

**BARBADOS**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL DIVISION**

**CV 1746 of 2014  
No. 869 of 2013**

**IN THE MATTER OF THE ESTATE OF HAROLD ST. CLAIR WHITE,  
deceased late of “Glen Fruin” Belle Plantation in the parish of Saint Michael in  
this Island**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High  
Court**

**Date of Hearing: 2017 June 13<sup>th</sup>  
Date of Decision: 2018 January 12<sup>th</sup>**

**Appearances:**

**Mr. Barry Gale Q.C. in association with Laura Harvey-Read Attorneys-at-Law for the Applicant**

**Mr. M. Tariq Khan Attorney-at-Law for the Respondent, Royal Fidelity Merchant Bank and Trust (Barbados) Ltd.**

**DECISION**

**Introduction**

[1] This matter has gone wrong procedurally and for that this Court accepts some measure of culpability. It represents this Court’s attempt to avoid pure

legalism and embark on “problem solving”, which ultimately was unsuccessful.

- [2] It remains the opinion of this Court that this matter is about the ability of a Caveator/Beneficiary of a Will to terminate the appointment of an Executor/Trustee, and the ‘possibility’ of a “quantum meruit” claim, but faced with the parties’ insistence that the Court make a Ruling (and the Caveator declining to amend her application and process when invited to do so by this Court), I am forced to adjudicate the matter before me.

### **The Application before the Court**

- [3] This matter was brought to the Court by Summons for Directions filed November 25<sup>th</sup> 2014 by the attorney-at-law for the Caveator. The Application is set out “in extenso” below:

“Let **ROYAL FIDELITY MERCHANT BANK AND TRUST (BARBADOS) LIMITED** Company No. 30048 whose registered office is situate at 27 Pine Road in the parish of Saint Michael in this Island the person warning of its Attorney-at-Law attend the Registrar of the Supreme Court at the Law Courts, Bridgetown on 20<sup>th</sup> day of February 2015 at 9.30 am/~~pm~~ on the hearing of an application on the part of **LUCIA BERNADETTE WHITE** of “Glen Fruin”, Belle Plantation in the parish of Saint Michael in this Island the Caveator for directions in this action.

The said **LUCIA BERNADETTE WHITE** as Caveator seeks:

1. A declaration that the said **ROYAL FIDELITY MERCHANT BANK AND TRUST (BARBADOS) LIMITED** is only entitled to charge reasonable professional fees on the basis of work actually done for acting as Executor to the Estate of Harold St. Clair White, deceased and that their bill be taxed by the Registrar and finally determined before any monies become payable to the said Royal Fidelity Merchant Bank and Trust (Barbados) Limited.

2. Such further directions as the Court may deem just.

### **The Chronology of Events**

[4] This Application was heard by another judge on February 20<sup>th</sup> 2015 and the following Order made:

- “1. Leave is granted to Lucia White to file and serve an Affidavit in support of her contentions on or before 20<sup>th</sup> March 2015;
2. Leave is granted to Carol Gaskin of Royal Fidelity Merchant Bank and Trust (Barbados) Limited to file and serve an Affidavit in response on or before 7<sup>th</sup> April 2015;
3. Legal submissions with authorities are to be filed and exchanged on or before 21<sup>st</sup> April 2015;
4. The matter is adjourned for mention to 8<sup>th</sup> May 2015.”

[5] The matter first came before this Court on March 16<sup>th</sup> 2016 when the parties indicated to the Court that the matter was “in negotiation”. It was adjourned to June 8<sup>th</sup> 2016 for case management in the event of failure of this initiative.

[6] On June 8<sup>th</sup> 2016 the parties appeared, (senior counsel Mr. Gale Q.C. appearing for first time) and indicated that there were two issues arising: firstly, the issue of whether Royal Fidelity can force the continuation of the administration of the Estate; and secondly, the issue of fees. (It is here noted that the Application before the Court does not contemplate issue #1). The parties agreed to submit a Consent Order within 48 hours providing for (1) the filing of additional Witness Statements by the Bank, (2) responses thereto by the Caveator, (3) the filing of a Statement of Agreed Issues by the

parties; (4) the filing of Written Submissions with authorities (the matter was given an adjourned mention date on November 2<sup>nd</sup> 2016).

- [7] No Draft Order was presented, but on November 2<sup>nd</sup> 2016 the parties appeared with a Draft Consent Order which was approved (in retrospect erroneously) by this Court. The matter was adjourned for Pre-trial Review on January 25<sup>th</sup> 2017, but counsel for the Caveator indicated that settlement negotiations were on-going, and to use her words “the doors for settlement [were] not closed”.
- [8] On January 25<sup>th</sup> 2017, there was a joint application for an adjournment after both parties expressed a wish to continue negotiations in the matter. It was adjourned to Tuesday June 6<sup>th</sup> 2017 for trial/hearing in the event of failure of these discussions/negotiations.
- [9] On June 6<sup>th</sup> 2017, having indicated to the Court that the parties were too far apart, the parties expressed a wish to proceed with the Application, and after the Court sought clarification on the nature of the matter to be determined by the Court (this Court being of the view that it may have been advisable in that event to amend the original application, that is, the Summons for Directions abovementioned) the parties indicated that they wished the Court to determine the matter as filed.

[10] The parties made their submissions on Tuesday June 13<sup>th</sup> 2017, at which time the Court reserved its decision in this matter.

### **The Affidavits**

[11] The Caveator filed an Affidavit in this matter on March 20<sup>th</sup> 2015. She is the widow and sole beneficiary of the Last Will and Testament under which Royal Bank of Canada was appointed Executor of the Estate. There is a Codicil to the Will appointing Royal Fidelity Merchant Bank and Trust (Barbados) Limited (hereinafter referred to as Royal Fidelity) to be Executor and Trustee of this Will. The salient part of this Codicil speaks to the issue of fees as follows:

“I APPOINT ROYAL FIDELITY MERCHANT BANK AND TRUST (Barbados) Limited...to be the Executor and Trustee of this my Will on the terms and Conditions including the right to remuneration and the incidence thereof as set forth in Royal Fidelity’s published Scale of Fees in force at the date of entering into the administration of the Estate as if such terms and Conditions were herein set out at length. Royal Fidelity shall have power if its standard Scale of Fees shall be altered after my death to charge remuneration for its services in accordance with such Scale of Fees as shall from time to time be in force.”

[12] The Affidavit documents the attempts by the testator’s widow/Caveator since the Testator’s death, to have Royal Fidelity “produce their published scale of fees so that I would know what they proposed to charge the estate for acting as Executor of the Estate...”

- [13] The complaint (at that stage) seems to have been that what had been provided to date is RBC Royal Bank of Canada's Terms and Conditions, Scale of Fees and Form of Appointment, never Royal Fidelity's. Royal Fidelity resisted providing an estimate/quotation of their fees in spite of having agreed at a meeting of the parties to do so, and the Caveator held back on providing an updated list of assets.
- [14] It is clear, from as early as 2012, that Royal Fidelity had positioned itself on two points: firstly, that they are not prepared to renounce their role as Executor/Trustee; and secondly, reduce (negotiate) their fees.
- [15] Interestingly, Royal Fidelity did eventually provide an estimate calculated on an estimated asset value under cover of letter dated November 24<sup>th</sup> 2014. On the basis of an Estate value of \$1,664,671.45 fees estimated were quoted as \$68,659.05.
- [16] The real gravamen of the Caveator's complaint and the source of the allegation of 'unreasonable fees' can be found at paragraph 12 of this Affidavit where the deponent states:

“Royal Fidelity has not provided me with their published Scale of Fees and is proposing to charge the Estate of my late husband what I consider to be wholly unreasonable fees given the amount of work which Royal Fidelity will have to do for this Estate as I am the only beneficiary and between my children and myself, we have done a lot of work already as set out in paragraphs 14 and 15 below. Furthermore, the fact that I have not been provided with any proof that my late husband was aware of Royal Fidelity's published Scale of Fees nor has any such document been presented to me I firmly believe that my late husband could not

have agreed to the proposed unreasonably high fees that Royal Fidelity is proposing to charge.”

[17] Paragraph 16 outlines the basis of the “directions” being sought from the Court:

“16. I am seeking the directions of this Honourable Court for the declarations sought so that the fees that Royal Fidelity may charge the Estate be reasonable and based on actual work done by them. The Estate is not a liquid estate. The Estate’s main asset is the matrimonial property situate at Glen Fruin, Belle Plantation in the parish of Saint Michael where I continue to reside. This matrimonial property is in dire need of major repairs which, coupled with the expenses that I have already paid as set out above, will cost more than the amount to be received from my late husband’s insurance policies. If Royal Fidelity is permitted to charge the amount they propose in the letter 24<sup>th</sup> November 2014 the matrimonial property will have to be sold which event I know my late husband would not have wanted or intended.”

[18] Royal Fidelity’s Affidavit in Response was deposed to by the Manager of its Trust & Corporate Services, Ms. Carol Gaskin and filed April 7<sup>th</sup> 2015. This Affidavit addresses the issue of the Scale of Fees deposing that the Scale of Fees provided to the testator when he executed his Will, was the same as the Scale of Fees at first publication on July 1<sup>st</sup> 1987, and that the Scale of Fees has remained unaltered since 1987, and remained in force since the merger of the Royal Bank of Canada and Fidelity Bank in the Bahamas, which resulted in the transfer of Executor and Trustee services to Royal Fidelity. It is noted that there has been no answering challenge to this evidence.

[19] Significantly, it also spoke to, and exhibited the correspondence of attorney-at-law C. E. Lewis that in reviewing the Will with the Testator prior to execution, she reviewed the Scale of Fees in force at the date of making the

Will, and that this was her standard practice. It was this deponent's assertion that the testator made a deliberate election regarding the appointment of Executor and was in full grasp of the financial implications of the appointment.

### **Witness Statements**

[20] Pursuant to the Consent Order of November 2<sup>nd</sup> 2016, the following Witness Statements were filed on November 18<sup>th</sup> 2016: C. A. Lewis (attorney-at-law) and M.A. Chung (a former Manager of the Investment and Trust Department of Royal Fidelity). Both spoke to the procedure employed, which affirmed the Testator's understanding and acceptance of the financial implications of his Will and Codicil.

### **The Issues**

[21] On the 8<sup>th</sup> June 2017, the parties filed a document titled Amended Agreed Statement of Facts and Issues (the first such document was filed January 27<sup>th</sup> 2017). This document removed from the table the issue of the Caveator's challenge to Royal Fidelity's role as Executor and Trustee (the principal issues being hitherto flirted with being (i) the intention of the Testator; (ii) the validity of the Codicil; and (iii) Royal Fidelity's continuation with the administration and settlement of the Estate).

[22] In this document, the parties jointly agree that the issues are as follows:

- “1. Whether the fees Royal Fidelity is entitled to charge are those based on:
- 1.1 The scale of fees set out in accordance with Royal Fidelity’s Scale of Fees.
  - 1.2 The scale of fees set out in accordance with RBC’s published Trustee and Executorship Regulations and Scale of Fees.
  - 1.3 Reasonable fees for work done in the administration of the Estate which fees should be taxed by the Registrar.”

### **The Case for the Caveator**

[23] Counsel for the Caveator relied on her Written Submissions filed April 23<sup>rd</sup> 2015 seeking a declaration that Royal Fidelity “is only entitled to charge reasonable professional fees on the basis of work actually done ... as Executor of the Estate of the Testator and that their bill be taxed by the Registrar and finally determined before any monies become payable to them.” This Court notes, however, that there is a difference between the Agreed Issues of January 2017 and June 2017. Only those submissions relevant to the document of June 2017 will be addressed (specifically the allegations that “Royal Fidelity has not produced any evidence to show that when the Testator signed his Codicil that he was made aware or given Royal Fidelity’s published scale of fees; Royal Fidelity has never produced their published scale of fees”. This is relevant as counsel for the Respondent has filed three (3) sets of Written Submissions, the contents of which are not all relevant to the final issues sought to be determined.

[24] Counsel for the Applicant's Submissions reveal that two caveats were filed by the beneficiary under the Will of the testator (who died August 20<sup>th</sup>, 2012) October 30<sup>th</sup> 2013 and October 1<sup>st</sup> 2014 respectively. A Warning to Caveator was filed November 13<sup>th</sup> 2014. The Summons for Directions was filed November 25<sup>th</sup> 2014, followed by the Affidavit of the beneficiary Lucia White filed March 20<sup>th</sup> 2015, and that of the Bank's representative Carol Gaskin of April 5<sup>th</sup> 2015.

[25] The Will was executed on July 25<sup>th</sup> 2008. By Codicil dated April 12<sup>th</sup> 2010 he appointed Royal Fidelity to be his Executor and Trustee on terms and conditions, inter alia, 'the right to remuneration as set forth in Royal Fidelity's published Scale of Fees in force at the date of entering into the administration of the Estate, and as if such Terms and Conditions were herein set out at length'. In addition, the Codicil provided that "Royal Fidelity shall have power if its standard Scale of Fees shall be altered after my death to charge remuneration for its services in accordance with such Scale of Fees as shall from time to time be in force." See paragraph [11] above.

[26] The core of counsel's submissions is an acceptance that Royal Fidelity is entitled to remuneration, but the quantum and method of calculating such

compensation is in dispute. Paragraph 20 of counsel's submissions, set out below, goes to the heart of her submissions. It states as follows:

“20. Royal Fidelity is seeking to incorporate a document not specifically referred to in the Codicil of the Testator being RBC Royal Bank of Canada's Terms and Conditions, Scale of Fees & Form of Appointment and is alleging that their Scale of Fees is the same as that of RBC's and wishes this Honourable Court to draw such a conclusion. The burden of proof is on Royal Fidelity to show that this document, RBC's Scale of Fees, was incorporated into the Codicil of the Testator and there is no doubt that that document is what the Testator intended to be incorporated into his Codicil.”

### **The Case for the Respondent**

[27] The Respondent's Written Submissions filed June 1<sup>st</sup> 2017 are deemed to be the relevant submissions in answer to the Applicant herein. It is again noted however that the Amended Agreed Statement of Facts and Issues filed June 8<sup>th</sup> 2017 narrowed the Issues for consideration as outlined in paragraph [20] above. Only those submissions relevant to the Agreed Issues of June 7<sup>th</sup> will be addressed. (Stated differently, there appears to be, inter alia, an abandonment of any challenge to Royal Fidelity's appointment as Executor/Trustee, and its continuing role of administration of the Estate).

[28] In particular, counsel addressed the application for a declaration that Royal Fidelity is only entitled to charge reasonable professional fees and that they be taxed by the Registrar, with the following submissions: that under **section 19** of the **Trustee Act Cap. 250** of the **Laws of Barbados**, this Court has a statutory power to set and fix reasonable fees of remuneration for any

professional person or any trust corporation when acting as a Trustee of any property; citing **Williams on Wills**, that where a Trust Corporation cannot rely on the terms of the Will and Codicil to claim remuneration (in accordance with a scale of fees), they are entitled to reasonable remuneration in relation to services performed; but nonetheless the Respondent submits that the Codicil makes precise provision for Royal Fidelity to be remunerated according to its ‘published scale of fees as shall from time to time be in force’; that the Court has an inherent jurisdiction to authorize payment of remuneration to trustees: see **Re Duke of Norfolk’s Settlement Trusts 3 All ER 1981**; that there is no ambiguity as to charging that would allow for the Court to rely on the **Trustee Act** to remunerate Royal Fidelity.

[29] The Respondent, in support of the submission that there was precise provision for remuneration, relied on the principle of ‘Incorporation of papers’ by reference: see paragraphs 23 to 28 of Written Submissions filed June 1<sup>st</sup>, 2017.

### **The Procedural Error Acknowledged**

[30] There are two procedural errors evident: firstly, this matter was heard pursuant to a Summons for Directions filed under the **Non-Contentious Probate Rules 1959**. It is unclear at what point, and why this matter was

given a suite number by the Registration Department without the filing of process under the **CPR 2008**.

- [31] In November of 2016, this Court incorrectly recorded a Consent Order after the parties indicated that they wished to record said Order following the Court's facilitation of the parties' settlement discussions. The effect of this Order was to deal with a Non-Contentious proceeding in a manner procedurally suited to a Contentious Proceeding.

### **The Jurisdictional Limits of a Summons for Directions**

- [32] As stated above, in the examination of the procedural mis-step in this matter, a critical fact is that the foundation of this matter is a Summons for Directions filed pursuant to **Rule 42 of the Non-Contentious Probate Rules 1959**, which provides as follows:

“42 (2) A Caveator having no interest contrary to the person warning but wishing to show cause against the sealing of the grant to that person, may, within eight days of service of the warning upon him exclusive of the day of such service, or at any thereafter if no affidavit has been filed under paragraph 3 of these rules, issue and serve a summons for directions which shall be returnable before a judge.”

- [33] It is clear, in the opinion of this Court, that a Summons for Directions filed pursuant to **Rule 42(2)** must be by a Caveator who has “no interest contrary to the person warning”, but nonetheless “wishing to show cause against the sealing of the grant to that person”. It is also the view of this Court, that a Caveator having an “interest contrary to the person warning”, if he or she

wishes to pursue that interest must institute Contentious Proceedings or alternatively, the person warning must do so.

[34] After the initial vacillation, it is made clear by the filing of June 8<sup>th</sup> 2017, that the Caveator has no intention “to show cause against the sealing of the grant” to Royal Fidelity, nor has the Caveator taken the position that she has an “interest contrary to the person warning (Royal Fidelity).”

[35] In an earlier Ruling made in a probate matter (**No. 565 of 2009 on July 28<sup>th</sup> 2017**), this Court made clear its view on the jurisdictional limits of a Summons for Directions filed under the Non-Contentious Probate Rules, by stating at paragraph 25 and onwards of that Ruling as follows:

“[25] ... there are two regimes for the handling of issues arising on the administration of estates, (1) under the Non-Contentious Probate Rules 1959; or (2) under Rule 67 of the Civil Procedure Rules 2008 (the CPR). These represent two completely separate jurisdictions; primarily that of the Registrar and the Court, with the exception of the limited jurisdiction of a judge in chambers under the provisions of the Non-Contentious Probate Rules 1959.

[26] **Karen Nunez-Tesheira** in her text **Non-Contentious Probate Practice in the English-Speaking Caribbean** defines ‘Non-Contentious Business’ as follows:

“Non-contentious, or common form probate business as it is otherwise called, is concerned with the business of obtaining probate and administration where there is no contention to the right thereto and includes the granting of probate and administration in contentious cases when the contest is terminated and all business of a non-contentious nature to be taken in court in matters of testacy and intestacy not being proceedings in any suit, and also the business of lodging caveats against the grant of probate or administration.”

[27] In the United Kingdom, the terms commonly used are Common Form Business or Solemn Form Business. This explanation of the two terms is provided by **Gibson's Probate: Law and practice in Probate:**

“Usually probate or administration is granted merely on the oath of the applicant; this *is common form business*. But sometimes the validity of the will or the applicant's right to a grant of probate or administration is disputed by another person, in which case an action has to be brought to settle the dispute; this is *solemn form business*.”

[28] *Solemn Form Business or Probate actions*, usually fall into three classes:

“(1) Actions to prove a will in solemn form, i.e., as to the validity of an alleged will.

(2) Actions to settle the right of two contending claimants to obtain a grant of administration. These actions are called “interest actions”.

(3) Actions for the revocation of probate or letters of administration previously granted in common form.”

[29] It is against this backdrop that the procedure for Caveats and Citations exists, and is provided for in the Non-Contentious Probate Rules. Caveats prevent the issue of a grant of probate or administration, as it is usual that the party lodging the caveat is desirous of having the Grant issued to him. In such event, it then becomes necessary for the other party to issue a Citation. See **Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 18<sup>th</sup> edition Chap 31** Summons for Directions by a Caveator.

[30] A Caveat lasts for 6 months unless renewed. The person applying for the Grant must take steps to clear off the Caveat by warning it, since the purpose of the caveat may not be to oppose a grant, but to obtain notification of it, for example, for the purpose of issuing a writ against the deceased's estate. (See **Gibson page 92 and page 337 of Non-Contentious Probate Practice** by **Karen Nunez-Tesheira**) where she lists 5 usual purposes for entering a caveat as follows:

- (a) To give the caveator time to determine whether he has grounds for objecting to the issue of a grant to some other person;
- (b) As a preliminary step to commencing a probate action or the issuing of citation proceedings;
- (c) To give the caveator an opportunity to apply to the court for an order that the surety/sureties to an administration bond do justify;

- (d) To permit a person with an equal right to letters of administration as that of the applicant, to obtain the necessary order from the court as to whom the grant should be made;
- (e) To afford any person interested in the estate of the deceased named therein, the opportunity to bring before the court any question in respect of the application for the grant; Rule 42/43 Non-Contentious Probate Rules.

[31] **Gibson’s** speaks to the procedure after Warning at **page 92** as follows:

“The warning will be signed by the registrar, and the original or a copy thereof must then be served on the person who entered the caveat. If the caveator wishes to make opposition his next step depends on whether he has an interest contrary to that of the person warning him, or has no such interest but wishes to show cause against the sealing of a grant to that person. In the former case he must, within eight days of service of the warning, enter appearance in the principal registry by filing the prescribed form, which will set forth his interest, and making an entry in the appropriate book. In the latter case he must, within eight days of service, issue and serve a summons for directions, returnable before a registrar of the principal registry. **In either event the contentious business then begins; the applicant for the grant will have to bring an action to establish his right. The costs of the caveat and warning will then be treated as costs in the cause.**” (my emphasis)

[32] Stated differently, there is no cross-over from non-contentious to contentious by the filing of a Summons for Directions. The only ‘contentious’ business permitted under such a Summons is the determination of which party is best suited to receive the Grant. Once contentious, the matter must commence under the CPR 2008 by the proper filing of a Claim.”

[36] See also paragraphs 43 to 45 of this Ruling and the comments of Barbados Court of Appeal in the case of **Stoute v Skeete, Civil Appeal No. 11 of 1999**.

[37] This Court maintains the fundamental jurisdictional difference between a Summons for Directions filed under the **Non-Contentious Probate Rules**

**1959**, and a Summons for Directions filed under **Order 25** of the “**old**” **Rules of the Supreme Court 1982** or (the equivalent under the ‘**new**’ **Rules (CPR)** of applying to the Court for Directions.

[38] The process of filing of Caveats and Summons for Directions, is purely in pursuance of dealing with the Non-Contentious issues, that is, to address administratively the issue of a grant of probate, usually in those cases where there may be an applicant for Grant, together with a Caveator[s].

[39] See **Williams Mortimer and Sunnucks on Executors, Administrations and Probate, 1<sup>st</sup>, ed**, at **Chap 31** under the rubric ‘**Summon for Directions by a Caveator**’; **Halsbury’s Laws of England, Vol. 102 on Wills and Intestacy: The Grant of Probate or Administration** under the rubric “**The High Court Practice and Procedure: Caveats: Tolley’s Administration of Estate Part C: On obtaining Probate and Grants of Administration-Caveats paragraph C 10-13; Tristram and Coote’s Probate Practice, 13<sup>th</sup> Edition at paragraph 23.65. See also Jolley v Jarvis [1964] 1 All ER 596; and Salter v Salter [1896].**

### **Remuneration of Personal Representatives: the Remuneration of Professional Trustees**

[40] This Court has a statutory power under **section 44** of the **Trustee Act** (not section 19 as submitted by counsel for the Respondent), to set and fix

reasonable fees of remuneration for any Trustee or Trust Corporation acting as Trustee of any Estate. This section states as follows:

“The court may, in any case in which the circumstances appear to it so to justify, authorise any person to charge such remuneration for his services as trustee as the Court determines”.

[41] The exercise of such power would arise generally where there has been no provision or no adequate provision in a testamentary instrument.

[42] In addition thereto, Courts have an inherent discretionary jurisdiction to authorise the payment of remuneration to Trustees, and in so doing, to determine what constitutes reasonable remuneration: see **Re Duke of Norfolk’s Settlement Trusts [1981] 3 All ER 220** where in a judgment (the Applicant therein sought an increase of remuneration authorised by the trust instrument) delivered by **Fox LJ**, the English Court of Appeal reviewed the authorities on this issue of the inherent jurisdiction of the Court, concluding at page 228:

“There is, in my judgment, no doubt that the court has an inherent jurisdiction to authorise payment of remuneration to trustees. **Danckwerts in J. Re Martins [1953] All ER 19, and Upjohn J in Re Worthington (deceased) [1954] 1 All ER 677** accepted that ... The question is the extent of that jurisdiction.”

[43] And at page 230 he states further in conclusion:

“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, to 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.”

### **This Court’s Approach**

[44] It was this Court’s view from the first reading of the file that the Summons for Directions should have been dismissed for two reasons as follows:

1. The order being sought was unnecessary and would in no way have advanced the matter taking into account the real issue as identified by the Caveator, namely, a declaration that the said Royal Fidelity Merchant Bank And Trust (Barbados) Limited is entitled to charge reasonable professional fees on the basis of work actually done as Executor to the Estate of Harold St. Clair White, and that their bill be taxed by the Registrar and finally determined before any monies become payable to the said Royal Fidelity Merchant Bank and Trust (Barbados) Ltd.

[45] It cannot be disputed that a Personal Representative authorized to charge, especially a professional personal representative, such as the Royal Fidelity Merchant Bank and Trust (Barbados) Limited is entitled to charge and to be remunerated, either in contractually agreed terms or in their absence reasonable fees.

[46] What constitutes ‘reasonable fees’ can provide fertile ground for contention: is it reasonable on the basis of fee charging by professional executors; is it

reasonable based on an assessment of the complexity of the tasks involved in settling a relatively simple estate; is it reasonable if compared to what an attorney-at-law would charge for the settling of an estate.

[47] It is trite law, and a general principle that beneficiaries and personal representatives are entitled to receive all proper costs incidental to the administration of the estate out of the estate: **see Probate Disputes and Remedies: Goodman and Hall, 1<sup>st</sup> edition at page 168.**

[48] In addition thereto, this is much law on the issue of the remuneration of professional trustees. In short, in those circumstances the issue becomes one of contractual interpretation, and more often than not, the rules applicable to the incorporation of extrinsic material in contractual interpretation.

[49] It is noted that the exchanges between the parties exhibited in the various Affidavits filed, reveal that the Caveator is of the view that reasonable fees, should be determined by a Registrar's taxation, when the critical issue must be whether there is a contractually binding process for the calculation of fees. The issue of 'reasonable fees' can only be a consideration after there has been a finding of law and fact that there is no contractually binding process for the calculation of fees. Counsel for Royal Fidelity distinguished the case of **Re Pooley [1888] 40 Ch D1** (relied on heavily by counsel for the

Caveator) on the grounds that it dealt with parties who came within the jurisdiction of the taxing master, unlike the case at bar.

[50] Disputes can and often arise as to the amount charged and where that occurs there are rights of redress available to a beneficiary disgruntled by the fees so charged: see **Re Duke of Norfolk's Settlement Trusts 3 All ER 1981**.

These are properly the subject of contentious proceedings, and in the opinion of this Court outside of the jurisdictional limits of a Summons for Directions under the Non-Contentious Probate Rules.

[51] No contract has been produced by Royal Fidelity, and consequently at best the relief sought should have been an Order compelling the Bank to set out for the approval of the Court the basis of charging if the parties fail to agree this.

[52] Alternatively, the Personal Representative has a right to apply for an Order for taxation of costs; whereas on the application of a beneficiary the Court exercises an inherent discretion as to whether it should grant an order for taxation of costs.

## 2. Procedure

The second reason is one of procedure. In this regard, the above discussion on the jurisdictional limits of a Summons for Directions under the Non-Contentious Probate Rules, speaks to this Court's views on this subject.

## **Conclusion and Disposal**

[53] It is indeed unfortunate that more than five years after the death of the Testator, this matter is no further advanced. The Caveator having determined that it was no longer challenging the appointment of Royal Fidelity as Executor/Trustee should have signalled such to the Registrar, to facilitate the completion of the non-contentious proceeding (common form probate business).

[54] In the face of this, the only Order that this Court feels that it can make in these circumstances, is an Order clearing off the Caveat (that is, that it ceases to have effect, and that the grant of probate be handed out to the Executor/Trustee, unless a Claim is issued within 14 days hereof), and it so orders.

[55] Even if it fell within the jurisdiction of this Court to make such an Order as sought by the Applicant pursuant to its jurisdiction under the Non-Contentious Probate Rules, there is no value in this Court making an order that Royal Fidelity is entitled to reasonable fees in light of the powers of the Court under the Trustee Act and under its inherent jurisdiction; the real issue is fundamentally a contentious issue and that issue is not jurisdictionally before this Court.

[56] In the premises, the application is dismissed.

[57] I will hear the parties' submissions on the issue of the costs.

**MARGARET A. REIFER**  
Judge of the High Court