Mr Shepherd's right to be paid for that work. Everything that Mr Shepherd did, he did as a partner in the Defendant firm. A distinction between Mr Shepherd and the firm in these circumstances would be wholly artificial. The judge was right, therefore, to focus upon whether the estate was obliged to pay Mr Shepherd for this work.

69. There were only four main potential routes to such an entitlement on the part of Mr Shepherd. Such an entitlement would have existed if there had been a charging clause in Mrs Brealey's will, but it was common ground that there was no such charging clause. Again, such an entitlement would have existed if the beneficiaries had provided their express agreement to it. However, there was no such express agreement in the present case. The fact that the Claimant, a main beneficiary (and, according to the Defendant, the other beneficiaries), was aware that the Defendant was being paid for all of the work done by Mr Shepherd does not amount to the necessary express agreement. Section 31(1) of the Trustee Act 2000 cannot assist the Defendant, because this section makes provision for the payment of a trustee or executor's out-of-pocket expenses, but it does not make provision for the payment of the professional fees of a trustee or executor. In the absence of a charging clause, or the express agreement of the beneficiaries, the entitlement could be derived only from one of the other two potential routes, section 29 of the Trustee Act 2000, or the **Boardman** jurisdiction.

70. It follows from the above, that I reject Ground 1 of the appeal. The question whether Mr Shepherd's firm is entitled to charge for the time that he spent as executor or Mrs Brealey's will depends upon whether such an entitlement arises under section 29 of the 2000 Act or under the **Boardman** jurisdiction. It is to these questions that I will now turn.

Ground 2 Was the judge wrong to fail to conclude that the Defendant was entitled to payment for the time spent by Mr Shepherd in his capacity as executor, pursuant to section 29 of the Trustee Act 2000, because the only other executor, Mr Hayward, had agreed in writing to his remuneration?

71. Section 29(2) of the Trustee Act 2000 provides that a 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. This applies even if a lay trustee would have been capable of providing the services (section 29(4)).

72. In the present case, the Defendant submits that the only other trustee/executor is Mr Hayward, and that he agreed in writing that Mr Shepherd may be remunerated for his services. The Claimant disputes both propositions. The judge accepted the Claimant's submissions, holding that Mr Smyth was an executor alongside Mr Hayward and Mr Shepherd and that, in any event, there was no evidence that Mr Hayward had agreed in writing to Mr Shepherd being remunerated as an executor. Accordingly, it is necessary for me to consider (1) whether Mr Hayward was the only other executor; and (2) if so, whether he agreed in writing that Mr Shepherd could be remunerated for his services as executor. I will consider these issues in turn.

Was Mr Hayward the only other executor?

73. The Claimant submits that Mr Smyth, as Mr Shepherd's partner in the Defendant, at the time of Mrs Brealey's death, was a third executor. It is common ground that Mr Smyth did not give written agreement to Mr Shepherd being paid for his services as executor. Accordingly, the Claimant submits, the requirement in section 29(2) cannot be met.

74. The starting point is that the relevant clause of the will, on its face, states that the executors will consist of Mr Hayward, Mr Shepherd, "and the partners at the time of my death in the firm of Shepherd and Co …." Accordingly, the terms of the will suggest, expressly, that Mr Smyth, as the other partner in the Defendant at the time of Mrs Brealey's death, was an executor.

75. However, on behalf of the Defendant, Mr Cohen submitted that there were several reasons why, nevertheless, Mr Smyth was not an executor.

76. Mr Smyth never intermeddled in the administration. He never had any active or passive role. During the three months during which he remained as a partner in the Defendant firm after Mrs Brealey's death he had no dealings whatsoever with the administration of her estate. I have admitted the evidence of Mr Smyth to this effect but, in any event, as I understand it, this was not in dispute at the hearing before Master Rowley. However, there is a dispute between the parties as to whether this means that Mr Smyth was not an executor for the purposes of section 29(1).

77. On behalf of the Defendant, Mr Cohen submitted that a person nominated as executor is free to decide whether to accept the office. Mr Cohen submitted that absent acceptance he or she is not an executor. Acceptance cannot be inferred from inaction. (Mr Cohen referred to paragraphs in Williams, Mortimer & Sunnucks, Executors, Administrators and Probate 20th ed at ¶6-32), and Lewin on Trusts at ¶13-026 in support of these proposition). Mr Cohen submitted that Mr Smyth was a passive partner in the Defendant firm for three months, having been nominated as trustee purely as a consequence of being partner at the date of Ms Brealey's death. He submitted that it is clear that Mr Smyth did not "accept" the office of executor such that his written agreement to Mr Shepherd's remuneration was never required.

78. On behalf of the Claimant, Mr Meehan submitted that it is the will that appoints an executor and it is from the will that an executor derives their authority. The nominated executor is of course entitled to accept or renounce the role, but in the absence of a formal act of renunciation, effected in writing, s/he remains an executor.

79. I agree with Mr Meehan's submission. In **Goodman v Goodman** [2014] Ch 186, Newey J said, at paragraph 15a, "An executor derives title from the will, and the property of the deceased vests in him from the moment of the testator' death…" This is supported by section 5 of the Administration of Estates Act 1925, which provides that there are three circumstances in which an executor's rights in respect of the executorship shall wholly cease. These are where the executor (i) survives the testator but dies without having taken out probate of the will; or (ii) is cited to take out probate of the will and does not appear to the citation; or (iii) renounces probate of the will. None of these circumstances applied to Mr Smyth. The fact that he was not involved in the proving of the will is not material: it is not necessary that all of the executors prove the will (as section 8 of the Administration of Estates Act 1925 recognises). Though it is open to an executor to decide whether or not to accept the office, the default position until he or she does so is that the office has been accepted. I do not think that the extracts from Williams, Mortimer and Sunnucks and Lewin on Trusts say otherwise. Rather, they are dealing with something different: the circumstances in which an executor may be debarred from renouncing the office because they have already done something that amounts to accepting it.

80. I accept Mr Cohen's submission that the fact that the grant of probate dated 23 June 2014, having granted probate to Mr Hayward and Mr Shepherd, said "power reserved to another executor" does not mean in itself that Mr Smyth had accepted the office of executor. However, that does not assist the Defendant. The fact remains that, regardless of his activity or inactivity, Mr Smyth was an executor unless and until he renounced the office.

81. Mr Cohen made a number of additional submissions on this issue in his supplementary skeleton argument.

82. The first was that, whatever the position as regards Mr Smyth, by s.35(1) of the Trustee Act 2000, the Act only applies to a "personal representative administering an estate". Mr Cohen said that Mr Smyth is not, on any measure "administering" Mrs Brealey's estate; only Mr Shepherd and Mr Hayward are, and so Mr Smyth was not an executor for the purposes of section 29. I do not accept this submission. The full wording of section 35(1) is as follows:

> "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."

This cannot be interpreted as qualifying the clear words in section 29(2) in any way. In particular it does not mean that the only executors who count for the purposes of section 29 are those who are actively involved in administering the estate. The purpose of section 35(1) is simply to make clear that the Act applies in the context of wills and estates as it does in the context of other types of trusts.

83. Mr Cohen next submitted that the proposition that only executors who are administering the estate are "trustees" for the purposes of s.29 of the TA 2000 is supported by section 8 of the Administration of Estates Act 1925, which provides that, once a will has been proved, the proving executors can exercise the powers of all the executors, and is also supported by the principle that in an action against a

testator's personal representative a person nominated as an executor who has not taken a grant or intermeddled is not to be joined. In my judgment, this is nothing to the point. These are provisions which provide practical means by which a will can be administered even if one or more of the executors is inactive, but they do not affect the meaning of "executor" for the purposes of section 29(1). Section 29(1) is plainly intended to be a safeguard to ensure that approval is given by all executors before a professional executor can charge for his or her work (in the event that there is no charging clause in the will). Whilst I can see that there would be practical advantages if it was not necessary to obtain the written approval of inactive executors (especially where there is a clause nominating all solicitors in a large firm as executors), but I do not think that this is a permissible interpretation of section 29(1).

84. Mr Cohen's third submission was that the acts of Mr Shepherd and Mr Hayward are deemed, by virtue of s.8 of the Administration of Estates Act 1925, to have been made with his concurrence. He submitted that an alternative approach is to say that, by virtue of s.5 and 6 of the Partnership Act 1890, the acts of the firm and Mr Shepherd bind My Smyth and/or Mr Shepherd acted as agent for Mr Smyth such that the agreement of the former is to be taken as that of the latter.

85. In my judgment, this submission is circular, and would denude section 29(1) of any force. So far as section 8 of the Administration of Justice Act 1925 is concerned, it is tantamount to saying that, notwithstanding the clear words of section 29(1), it is not necessary to obtain the written agreement of executors who did not prove the will, because they are deemed to have agreed to whatever is done by the executors who proved the will. That may be so, but it does not mean that they have given written approval. As Mr Meehan submitted, if section 8 were to have this effect, it would mean that one executor could give approval, and this would remove the protection of section 29 completely. Moreover, some of the fees that were charged for Mr Shepherd's services as executor were levied in relation to the period before the will was proved. As for the provision of the Partnership Act 1980, once again they do not mean that Mr Smyth gave written approval to the charges.

86. The next point made by Mr Cohen on this issue is that if the interpretation of section 29 which was adopted by Master Rowley (and by me) were right, then it would lead to an absurd result. It would mean that solicitor-executors in large firms would have to obtain the written agreement of all their partners. This would be impractical and would deprive section 29 of any effect. I do not accept this submission. The solution for large firms of solicitors is to include an express charging clause in the will. Even though there would be real practical difficulties for large, perhaps international, firms of solicitors in obtaining the agreement of all executors, this does not detract from the fact that the requirements of section 29(1) can be met in other cases, where there is a limited and manageable number of trustees. The present case, is of course, such a case, as there were only three executors.

87. The final point made on behalf of the Defendant is that Mr Smyth has now expressly renounced his status of executor, in his witness statement dated 7 October 2022. However, in my judgment this does not retrospectively affect the question as to whether he was an executor at the material time.

88. Accordingly, in my judgment, Mr Smyth was an executor of Mrs Brealey's estate. As he did not give written approval to payment to Mr Shepherd for the work done as

executor, this is fatal to the Defendant's argument based on section 29 of the Trustee Act 2000.

Did Mr Hayward agree in writing to Mr Shepherd being remunerated as an executor?

89. Since I have already held that the Defendant's argument based on section 29 cannot succeed, I will deal with this issue only briefly.

90. Mr Cohen submitted that there were two occasions in which Mr Hayward gave written authorisation for Mr Shepherd to be paid for his role as executor. The first was that Mr Hayward signed the principal retainer in May 2014, which expressly set out Mr Shepherd's charge out rates. Second, and in any event, Mr Hayward's approval of the breakdown of costs plainly was "an agreement in writing" which provided for Mr Shepherd's remuneration.

91. I do not accept either of these submissions. The problem with the submission based on Mr Hayward's signature of the principal retainer is that, whilst Mr Hayward expressly approved charge out rates for Mr Shepherd, he did not expressly approve payment to Mr Shepherd for his work in the capacity of executor. The principal retainer did not say that Mr Shepherd would be charging for his work as executor. As for Mr Hayward's signature to indicate his approval of the breakdown of costs, this was done for the purposes of the proceedings herein. Mr Hayward signed the breakdown at some time after November 2019, well after most, if not all, of the costs had been incurred. In my judgment, this cannot be effective as a retrospective approval of the costs of Mr Shepherd's work in the capacity of executor. I have grave doubts as to whether approval for the purposes of section 29(1) can be given retrospectively, but, in any event, I do not think that this signature, which was on a document prepared pursuant to a court order in these proceedings, could be effective. It was not a step taken to regulate the relationship between the estate and Mr Shepherd, and, in any event, it did not state in terms that Mr Hayward approved of the payment to the Defendant of fees in relation to Mr Shepherd's work in the capacity of executor.

92. None of the invoices that were issued from time to time whilst the work was being done was signed or initialled by Mr Hayward. Most were signed or initialled by Mr Shepherd. However, even if they had been signed or initialled by Mr Hayward, I do not think that this would have been sufficient to amount to written authorisation of the charges for work done by Mr Shepherd in his capacity as executor, as none of the invoices expressly state that this is what the charges (or some of them) were for.

93. Accordingly, even if Mr Smyth was not an executor, the requirements of section 29(1) of the Trustee Act 2000 have not been met, as Mr Hayward did not give the requisite written authorisation for Mr Shepherd's work as executor to be remunerated out of the estate.

Ground 3: Should the judge have exercised the court's inherent jurisdiction to permit the recovery of the fees for the time spent by Mr Shepherd, given the unjustified windfall that would otherwise accrue to beneficiaries as a result of the unremunerated services of Mr Shepherd?

94. This submission is based upon the **Boardman** jurisdiction.

The way that the point was argued before Master Rowley

95. Before Master Rowley, counsel for the Defendant (who was not Mr Cohen) contended that the Court should permit the Defendant to recover the fees that had been incurred by Mr Shepherd in his capacity as executor under the **Boardman** jurisdiction. Counsel relied in particular upon two points. The first was that a costs order had been made against the Claimant elsewhere, which included some of Mr Shepherd's fees and which had been paid by the Claimant as part of a compromise. Counsel suggested that this implied consent by the Claimant to the fees in principle of Mr Shepherd as an executor. Secondly, counsel also submitted that the Claimant was well aware of Mr Shepherd's role in administering the estate. If he was concerned about the costs being incurred, it was surprising that the Claimant did not raise the point at any time during the seven years of the administration. It was not a straightforward administration, and there was constant dialogue with the beneficiaries.

96. In response, Mr Meehan, who acted on behalf of the Defendant before Master Rowley as he did before me, submitted that the **Boardman** jurisdiction should only be exercised sparingly and in exceptional circumstances. He relied upon the judgment of Chief Master Marsh in **Gavriel & Anor v Davis** [2019] EWHC 2446 (Ch), in which the following was said, at paragraphs 3 and 8 of the judgment:

> "3. As the claim has developed, the real issue between the parties concerns whether or not there was an agreement or understanding reached between them, such that the general proposition that in the absence of a charging clause the Defendant should not be entitled to charge remuneration for her work, is abrogated. The general principle that applies, which is part of the self-dealing rule, is not in doubt. This is perhaps, more than anything else, a claim that involves a cautionary tale where an executor takes a grant in respect of the will, which does not have a charging clause, without having obtained a clear agreement in writing from all the beneficiaries that reasonable or fixed charges can be made.
>
> ….
>
> "8. The principles that are in play are not in doubt… In the absence of a charging clause an executor is not entitled to be remunerated other than to be reimbursed out of pocket expenses. There are exceptions to that rule, the relevant ones being where the Court authorises remuneration or where there is an agreement between the executor and the beneficiaries that charges may be made. There is a secondary position, which I can, by way of shorthand, refer to as the **Boardman v Phipps** [1966] UKHL 2 jurisdiction. This is summarised in paragraph 51.09 in Williams, Mortimer and Sunnucks. In essence, the Court, even in the absence of a charging clause or an agreement, may authorise remuneration. ***The principles that are recorded in that paragraph include that the power is to be***

> ***exercised sparingly and in exceptional circumstances*** and that the Court should, when deciding whether to exercise the power, have regard to all the circumstances of the case, including the honesty of the representative. There is, however, a wider consideration in play, namely that there may be circumstances in which it would be inequitable for beneficiaries to take the benefit of the executor's efforts without paying for the skill and labour which produced it..."
>
> (emphasis added)

97. Mr Meehan submitted that there was nothing exceptional about the administration of this estate. Any reasonably competent fiduciary could have dealt with it. Mr Meehan further submitted that any submission based on the **Boardman** jurisdiction had to be made by application and supported by evidence and none had been provided on behalf of the Defendant.

98. It is not clear whether counsel for the Defendant challenged the submission that the **Boardman** jurisdiction should be exercised sparingly and only in exceptional circumstances. It does not appear from the judgment, however, that the **Perotti v Watson** case was cited to Master Rowley.

Master Rowley's consideration of the Boardman jurisdiction point

99. Master Rowley said, at paragraphs 31 and 32 of his judgment:

> "31. It might be thought, given the significance of the fees charged by Mr Shepherd, that he might have given a witness statement to explain the arrangements in this case. But he has not and therefore there is no explanation of, for example, why there was no charging clause in the will of Mrs Brealey. It seems to me that I have to conclude that this was the intention of Mrs Brealey on the basis that she should be taken to have put her name to a deed which accurately reflected her intentions. As a starting point, therefore, it would seem that Mrs Brealey did not expect her executors to charge for their services.
>
> 32. It is always possible that the provisions of the Trustee Act were in the mind of Mr Shepherd (who, as I understand it, drafted the will) and that, under the Act, silence in the trust instrument was not necessarily prejudicial to a charge being made by Mr Shepherd as a professional executor. But if that were so, then the arrangements neededto be compliant with the provisions of that Act."

100. Master Rowley explained why he declined to exercise the **Boardman** jurisdiction at paragraphs 37-39 of the judgment:

> "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."

The Defendant's arguments on appeal in relation to the Boardman jurisdiction

101. In his arguments before me, and, in particular, in his written submissions that were provided after the draft judgment was circulated, Mr Cohen submitted that Master Rowley had erred in law in approaching the **Boardman** jurisdiction on the basis that it should be exercised sparingly and only in exceptional circumstances. He said that this did not reflect the law as set out in the judgment of the Court of Appeal in **Re Duke of Norfolk's Settlement Trusts** [1982] Ch 61, and in the judgment of Neuberger J in **Perotti v Watson**. Mr Cohen submitted that the benchmark to be applied to the **Boardman** jurisdiction is simply "the good administration of trusts" and that there was no limitation to the effect that the jurisdiction could only be exercised in exceptional circumstances. Mr Cohen further submitted that I am bound by principles of judicial comity to adopt the interpretation of **Re Duke of Norfolk's Settlement Trusts** that was adopted by Neuberger J in **Perotti v Watson**, and so to find that there was no "exceptional circumstances" requirement.

102. Mr Cohen submitted that, since Master Rowley had erred in law in coming to his decision on the **Boardman** jurisdiction, this Court should set aside Master Rowley's decision and consider the matter afresh. The High Court was in a position to do so, because I had before me the same material as was before Master Rowley, plus the decision of the Legal Ombudsman in relation to a number of complaints brought by

the Claimant against the Defendant, which had been issued only after Master Rowley's decision, and which had been placed before me with the agreement of the parties.

103. Mr Cohen submitted that this was an appropriate case in which to exercise the **Boardman** jurisdiction so as to authorise the payment of the fees incurred by Mr Shepherd in his capacity as executor because:

1) All the beneficiaries knew and approved of Mr Shepherd's charges whilst they were being incurred;

2) Only the Claimant, who is entitled to minority share of the residuary estate, has challenged those charges in this action;

3) Mr Shepherd's time was approved by Mr Hayward (Ms Brealey's brother) at all material times;

4) Mr Shepherd deployed his specialist skills in the advancement of the administration; and

5) A significant factor in determining whether to invoke the jurisdiction is the fact the beneficiaries should not be permitted to take advantage of a professional's skill and labour without paying for it. Mr Cohen submitted that Master Rowley failed to give proper weight to this consideration.

104. In the alternative to the above, Mr Cohen submitted that, even if he did not misdirect himself in law, Master Rowley had been plainly wrong to decline to exercise the Boardman discretion.

The Claimant's arguments on appeal in relation to the Boardman jurisdiction

105. As I have said, Mr Meehan submitted that this was not an appropriate case in which to reopen consideration of a point that I had dealt with in my draft judgment, in response to further written submissions from a party. As I have already indicated, I have decided that I should give further consideration to this issue.

106. Mr Meehan submitted that Master Rowley had not erred in law. He said that the textbooks are right to say that the Boardman jurisdiction should be exercised sparingly and in exceptional circumstances. There is authority for this proposition in **Re Worthington** [1954] 1 WLR 526 (Upjohn J) and in passages in the judgments of two of the Law Lords in **Guinness PLC v Saunders** [1990] 2 A.C. 663. He further submitted that, properly understood, the judgment of the Court of Appeal in **Re Duke of Norfolk's Settlement Trusts** does not cast doubt upon the proposition derived from Re Worthington that the **Boardman** jurisdiction should be applied only in exceptional circumstances, and that Neuberger J was wrong in **Perotti v Watson** to say otherwise.

107. In addition, Mr Meehan submitted that Master Rowley had not been plainly wrong to decline to exercise the **Boardman** jurisdiction, and that there was no valid basis for an appellate court to interfere with his ruling.

Discussion

In light of the authorities, should the Boardman jurisdiction be exercised only sparingly and in exceptional circumstances?

108. In my judgment, for the reasons set out below, the answer is "yes". I am, for obvious reasons, hesitant about taking a different view on this matter from the view that was taken by such an eminent Chancery judge as Neuberger J, but, nonetheless, I accept Mr Meehan's submission that the test as set out in the authorities requires that the **Boardman** jurisdiction should only be exercised sparingly and in exceptional circumstances.

109. The statement that the **Boardman** jurisdiction is to be exercised sparingly and in exceptional circumstances is to be found in two of the major textbooks: Williams, Mortimer and Sunnucks, paragraph 51-09, and Lewin on Trusts, paragraph 20-49. The authority given in the text books for the "exceptional and sparing" approach was, in Williams, Mortimer and Sunnucks, **Re Worthington** [1954] 1 WLR 526 (Upjohn J) and **Guinness PLC v Saunders** [1990] 2 A.C. 663, and, in Lewin, **Re Worthington**.

110. The fact that this proposition is to be found in two of the leading textbooks lends some support to the view that it represents the law, but, as Mr Cohen submitted, it does not necessarily follow. Sometimes even the most well-respected textbooks occasionally mis-state the law.

111. The form of words referring to "exceptional circumstances" is not derived from **Boardman v Phipps** itself. Indeed, in that case, the House of Lords only dealt briefly with the proposition that a trustee may be entitled to remuneration for work done on behalf of a trust. The main issue in that case was whether a trustee was obliged to account to beneficiaries for profits made out of the trust. As regards the proposition that the trustees, who had acted honestly and who had made a very great deal of money for the trust, should be entitled to a "liberal allowance" for their work, the House of Lords adopted the conclusions of Wilberforce J at first instance (1964 1 WLR 994), but Wilberforce J did not deal with the matter in any detail either.

112. The form of words is, rather, taken from the judgment in **Re Worthington.** Upjohn J said the following at 528: "…I think the true rule is that the court has an inherent jurisdiction to allow a trustee remuneration even as against creditors, but that the jurisdiction must be exercised sparingly and only in exceptional cases.". Upjohn J reiterated that the jurisdiction must be exercised sparingly and only in exceptional cases at 530.

113. The key question, in my view, is whether the Court of Appeal in **Re Duke of Norfolk Settlement Trusts** departed from the rule as set out in **Re Worthington,** and replaced with a less restrictive rule which requires a court simply to consider the good administration of trusts when deciding whether to exercise the **Boardman** jurisdiction.

114. The Duke of Norfolk case concerned a trust deed which did provide for remuneration of the trustees. However, since the trust deed had been executed, the role of the trustees had changed very considerably. This was because the property which was

the subject of the trust (mainly consisting of land holdings in parts of central London) had increased greatly in size and complexity. The Court held that the work involved in administering the trust was plainly outside what had been foreseen when the trustees first accepted office (see judgment page 70). The application for an increase in the remuneration of the trustees was uncontested by the then-living beneficiaries (p71).

115. Importantly, in my view, the Court of Appeal made clear that it was only concerned with the question whether there was a jurisdiction to increase remuneration, in circumstances where there was already a remuneration power in the trust deed. The essential question was whether the court's inherent jurisdiction applied not only to cases in which the trust deed made no provision at all for remuneration, but also to cases in which the trust did make express provision for remuneration, but it was inadequate. At the request of the parties, the Court was not concerned to decide whether, if there was such a jurisdiction, it should be exercised in that case. This is made clear at page 71 of the judgment, in the judgment of Fox LJ:

> "At the request of the parties this court will decide the question of jurisdiction only. We are not asked to decide whether, if any jurisdiction exists, it should be exercised."

116. It follows that the Court of Appeal in **Re Duke of Norfolk Settlement Trusts** was simply not concerned with the test that should be applied to the exercise of the **Boardman** jurisdiction. Rather, the sole issue before the Court was whether the jurisdiction applies at all, not only to cases where the trust deed is silent about remuneration, but also to cases in which the trust deed makes provision for remuneration, but it is too low. The Court of Appeal held that the jurisdiction does extent to cases in which there is provision for remuneration in the trust deed (p79).

117. It follows in turn that, even if the Court of Appeal had expressed a view about the "exceptional circumstances" test, it would not be binding on the High Court, as it would be obiter dicta only. Nonetheless, it would be worthy of great respect. In fact, however, in my view, the Court of Appeal in **Re Duke of Norfolk Settlement Trust** referred only briefly to the "exceptional circumstances" test, and the Court did not disapprove of the test, or say that it should be departed from, save to the specific and limited extent that there might be cases in which the effect of inflation justifies an increase in remuneration, whether or not inflation can properly be called an exceptional circumstance.

118. The Court of Appeal cited, without adverse comment, the passage from Upjohn J's judgment in **Re Worthington** in which he said that the jurisdiction should be exercised sparingly and in exceptional circumstances, at page 74 of its judgment. The Court also referred, at page 75, to a passage in **Re Barbour's Settlement Trusts** [1974] 1 WLR 1198, in which Megarry J said that the words "exceptional cases" as used by Upjohn J may require further explanation, because he doubted that Upjohn J intended to exclude the disastrous consequences resulting from inflation merely because inflation is not an exception but, unhappily, the rule. The Court of Appeal also quoted the following sentence from Megarry J's judgment:

> "Yet there must at least be proper evidence before the court of consequences of such weight and gravity as to justify the

> exercise of the jurisdiction."

119. At page 75, Fox LJ also referred to the ruling given by Walton J at first instance in **Re Duke of Norfolk Settlement Trusts**. Walton J had ruled that there was no jurisdiction to increase remuneration for trustees unless the circumstances were such as to raise an implied promise to pay it on behalf of the beneficiaries. Walton J referred to such circumstances (i.e. an implied promise) as justifying the authorising of payments for work of a wholly exceptional nature.

120. Fox LJ said, at page 75:

> "In my opinion, the judge took too narrow a view of the inherent jurisdiction."

121. In my judgment, in this observation, Fox LJ was not rejecting the rule as set out in **Re Worthington** that the **Boardman** jurisdiction should only be exercised sparingly and in exceptional circumstances (save, perhaps, to the extent that the effects of substantial inflation may also be taken into account, whether or not that counts as exceptional circumstances). Rather, he was disagreeing with the view expressed by Walton J in the court below to the effect that there is no jurisdiction at all to increase a trustee's remuneration where the trust deed has specified an amount of remuneration. This is the conclusion that he went on to explain at pages 75-79 of the judgment.

122. Mr Cohen relies in particular upon the following passage at page 79 of Fox LJ's judgment:

> "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."

123. This is where the reference to "the good administration of trusts" appears. However, I think that it is clear from the context in which these words are used that what is meant is that the extension of the inherent jurisdiction to cover increases in remuneration where the trust deed makes some provision for remuneration is justified by the good administration of trusts. In this passage, Fox LJ was not saying that there is no "exceptionality" rule for the inherent jurisdiction, and he was not saying that, rather than exercising the jurisdiction sparingly and in exceptional circumstances, the court

should do so whenever the judge considered that it was consistent with the good administration of trusts to do so.

124. The final passage in the judgment in **Re Duke of Norfolk's Settlement Trusts** upon which Mr Cohen relies is at page 79 and is as follows:

> "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."

125. In my judgment, Fox LJ was not intending, in this passage, to supersede to rule in **Re Worthington** with a more generous approach to the exercise of the inherent jurisdiction. Rather, he was setting out the legal principles which underpin the existence of the inherent jurisdiction, and emphasised that the court has to be careful to protect the interests of beneficiaries. He had made clear, earlier in the judgment, that the appeal was concerned solely with whether the jurisdiction existed in these circumstances, not whether it should be exercised in this case.

126. In his concurring judgment, Brightman LJ dealt only with the question whether there was jurisdiction at all to increase remuneration for trustees for whom some provision for remuneration had been made in the trust deed.

127. In summary, therefore, the Court of Appeal in **Re Duke of Norfolk's Settlement Trusts** was not concerned with the rules that apply to the exercise of the inherent, or **Boardman**, jurisdiction. Rather, the Court was solely concerned with the question whether the inherent jurisdiction applied at all to cases in which there was provision for trustee remuneration in the trust deed. Moreover, on my reading of the judgment, the Court of Appeal did not purport to lay down any rules about the approach that courts should take to the inherent jurisdiction, let alone purport to depart from the "exceptionality" rule identified in **Re Worthington**.

128. It is clear, however, that in two subsequent cases, judges have taken a different view of the judgment in **Re Duke of Norfolk's Settlement Trusts**. I will take them in reverse chronological order.

129. The judgment that is relied upon by Mr Cohen on behalf of the Defendant is **Perotti v Watson**. In this case, a solicitor executor applied for an order providing for him to be remunerated for his work as executor, notwithstanding that the will made no provision for payment. Neuberger J granted his application.

130. In my judgment, the facts in **Perotti v Watson** satisfied the "exceptionality" test. In particular, after the executor commenced work it became clear that the testator had hidden some £700,000 in assets in a Swiss bank. This required complicated additional work, which could not have been anticipated when the executor accepted his role, including a legal issue relating to the domicile of the testator. The judge said that the work that was required to be done was wholly outside that which had been contemplated when the executor was appointed. One of the beneficiaries had challenged everything that was done by the executors, and has behaved very aggressively. There were particular reasons in that case why the solicitor executor had expected to be paid for his work, even though he had not included a charging clause when drafting the will.

131. For these reasons, in my view, Neuberger J's conclusions would have been the same whether or not he had taken the view that there was no "exceptionality" rule for the inherent jurisdiction. It is clear, however, that, as Mr Cohen submitted, Mr Justice Neuberger did take the view that the ruling in **Re Worthington** to the effect that the inherent jurisdiction should be exercised sparingly and in exceptional circumstances, should no longer be followed. He took this view because he considered that this had been overruled by the Court of Appeal in **Re Duke of Norfolk's Settlement Trusts**.

132. With regret, I must disagree with Neuberger J. For the reasons set out above, I take the view that the Court of Appeal in **Re Duke of Norfolk's Settlement Trusts** was dealing with a different issue and did not purport to set aside the rule about the approach to the inherent jurisdiction that was laid down in **Re Worthington**. Neuberger J pointed out that the Court of Appeal said that Walton J had taken too narrow a view of the inherent jurisdiction. However, for the reasons I have already given, I read this to mean that Walton J was wrong to hold that the inherent jurisdiction did not apply to cases concerning the increase in remuneration, not that he was wrong to follow **Re Worthington** in saying that the inherent jurisdiction, where it applied, must be exercised sparingly and in exceptional cases.

133. The second case is one that was referred to by Neuberger J in **Perotti v Watson.** The case is **Foster and others v Spencer** [1996] 2 All ER 672 (HHJ Paul Baker QC, acting as a Deputy High Court Judge). This was a case in which a group of amateur cricketers became trustees of a trust to manage a village cricket ground as a favour to their club. For a number of reasons, this became very onerous indeed, and involved the trustees in a difficult sale of the land to developers. They were involved in a great deal of work over many years, and far more work than could possibly have been anticipated when, as young men, they agreed to become trustees. This was a very clear case, in my view, of exceptional circumstances.

134. HHJ Paul Baker QC analysed the authorities in his judgment and took the same view of the meaning and effect of **Re Duke of Norfolk's Settlement Trusts** as Neuberger J later did. As with the reasoning in **Perotti v Watson**, I am unable to agree with the analysis.

135. Mr Cohen submits that, whether I agree with Neuberger J's reasoning in **Perotti v Watson** or not, I am obliged to follow it. This is because one first instance judge should follow the ruling of another first instance judge unless he or she is convinced that the other judge's ruling was wrong: **R. v Greater Manchester Coroner, Ex p. Tal** [1985] 1 Q.B. 67, DC, at 81A, per Robert Goff LJ.

136. I do not accept this submission, for a number of cumulative reasons. First, there are conflicting first instance rulings: **Re Worthington**, on the one hand, and **Foster and others v Spencer** and **Perotti v Watson**, on the other. It is true that the latter two are more recent in time but, for the reasons I have given, I am convinced that they are wrong on this part of the analysis of the legal principles, though I am of the view that each case was plainly right in the result. Second, as Mr Meehan pointed out, the judge in **Perotti v Watson** did not purport to set out clear guidance as to the approach to be taken to the exercise of the inherent jurisdiction. To say that one should be guided by "the good administration of trusts" does not really provide any helpful guidance. Third, the "exceptionality" approach is consistent, in my view, with the legal principles which underpin the inherent jurisdiction or **Boardman** jurisdiction. The starting point is the protection of beneficiaries, and the principle that trustees are not entitled to remuneration unless the trust deed makes provision for it. Courts should be cautious about eroding that protection by use of the inherent jurisdiction. It should not be the norm that trustees are entitled to be paid even if there is no express provision for it. Fourth, I am comforted that the two leading textbooks refer to the "exceptionality" rule. Even if, as Mr Cohen pointed out, the law report in **Perotti v Watson** is difficult to find (and he should be commended for his industry in finding it) the same does not apply to **Foster and others v Spencer,** which is in the main All England Law Reports. Fifth, the "exceptionality" approach was endorsed by Chief Master Marsh in **Gavriel** and was endorsed by Master Rowley in the present case. Though I am not bound by the ruling in **Gavriel** and I am, of course, not bound by the reasoning of Master Rowley in the present case, it is appropriate to give respect to the views of two very experienced and specialist judges. Sixth, and perhaps most significantly, the "exceptionality" approach gains support from observations of two of the law lords in **Guinness v Saunders.** One of the issues in that case was whether it was appropriate to use the Boardman jurisdiction to allow remuneration of a board director in circumstances in which the board had not authorised his payment. In his speech, Lord Templeman said:

> **"Phipps v. Boardman** decides that in exceptional circumstances a court of equity may award remuneration to the trustee." [1990] 2 AC 663, at 694

Similarly, at page 701, Lord Goff of Chieveley injected a strong note of caution concerning the exercise of the **Boardman** jurisdiction:

> "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.
>
> Not only was the equity underlying Mr. Boardman's claim in **Phipps v. Boardman** clear and, indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests."

137. In my judgment, a generous and permissive approach to the exercise of the inherent jurisdiction would be inconsistent with the guidance in **Guinness v Saunders**. Conversely, the "exceptionality" rule as set out in **Re Worthington** is entirely consistent with **Guinness v Saunders**.

138. Mr Cohen pointed out that the unsuccessful party in **Perotti v Watson** appealed to the Court of Appeal and the Court of Appeal refused leave on the inherent jurisdiction point. I do not think that this is significant. As I have said, and with respect to Neuberger J, he was plainly right to exercise the inherent jurisdiction, on the facts of the case, whatever the test was.

139. For all of these reasons, I am satisfied that Master Rowley did not err in law when he directed himself that the inherent jurisdiction, or **Boardman** jurisdiction should be exercised only sparingly and in exceptional circumstances. It follows that there is no valid basis upon which I can set aside his decision and re-take it myself. In any event, in light of the reasoning of Master Rowley's judgment, the outcome would have been the same whether he had applied the "exceptionality" test or some more generous test. The fundamental problem facing the Defendant was that it had not provided the court with any sufficient evidence upon which to found the exercise of the inherent jurisdiction. This problem would have existed, whatever the nature of the test to be applied. As Megarry J said in Re Barbour's Settlement Trusts, referred above, there "must at least be proper evidence before the court of consequences of such weight and gravity as to justify the exercise of the jurisdiction".

140. The only remaining question, for the purposes of Ground 3, is whether, in exercising his evaluative judgment for the purposes of the **Boardman** jurisdiction, Master Rowley went so far wrong as to mean that his ruling should be overturned.

Was Master Rowley's decision in relation to the Boardman jurisdiction "plainly wrong"?

141. This aspect of the appeal amounts to a challenge by the appellant to an evaluative judgment of a specialist judge. It is akin to an appeal against the exercise of a judicial discretion. Mr Cohen submitted that this ground is not a challenge to the exercise of a judicial discretion or similar, but is a pure point of law. I do not agree. This is a challenge to a conclusion reached by a judge on a matter, having considered and

given weight to the relevant considerations (not all of which point one way), and is a classic example of a challenge to an evaluative judgment.

142. The approach which an appellate court should take towards such a challenge was very helpfully summarised by Saini J in **Sakandar Azam v University Hospital Birmingham NHS Foundation Trust** [2020] EWHC 3384 (QB) at paragraphs 48-50:

> "48. At this stage it is important to restate some basic principles concerning appellate challenges to the exercise of a discretion at first instance.
>
> 49. I base my summary on a number of well-known cases including **G v G** [1985] 1 WLR 647 (HL) , **Tanfern Ltd v Cameron-MacDonald** [2000] 1 WLR 1311 (CA) , **Chief Constable of Greater Manchester Police v Carroll** [2018] 4 WLR 32 (CA) , and **Kimathi & Ors v Foreign and Commonwealth Office** [2018] EWCA Civ 2213 (the latter two cases being concerned specifically with section 33 of the LA 1980).
>
> 50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:
>
> (i) a misdirection in law;
>
> (ii) some procedural unfairness or irregularity;
>
> (iii) that the Judge took into account irrelevant matters;
>
> (iv) that the Judge failed to take account of relevant matters; or
>
> (v) that the Judge made a decision which was "plainly wrong".
>
> 51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible.
>
> 52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to

> be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.

143. In my judgment, this is the approach that I should adopt to this ground of appeal.

144. As I have already found, Master Rowley did not misdirect himself in law on this issue.

145. At paragraph 31 of his judgment (set out above), Master Rowley said that in the absence of any evidence from Mr Shepherd, and in the absence of a charging clause in the will, he had to take as his starting point the proposition that Mrs Brealey did not expect her executors to charge for her services. With respect to the judge, if I had been the first instance judge, I might have taken a different view. It seems to me that, even in the absence of a charging clause, and in the absence of any evidence from Mr Shepherd, the circumstances were such as to justify the inference that Mrs Brealey would have expected to pay Mr Shepherd for of the work that he was going to have to do. He was not a friend or relative and there would be no particular reason why he would be expected to provide his services as executor for free, especially if, as seems likely, Mrs Brealey might have anticipated some difficulties arising with her son after her death (so that the work of an executor would be more onerous than normal). However, that does not mean that I can or should set aside the judge's conclusion on this matter. It cannot be said that he was plainly wrong to take a different view. Mr Shepherd might have been prepared to do the work of an executor for free, in return for ensuring that the work of administering the estate would be given to his firm. The absence of a charging clause is significant.

146. Accordingly, the judge was entitled to proceed on the basis that Mrs Brealey did not expect her executors to charge for their services. In any event, it does not appear from the judgment that this was a major consideration in the decision whether to exercise the **Boardman** jurisdiction. Master Rowley said that two main grounds had been advanced by the Defendant's then counsel to justify the exercise of the **Boardman** jurisdiction. The first was that the Claimant had paid Mr Boardman's fees in other proceedings. The judge was entitled to take the view that this was not a sufficient ground to justify the exercise of the court's inherent jurisdiction. The other was that the Claimant was aware of Mr Shepherd's involvement in the administration of the estate. Once again, the judge was entitled to take the view that this was not enough either. The Claimant was also aware was no charging clause in the will.

147. The fundamental difficulty facing the Defendant in seeking to persuade the judge to exercise the **Boardman** jurisdiction, as I have said, was that the Defendant did not place any, or any adequate, evidence before the Court to persuade him to exercise the discretion. So, for example, there was no evidence about Ms Brealey's expectation as to whether Mr Shepherd would be paid in his capacity as executor. There was no evidence about whether the work that the solicitors did in relation to the will was unexpected (or whether it had been anticipated at the time the will was signed, that the Claimant would be "difficult").

148. As for the other points that are made by Mr Cohen (and it is not clear whether the same points were made to Master Rowley), the judge was not plainly wrong to have failed to find that the **Boardman** jurisdiction should apply because of the particular complexity of the role of executor in this case. Though the role was demanding, the judge was entitled to take the view that it was not so demanding that, taking all the circumstances into account, the **Boardman** jurisdiction applied so that the inherent jurisdiction of the court should be invoked to provide for payment to the Defendant for Mr Shepherd's work as executor.

149. It is true that it feels unfair that a professional solicitor should not be entitled to payment for demanding work that he carried out for a client. Indeed, I have considerable sympathy for Mr Shepherd and his former firm. It is clear that a very great deal of work was done in relation to this estate and in circumstances in which the Claimant made the task of the executors more difficult than it should have been (additional work was required because the Claimant refused to give up possession of Park House and steps had to be taken to recover a loan of £40,000 that had been made by Mrs Brealey to the Claimant; the Claimant complained about the Defendant to the Legal Ombudsman, but 15 of the 17 complaints were dismissed and those that were upheld were relatively minor). Mr Shepherd acted with complete propriety and competence throughout. There was nothing underhand or improper about his actions, and Mr Hayward and the beneficiaries, including the Claimant, were aware at all material times that he was acting as executor and charging for it. If there had been no professional executor, the demands upon Mr Hayward as a sole executor would have been very great indeed, especially given the family dynamic. Nevertheless, in my judgment the **Boardman** jurisdiction may be exercised only sparingly and in exceptional circumstances. Furthermore, the consideration that professional advisers should generally be paid for their work is counter-balanced by a consideration which was emphasised by Mr Meehan in his submissions, namely that there is a general rule that a personal representative is not entitled to profit from their position, unless the position is made clear and approved in writing. As I have said, there is no evidence that Mr Shepherd was taken by surprise by the scale of the work that he was required to do as executor.

150. The fact that the beneficiaries, including the Claimant, knew about the charges at the relevant time is, in my view, only a minor consideration, although I fully appreciate why it must be galling to the Defendant. The fact remains that the Claimant did not waive or forfeit his right to take proceedings under section 71(3) of the Solicitors' Act 1974. Again, as I have said, though the role of executor will no doubt have been challenging for Mr Shepherd, there was no evidence before the judge to support the contention that it was so exceptionally challenging as to trigger the **Boardman** jurisdiction.

151. Mr Cohen relied on similarities between the present case and **Perotti v Watson.** It is true that there are some similarities. The work on administering the estate took a number of years in the present case as it did in **Perotti v Watson**. In both cases, one of the beneficiaries was hostile to the executors from the outset, and this made their work more difficult. However, all cases depend on their own particular facts. There were also major differences between **Perotti v Watson** and the present case. In particular, the legal and other complexities of the management of the estate in **Perotti v Watson** were made immeasurably more difficult by the fact that the testator had

concealed assets in Switzerland, an act which threw his domicile into doubt. Nothing of that sort applied to the present case and there was nothing of particular and unusual difficulty in the work that was done by the executors. For the reasons I have already given, the conclusion reached by the judge was not plainly wrong, and this position is not affected by any superficial similarities with **Perotti v Watson**.

152. In summary, the judge applied the correct test, he did not ignore relevant considerations or take account of irrelevant considerations, and he came to a conclusion which cannot be said to be plainly wrong. There has to be something exceptional to justify the use of the **Boardman** jurisdiction and in my judgment, especially given the absence of relevant evidence, there is no proper basis upon which I could find that the judge was plainly wrong to take the view that there was no sufficient exceptional feature in the present case. Nor does the report of the Legal Ombudsman affect matters to such an extent that I should set aside the judgment of Master Rowley.

153. As I have already said, it is not clear to me whether, at the hearing before Master Rowley, counsel for the Defendant disputed that the test for the **Boardman** jurisdiction is an exceptionality test. If he did not, then this is a further difficulty facing the Defendant in relation to this ground of appeal. The argument based on **Perotti v Watson** would be a new point, raised for the first time on appeal. However, regardless of whether the point was taken below or not, I dismiss the appeal on Ground 3, for the reasons set out above.

Ground 4: If, contrary to the Defendant's primary submissions, the judge was right to disallow Mr Shepherd's fees when acting in the capacity as executor, should the disallowance be restricted to the profit the Defendant made on Mr Shepherd's time, and not the cost of providing the service for which charge is sought?

154. As I have said, this argument was not advanced before the judge. I do not accept Mr Cohen's submission that this ground is subsumed in Ground 3, on the basis that all Ground 4 amounts to is Ground 3 but restricted to permitting the Defendant's costs of providing Mr Shepherd's services rather than seeking profit in addition. In my judgment, this is a new point, based on the proposition that a differentiation can be drawn between profits and the cost of providing the service.

155. As Mr Meehan submitted, in **Singh v Dass** [2019] EWCA Civ 360, the Court of Appeal identified the following legal principles that apply where a party seeks to raise a new point on appeal:

a) An appellate court will be cautious about allowing a new point (paragraph 16);

b) Generally, a new point will not be admitted where it would necessitate new evidence or the point would have resulted in the trial being conducted differently (paragraph 17);

c) The Respondent must have had adequate time to deal with the point, he must not have acted to his detriment on the faith of the earlier omission and he must be able to be adequately protected in costs (paragraph 18).

156. A grant of permission to appeal is not leave to rely on the new point: **Mullarkey v Broad** [2009] EWCA Civ 2, at paragraph 29.

157. In my judgment, condition (c) is satisfied in the present case. Mr Meehan has had the opportunity to deal with this point. However, it would be wrong to allow the appeal on this point (even if it was a good point) because it would have necessitated new evidence and this point might have resulted in the trial being conducted differently (condition (b)). I accept the proposition that solicitors' costs can often be separated into "time" costs and "profit" costs: see **Re Eastwood** [1975] Ch 112, at 119-120. However, I agree with Mr Meehan that no evidence has been provided as to the basis on which Mr Shepherd was remunerated, or how the costs attributable to him were made up. It is not clear whether Mr Shepherd, as Senior Partner, was even salaried, or whether in fact he withdrew funds from partnership profits. The Defendant has not provided any evidence as to the partnership's overheads and profits and how its hourly rates were arrived at. Had the Defendant provided such evidence, it may have required evidence in response, or necessitated cross examination.

158. I should add that, in any event, I do not consider that this is a good point. I do not think that any part of the fees that were charged in relation to Mr Shepherd's services were "expenses properly incurred by [Mr Shepherd] when acting on behalf of the trust", for the purposes of section 31 of the Trustee Act 2000. The fees were not expenses incurred by Mr Shepherd at all. They were fees charged by the Defendant, a law firm, in respect of work done by Mr Shepherd as a partner in the firm. As section 31 does not apply, the Defendant is thrown back on arguments based on section 29 or the **Boardman** jurisdiction. As for section 29, there was no written authorisation by the other executors for any element of the charges made in relation to Mr Shepherd's services. The problems that the Defendant faces in relation to section 29 apply just as much to the "cost" element of the fees as they do to the "profit" element. The same goes for the **Boardman** jurisdiction argument. The reasons why the judge was entitled to reject the **Boardman** jurisdiction argument apply equally to all elements of the fees that were charged in relation to Mr Shepherd's services as executor.

Conclusion

159. For these reasons, the appeal is dismissed. The case is remitted to Master Rowley for a further stage of the detailed assessment of costs, in order to identify the extent to which the costs charged by the Defendant to the executors represented fees for the services provided by Mr Shepherd as executor.