

# **THE COMMON LAW INEQUITIES IN REMUNERATING THE SOLICITOR-EXECUTORS AND TRUSTEES: WHITHER THE INTEREST OF THE NIGERIAN PROFESSIONAL?**

**BY**

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## **INTRODUCTION**

One notable area of legal practice that has left the practitioner palpably deficient in financial earnings and or incapacitated to recover at law is the performance of his role as either an executor or trustee or a legal estate under virtually the extant laws of most States in Nigeria. At Common Law and its indigenous followership in Nigeria, it is not legally expected that the Practitioner raises his bill of charges for acting in execution of a Will. The Lawyer who plays the role of the executor or a trustee, in equity and trust, does so markedly gratuitous.

As if conscious of such seemingly a priestly obligation, it is observed that more often than not most testators merely or customarily leave token legacies (between N250 and N500)<sup>1</sup> for their executors and trustees who act as such.<sup>2</sup> In spite of such token legacies their estates have been known to be efficiently administered and the trusts created under the Will faithfully and fairly carried out by lay-executors as well as legal practitioners. While perusing those Wills one cannot but notice their simplicity and lack of sophistication in terms of their contents and the obligations imposed upon the time of trustees simple devices, bequests and directions like the education of the surviving children, the maintenance of spouses or other dependants.

A common phenomenon is that the worth of the estates involved are not much apart between the Wills of the very rich and the less rich; even though being rich is relative. What is pointedly a common denominator gleaned from these Wills is that they are documents arising from the rich and not the poor perhaps because poverty is not a valid

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<sup>1</sup> Prior to the advent of the Naira older Wills expressed such legacies in guineas

<sup>2</sup> Scanning though some Wills registered in the Probate Registries of Lagos, Ogun, Oyo and Ondo, Kaduna and Benue States plotted for investigations, rarely has any testator given more than such a token sum, although in addition children or other relations, so appointed, were given befitting legacies but qua consanguinity or affinity not qua executor or trustee.

bequest: for even if it is a virtue, the law does not encourage it. Another interesting fact is that those appointed to these positions of trusts were old and mature people, colleagues or friends of the testators who invariably had retired or 'pensioned' or who would soon be in such status and who would have more than enough time to devote to the affairs of their departed friends. The creation of a class of nouveau riche by the oil boom, the fact that being wealthy is not now limited to the old and the hardworking, the fact that family relations are now becoming more complex and no longer as homogenous as before, call for a new appraisal as to the class of legal practitioners to be appointed executors and trustees of Wills.

It is not the purpose of this Paper to examine the powers and duties of executors<sup>3</sup> rather, it sets out to demonstrate the need to infuse men of affairs particularly professionals into the cadre of executors and trustees, to examine the compensation that could go with such infusion in view of the notion both at common-law and in equity about payments of executors and trustees for their time and trouble, and for the same reasons to show how this cadre of executors and trustees could be rewarded within the law. Above all, this Paper is to assist legal practitioners to draft appropriate clause(s) in the Will to enable executors and trustees particularly professionals among them draw compensation for their time and trouble in the administration of the estate.

### **The Professional touch of the Solicitor-Executor/Trustee**

Most of the Wills discovered to have been executed in the early times of legal history<sup>4</sup> were simple and their demand on the time and energy of executors and trustees was limited. The gathering of assets, the distribution of the assets and the administration of the trusts created under the Will was neither time consuming nor complex enough to seek professional advice or help. This study discovered, however, that not only has the general economy and personal wealth creation and acquisition have become sophisticated but also that the means by which they are to be disposed, even by testators have become complex. For example, the power of the testator<sup>5</sup> has been given to extend to:

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<sup>3</sup> For an exposition of the powers of executors see Ocheme, P. (2007) 6 Q. L. R. 150; *Forster v. William Deacon's Bank Limited (1935) Ch. 359*.

<sup>4</sup> Such times past include before, during and up to the end of the 20<sup>th</sup> Century.

<sup>5</sup> See Section 3 of the Wills Law, Cap. 175. Revised Laws of Benue State of Nigeria, 2004

All contingent, executor or other future interests in any property, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested and whether he may be omitted thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will.<sup>6</sup>

In line with modern concepts of wealth considered worthy to be willed and over which legal expertise is required to be administered in attending to the testator's dying declarations, the term Property as known to law is usually more encompassing than as known to even some testators before and after their demise. For example, "property" as found for purposes of the subject matter of this Paper, includes, (and perhaps not limited to):

right of occupancy, sublease, sub-underlease and funds, securities for money, share of government, debts, things in action, rights, credits, goods and all other property whatsoever which by law devolves upon the executor or administrator and any share of interest therein.<sup>7</sup>

Another phenomenon to be observed is that many more men and women have now been admitted into the class of the wealthy and the affluent. And whatever such people leave behind may run into hundreds of millions and into billions of Naira when their foreign holdings are converted. Unfortunately wealth and affluence have adversely affected family relations. Brothers are no longer each others' keepers and there is much stress that everyone looks out for himself without caring for the overall good of the family. The expectation of the testator's bounty leads to unnecessary feud, jealousy and unmatched rivalry between kinsmen.

The Will therefore is anything but simple to ensure that amongst the warring dependants the chosen beneficiaries get what is meant for them and those excluded do not by any subterfuge eat anything. Besides it may require an accountant to unravel the details of the statistics of the estate, he may have to advise on when the assets should be called in taking into accounts many factors price of stocks and shares at the Stock Exchange, the current market value of other non-quoted assets including land and houses, the surrender value of commercial notes and other negotiable instruments. The banker too may have to be called in. As expected, the lawyer will have forms to complete, obtain probate, gather the assets, ascertain the beneficiaries, arrange for the distribution of the estate according to the tenor of the Will and service the

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<sup>6</sup> Ibid, at Sub-section (3)(a).

<sup>7</sup> See Section 2 of the Wills Law, Cap. 175. Revised Laws of Benue State of Nigeria, 2004

various trusts usually created under the Will.

A modern Will, as argued by this Paper, thus requires specialist advice and attention. The days of the simple Wills can, by reasons among others given above, be said to be over. The hitherto lay-executors and trustees are, per force of complexities, giving way for professional executors/trustees. It is possible, of course, to argue that the lay-executors/trustees could throttle and muddle through the intricacies of figures and technicalities and eventually sort things out by employing experts. For this to be done, the lay executors/trustees must be in a position to identify the problems and the areas where help is required. It is usually better if professionalism was brought into the Will from the onset and those appointed executors and trustees were professionals who will use their skill time and energy to administer the estate. And the expertise to be dispensed in this regard should not only be earned but also be remunerated.

### **Rationale for Not Remunerating the Professionals**

It does appear that generally both at Common Law and at equity, an executor/trustee cannot charge for his time and care expended in the administration of the estate. Many factors are responsible for what appears to be an unfair rule that executor/trustee should not be compensated for work done even to the advantage of the estate and the beneficiaries. First, the basic principle is that an executor or trustee is a volunteer. As such he acts voluntarily and is not paid for his services. It does not matter that the services he offers and performs are of a professional nature as where for example he is a solicitor or banker or an accountant. The crux of the matter is that whatever the nature of the services he provides whether professional or personal he is not entitled to any remuneration.

Secondly the executor/trustee occupies a fiduciary position in relationship to the beneficiaries of the estate. Because of this unique position he must remain independent and he must not allow his duties and his interest to conflict. Kolawole J. C. A. explained the consequences of the executor's fiduciary position in *Okusuji v. Lawal*<sup>8</sup> when he said:  
...it is settled rule of equity that no one having duties of fiduciary nature to discharge shall be allowed to enter into engagements in which he has or can have personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect.<sup>9</sup>

Thirdly, the executor/trustee has discretion by virtue of his office to decide whether payments or other expenses should be incurred in relation to the administration of the estate. And where he has such discretion he must not have a personal interest in exercising the discretion in a particular way. "He must be motivated to benefit the trust not himself."<sup>10</sup> Stirling J., as early 1893, warned of the possible conflict that could result if

<sup>8</sup> (1986) 2 NWLR 417.

<sup>9</sup> Ibid. at p. 433

<sup>10</sup> See Paul Todd: Equity and trust London 1986 p. 149.

the executor/trustee indulged in paying himself for services and work done in the administration of the estate. He said:

The rule really is that no one who has a duty to perform shall place himself in a situation to have his interest conflicting with that duty: and a case for the application of the rule is that a trustee himself doing acts which he might perform, employ others to perform, and taking payment in some way for doing them. As the trustees might make the payment to others, this court says he shall not make it to himself, and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate.<sup>11</sup>

The moral behind His Lordship's observation is simply that no person in whom fiduciary duties are vested shall make a profit by performing such duties; since by trust his duty includes seeing that no improper charges are made.

A lawyer executor/trustee cannot circumvent the rule that in the absence of express authority he cannot charge for care and loss of time by instructing a firm of solicitors which he is a partner. Any fee paid to the firm becomes partnership money and the lawyer being a partner will of course share therein. Allowing him to share in the partnership profits is aiding him to get paid for services of which he should not ordinarily be paid. The courts will not approve of this.

In *re Gates Arnold v. Gates*,<sup>12</sup> the testator appointed Arnold as the executor and trustee of his Will. The Will did not confer on the solicitor-trustee to charge for business transacted by him or his firm in the administration of his estate. The solicitor-trustee tried to pass his bill of costs which was described as "the plaintiff's bill of costs". In fact the work was performed throughout by the firm of solicitors of which the solicitor-trustee was partner. The Taxing Master allowed the plaintiff's out-of-pocket expense but in the absence of an express power for a solicitor-trustee to charge, disallowed the profit costs.

The matter was brought to court by an Originating Summons and it was held that in the absence of an express power in the

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<sup>11</sup> In *Re Doody Fisher v. Doody* (1893) 1 Ch D. 129 at p. 134

<sup>12</sup> (1933) Ch. 913

instrument creating the trust for a solicitor-trustee to charge, a solicitor-trustee who employs the firm of solicitors of which he is a partner to act for him in the conduct of an action to administer the trust estate is in no better position than a solicitor-trustee who acts as his own solicitor, and on taxation of his costs, will not be allowed profit after costs. It does not matter that there is an agreement between the solicitor-trustee and his firm that he would not share in the costs received from the estate or trust;<sup>13</sup> neither is it of relevance that the solicitor-trustee now does limited work for the partnership and receives a fixed salary from the firm which salary is only a small portion of the firm's profit.

In *Claremounty v. Hall*,<sup>14</sup> a solicitor who was a trustee under an instrument which gave no power to trustee-solicitor to charge profit costs for work done in connection with the trust took out an originating summons for the determination of matters relating to the settlement of his firm's fees. He was partner in a firm of solicitors and had before the trust questions came up, arranged with his partners that he should do only limited amount of work in connection with the practice of the partnership and should receive a salary of \$600 a year out of the profits of the firm, this amount being only a small portion of the total yearly profits of the partnership.

The solicitor-trustee employed his firm to do legal work in connection with the trust, the work being done by a partner who was not a trustee. The taxing master disallowed all the profit costs passed by the solicitor-trustee and allowed only out-of-pocket disbursement, on the ground that he had employed his firm to do the work. That decision was upheld by Eve J. On appeal, it was held affirming the decision of Eve J., that in as much as the solicitor-trustee derived some benefit from the profits of the partnership although limited in amount he was entitled to employ the firm in which he was a partner to do work in connection with the trust for which profit costs could be charged.

### **The Practice of Reimbursing Executor/Trustee's Reasonable Expenses**

The general rule on the remuneration of executors/trustees does not preclude them from being reimbursed for out-of-pocket expenses that

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<sup>13</sup> Ibid

<sup>14</sup> (1934) Ch. 623

is, expenses wholly and exclusively incurred in the affairs of the estate. Naturally they might seek legal advice, the fees of which must be settled provided those amongst them do not participate in the sharing of the profit costs. Similarly telephone calls, postage stamps and other sundry expenses met by the executor must be paid back from the estate.<sup>15</sup>

### **How Strict is the Rule?**

The rule that generally an executor/trustee will usually be allowed nothing as compensation for his personal trouble or loss of time is so strict that it is not affected or altered by the executor's renunciation of the executorship and in his afterwards assisting in it; nor the fact that he deserves more and has benefited the estate to the prejudice of his own affairs.<sup>16</sup> Where, for instance, the execution of the office was likely to be attended with trouble and the executor who had no legacy<sup>17</sup> and who at first declined but afterwards agreed with the residuary legatee in consideration of some money to act in the executorship, died before the execution of the trust was completed, the court refused the claim of his executors to be allowed the money out of the trust money in their hands observing that independently of the executor having died before the trust was executed, such bargains ought to be discouraged as tending to dissipate the property.<sup>18</sup> A surviving partner who is an executor is not entitled without express stipulation to any allowance for carrying on the trade after testator's death.<sup>19</sup>

### **Exceptions to the Rule**

Though strict as often remembered by the Lord Justices, yet the rule admits of some exceptions. They are essentially three such exceptions, to wit: the Rule in *Cradock v. Piper*<sup>20</sup>; the inherent jurisdiction of the court to order remuneration, and authority in the Will or Trust Instrument to remunerate. It is appropriate that these exceptions be discussed in details so as to appreciate the recommendations that would be made, later on, for the benchmark in the Nigerian circumstance.

<sup>15</sup> Hanbury & Maudsley: Modern Equity 12<sup>th</sup> Edition London 1985 edited by Jill E. Martin P. 568. And also Snell's Principles of Equity 28<sup>th</sup> Edition Sweet & Maxwell 1982 edition by Baker & Landan p. 252.

<sup>16</sup> *Robinson v. Pett* 3 p. Wims 249

<sup>17</sup> See Post pp. for the understanding of the term legacy used in this context.

<sup>18</sup> *Gouls v. Fleetwood* 3 P. Wims 251

<sup>19</sup> *Stocken v. Dawson* 6 Beav 371.

<sup>20</sup> (1861) 1 Mac &G. 664

<sup>21</sup> Snell's op cit 253

## Rule in *Cradock v. Piper*

Under the rule a solicitor-trustee is entitled to his profit costs when he acts as solicitor in an action or other legal proceedings on behalf of himself and his co-trustee jointly (and not himself alone) except so far as the costs have been increased by his being one of the parties. The rule applies not only to hostile proceedings against the trustees but also to friendly infant and it is immaterial whether the trustees are plaintiffs or defendants, or applicants or respondents.<sup>21</sup>

This exception to the general rule is rather anomalous. It applies only to lawyer executor/trustee. Other professionals who are executors and trustees cannot avail themselves of the benefit of the exception. Even for lawyers the application of the rule is cumbersome.

The lawyer trustee cannot act for himself and charge. In a situation where he is a surviving trustee and he acts for the trust he will be doing so gratuitously. Should the cost go up because he is one of the parties to the action he will not be able to pass his profit costs. The exception introduced by the rule has been criticized even though the rule had been firmly established by the first decade of the nineteenth century.<sup>22</sup> Lord Justice Lindley in *Lawton v. Elswes*<sup>23</sup> remarked as follows about the rule:

I am not one of those who admire the decision in *Cradock v. Piper*. It is one of those cases which are anomalous but which have laid down a certain rule, and that rule has been acted upon by everybody whom it concerns for so long a time that we cannot and ought not to vary it.

By the somewhat anomalous rule of *Cradock v. Piper*, a solicitor-trustee or his firm may charge costs if he has acted for a co-trustee as well as himself in respect of business done in an action or matter in court, provided of course, that his acting for himself has not increased the expenses that would have been incurred had he been acting only for his co-trustee. In that manner, a solicitor-trustee may employ his partner to do any legal work whether in or out of court, and may pay his proper charges out of the trust estate just as he might with any other solicitor, provided the partner will be exclusively entitled to the profit costs for his own benefit.<sup>24</sup>

Despite the recognition of the Rule in *Cradock v. Piper*, there appears that the rule would not always be swallowed hook line and sinker, for as was discovered subsequently, it was held<sup>25</sup> "that where a solicitor-trustee employs his firm to act as solicitors to the trust, in the absence of any charging clause in the trust instrument, the firm is not entitled to charge for its services, even though the solicitor-trustee has agreed with

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<sup>21</sup> Snell's op cit 253

<sup>22</sup> See Lindley I. J. and Bowen L. J. in *Re Doody* (1893) 1 CH. 129 AT p. 142

<sup>23</sup> (1887) 34 Ch. D 675 AT P. 689.

<sup>24</sup> See *Clack v. Carlon* (1861) 30 L.J. Ch. 639.

<sup>25</sup> *Re Gates* (1933) Ch. 193.

<sup>25</sup> *Re Gates* (1933) Ch. 193.



the partner that he himself will receive no part of the fees”<sup>26</sup>. Given the Lordship opinion in this later case and the fact that some text-writers<sup>27</sup> have classified the *Cradock's rule* as anomalous<sup>28</sup>, it would appear that this cannot serve as benchmark for the Nigerian lawyer, save by a legislative reform.

### **The Inherent Jurisdiction of the Court**

Snell's principles affirm that the court has an inherent jurisdiction to allow a prospective or an existing trustee to retain remuneration where none was provided by the trust instrument in respect of both past and future services. In exercising this jurisdiction the court has to balance two conflicting influences. On the one hand the office is generally gratuitous; on the other, the trust should be well administered. For instance, remuneration has been awarded where the services of a particular trustee are of special value and who refuses to act without payment.<sup>29</sup> It was also awarded where the duties had proved unexpectedly onerous.<sup>30</sup> It does appear though that remuneration will be awarded on an application. The point to note about the exception is that its application depends on the discretion of the court. It is available only if the court says so. And for the court to say so, it is dependent on the latitude of the actual or inherent jurisdiction conferred on the court by the law.

### **Authority in the Will or the Trust Instrument:**

This is by far the most important breach that can be made on the fortress which equity has built around non-payment for services rendered by trustees. Here the exception from the general rule comes from the very source upon which the trust was founded. Authority to charge usual professional fees which in legal parlance is called profit costs emanates either from the testator of the Will or the settler of the trust himself. Subject to the rules of interpretations the court will generally allow the executor or the trustee to pass his profit costs. Let us now consider some of the reasons that strengthen this head of exemption:

### **The Lawyer may say: “No Pay No Professional Services”**

Professionals are weary of laboring without adequate compensation not to talk of compensation at all. The duties of administering modern Wills are onerous, complex and time consuming.

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<sup>26</sup> Ibid at p. 204.

<sup>27</sup> See for example, Gilbert Kodolinye: *An Introduction to Equity in Nigeria*, Spectrum Law Publishing, Ibadan, 1990.

<sup>28</sup> Ibid at p. 125

<sup>29</sup> *Re Freeman's S. T.* (1887) 37 Ch. D. 148

<sup>30</sup> *Cambridge v. Blair* (1845) 8 Beav. 588 at p. 596

It is highly unlikely that a professional who has his own office overheads to meet will leave lucrative practice and rewarding briefs for more reimbursement expenses. It is ludicrous to expect that a professional executor/trustee will assume the arduous task of administering a Will or trust on the flimsy hope that the court would order the estate to compensate him for his time and pains. The bottom line is that this cadre of executors/trustees will be difficult to come by.

It is customarily expected to find clients/intending testators expressed the desire that their lawyers who might have drafted their Wills should act as the executors and trustees of their Wills. The writer was faced with many such requests. Ironically, however, because of the knowledge of the law many lawyers have had to turn down their clients' requests. Many refuse to explain the reasons for declining to act. It is usually embarrassing to tell a client of many years standing that you could not act for him because the rigid rules of law and equity prevent you from charging for work done for the estate. One would have thought that it is the same closeness that should induce the lawyer to talk with his client with some candour. If the client was properly educated on the issue he might be prepared to do justice by making it possible for the lawyer, while obtaining drafting instructions, to charge the usual professional charges. The moral is that lawyers should put the facts before clients and advise them on what to do to rectify the anomaly inherent in the rule which stated that executors/trustees could not be paid. The remedy lies in drafting appropriate clause in the Will or the Trust.

### **A Guide to Drafting Acceptable and Appropriate Clause**

Usually the court will not question any attempt by a settlor or testator to circumvent the established rules. As long as the mandate to charge fees is clear and unambiguous the court will give effect to it. If however, the mandate is not free from doubt or ambiguity the court will use its power of interpretation to give what it considers as appropriate meaning to the enabling clause. It is therefore necessary to give guidance to lawyers to know exactly the practical cause and effect of the enabling text to be included in the enabling clause. This is best done in reference to decided cases. The following should therefore be noted:

#### **(i) Enabling Clause to charge is a Legacy to the solicitor**

In law a charging clause - that is, the clause in the Will which gives authority to the solicitor-executor to charge fees, amounts to a legacy of profit costs. Accordingly, all the rules and law applicable to legacy generally will equally apply to this type of legacy.

In the case in *Re white; Pennell v. Franklin*<sup>31</sup> it was held that a solicitor who is the sole executor and trustee of a Will is not entitled to his profit costs for acting as solicitor to the estate if it turns out to be insolvent, even though the Will contains the usual clause empowering him to charge

<sup>31</sup> (1998) 1 Ch.D. 297

for works done; for the clause being in effect a legacy of profit costs to the solicitor, he cannot claim it as against creditors. The facts are that Mr. White appointed a Mr. Franklin and two others as executors and trustees of his Will which he made in 1884. Franklin was a solicitor.

The testator directed in the Will that Franklin should be allowed all professional and other charges for his time and trouble. The Will was proved only by Franklin the two others disclaimed. Two creditors took out summons each against the estate. Franklin defended both actions. It was found that the estate was insolvent and unable to pay the two creditors. Probate administration judgment was pronounced in both actions; the record of the proceedings was given to one of the creditors. In a claim for profit costs due to Franklin as solicitor to the estate, the accounts and inquiries showed that the estate was insufficient for payment of the debt in full.

The rationale behind the judgment in this case is that the enabling clause is really a gift on condition. It is a gift of the privilege of charging which the solicitor and trustee if he chose to act as solicitor would not otherwise have. It is for the solicitor to ask himself whether or not it is worth his while to act for the estate. He is not obliged to act but if he did act, he must take the risk of not being paid out of the estate. The matter was succinctly put by Kekewich J. when he said:

It seems to me that the right to charge profit costs must be regarded as a matter of bounty; but for that clause the solicitor cannot charge. It is a gift by the testator to the solicitor of something the law will not otherwise allow him to take... if then this is a legacy the whole question is settled the legatee cannot compete with creditors... a legacy can only come out of that part of the estate which is left after payment of debts and testamentary expenses.<sup>32</sup>

The law is therefore clear that a solicitor executor-trustee cannot claim profit costs in spite of the testator's declaration in the Will until creditors are paid and satisfied. It is so notorious that the application is not limited only to solicitor executor-trustee alone. In the words of Cozens-Hardy M. R. in *Re Salmen; Salmen v. Bernstein*<sup>33</sup> the principle applies not only to solicitor-trustee but to all trustees, to accountant-trustees, to architect-trustees and surveyor-trustees: in fact to all professional trustees.

Since most of these principles and rules yield to contrary intention, it seems that the testator or the settler may displace it by

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<sup>32</sup> *Ibid.* at pp. 299-300.

<sup>33</sup> 107 L. T. 108 at p. 111.

express provision in the Will or the Trust. With careful drafting the charging clause in the Will might confer priority on the profit costs of the trustee by stipulating, suggestively as follows:

Notwithstanding, any rule of law the solicitor-executor shall be paid and discharged fully in priority to the claims of any creditor.

Profit legacy is treated for all practical purposes as legacy. Where the estate is sufficient to pay the debts but is insufficient to pay the legacies in full, the profit costs must abate with the legacies unless the clause gives priority over the other legacies.<sup>34</sup> Under some of the various Wills Laws operating in Nigeria if a person to whom, or to whose spouse, the Will gives a benefit witnesses it, the benefit is lost although the signature is perfectly valid.<sup>35</sup> Accordingly, the solicitor or other professional executor/trustee in favour of whom the Will confers authority to charge profit cost should refrain from witnessing the Will and so also his spouse. If either he or his spouse witnesses then all he can get is out-of-pocket expenses and nothing more, except he can trace the authority to charge to another Will or Codicil which neither he nor his spouse attested, in which case his right to charge profit costs is resuscitated.<sup>36</sup>

**(ii) Subject to contrary intention, professional executor/trustee will be able to charge only for strictly professional services**

Guarding jealously the rule that an executor/trustee is a volunteer, that is, he is expected by law and equity to act gratuitously, the courts have had to construe charging clauses restrictively in the sense that the executor/trustee is allowed to pass in his accounts, costs that have been charged for strictly professional services.

He is denied the right to pass costs charged for matters which a layman ought to do personally without the intervention of a lawyer. If, however, the executor or settler expressly stipulates in the Will or other appropriate instrument that the professional should be able to charge for services whether professional or otherwise or services which can be performed by a layman without the intervention of professional then the professional will be able to charge for non-professional services. But the power to do this must be plain and unambiguous.

In *re Chapple; Newton v. Chapman*<sup>37</sup> a testatrix by her Will appointed her solicitor who incidentally prepared the Will, one of her two

<sup>34</sup> *Commissioner for Stamp duties of New South Wales v. Pearse* (1954) A. C. 91.

<sup>35</sup> See S. 15 Wills Act 1837

S. 12 Wills Law 1954 of the Old Western Region.

S. 10 Wills Edict 1990 of Lagos State.

S. 8 Wills Edict 1990 of Oyo State.

S.10 Wills Law, Cap. 175, Laws of Benue State of Nigeria, 2004.

For cases on the matter see *Re Berber (No. 1)* (1886) 31 Ch. D. 665; *Re Pooley* (1888) 40 Ch. D.

<sup>36</sup> *Re Trotter* (1899) 1 Ch. 764 and *Re Royce's W. t.* (1959) Ch. 626

<sup>37</sup> (1884) 27 Ch.D. 584

executors and trustees. She stated therein that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges". She expressly directed further that:

Notwithstanding, his acceptance to the office of trustee and executor he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given and bestowed by him in or about the execution of the trusts and powers to the Will and the management and administration of the trust estate as if he, not being himself a trustee or executor were employed by the trustee or executor.

Under this direction the solicitor-trustee delivered bills of cost which included charges of all business done by him, not minding whether such business was strictly professional or could have been transacted by a lay executor without the assistance of a solicitor. The enabling clause appears all embracing and seems superficial as if any bills delivered on work done in the course of the estate whether professional or otherwise would be accommodated. But the court did not share this superficial conclusion. It rather held that all items which were not of a strictly professional character ought to be disallowed. Mr. Justice Kay chastised the lawyer that he was too high-minded to put in the enabling clause anything which would entitle him to such a extravagant charge and that it would require very clear words to induce the court to accede to such general construction.<sup>38</sup> His Lordship argued in support of his judgment that a trustee or executor should not employ and ought not to employ a solicitor to do things which he could properly do himself and he stressed that any person whose fortune it was to be a trustee or executor had many things to do which he could not properly throw on his solicitor.<sup>39</sup>

The fact that the enabling charging clause in the Will or Trust is compendiously drafted does not necessarily mean that the court will allow the professional executor-trustee to pass all types of bills whether for professional services or not. The yardstick is simply this can it be deduced from the face of the records that the testator had given a *carte blanche* that will enable all and sundry bills to be passed? Except the answer is in the affirmative the court will disallow those bills charged for services that are not strictly professional.

In *Clarkson v. Robinson*,<sup>40</sup> the testator J. P. Robinson by his Will

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<sup>38</sup> *Ibid.* at p. 586

<sup>39</sup> *Ibid.* at p. 587

<sup>40</sup> (1990) 2 Ch. 722.

express provision in the Will or the Trust. With careful drafting the charging clause in the Will might confer priority on the profit costs of the trustee by stipulating, suggestively as follows:

Notwithstanding, any rule of law the solicitor-executor shall be paid and discharged fully in priority to the claims of any creditor.

Profit legacy is treated for all practical purposes as legacy. Where the estate is sufficient to pay the debts but is insufficient to pay the legacies in full, the profit costs must abate with the legacies unless the clause gives priority over the other legacies.<sup>34</sup> Under some of the various Wills Laws operating in Nigeria if a person to whom, or to whose spouse, the Will gives a benefit witnesses it, the benefit is lost although the signature is perfectly valid.<sup>35</sup> Accordingly, the solicitor or other professional executor/trustee in favour of whom the Will confers authority to charge profit cost should refrain from witnessing the Will and so also his spouse. If either he or his spouse witnesses then all he can get is out-of-pocket expenses and nothing more, except he can trace the authority to charge to another Will or Codicil which neither he nor his spouse attested, in which case his right to charge profit costs is resuscitated.<sup>36</sup>

**(ii) Subject to contrary intention, professional executor/trustee will be able to charge only for strictly professional services**

Guarding jealously the rule that an executor/trustee is a volunteer, that is, he is expected by law and equity to act gratuitously, the courts have had to construe charging clauses restrictively in the sense that the executor/trustee is allowed to pass in his accounts, costs that have been charged for strictly professional services.

He is denied the right to pass costs charged for matters which a layman ought to do personally without the intervention of a lawyer. If, however, the executor or settler expressly stipulates in the Will or other appropriate instrument that the professional should be able to charge for services whether professional or otherwise or services which can be performed by a layman without the intervention of professional then the professional will be able to charge for non-professional services. But the power to do this must be plain and unambiguous.

In *re Chapple; Newton v. Chapman*<sup>37</sup> a testatrix by her Will appointed her solicitor who incidentally prepared the Will, one of her two

<sup>34</sup> *Commissioner for Stamp duties of New South Wales v. Pearse* (1954) A. C. 91.

<sup>35</sup> See S. 15 Wills Act 1837

S. 12 Wills Law 1954 of the Old Western Region.

S. 10 Wills Edict 1990 of Lagos State.

S. 8 Wills Edict 1990 of Oyo State.

S.10 Wills Law, Cap. 175, Laws of Benue State of Nigeria, 2004.

For cases on the matter see *Re Berber (No. 1)* (1886) 31 Ch. D. 665; *Re Pooley* (1888) 40 Ch. D.

<sup>36</sup> *Re Trotter* (1899) 1 Ch. 764 and *Re Royce's W. t.* (1959) Ch. 626

<sup>37</sup> (1884) 27 Ch.D. 584

executors and trustees. She stated therein that it was her desire that he should continue to act as solicitor in relation to her property and affairs, and should "make the usual professional charges". She expressly directed further that:

Notwithstanding, his acceptance to the office of trustee and executor he should be entitled to make the same professional charges and to receive the same pecuniary emoluments and remuneration for all business done by him, and all attendances, time and trouble given and bestowed by him in or about the execution of the trusts and powers to the Will and the management and administration of the trust estate as if he, not being himself a trustee or executor were employed by the trustee or executor.

Under this direction the solicitor-trustee delivered bills of cost which included charges of all business done by him, not minding whether such business was strictly professional or could have been transacted by a lay executor without the assistance of a solicitor. The enabling clause appears all embracing and seems superficial as if any bills delivered on work done in the course of the estate whether professional or otherwise would be accommodated. But the court did not share this superficial conclusion. It rather held that all items which were not of a strictly professional character ought to be disallowed. Mr. Justice Kay chastised the lawyer that he was too high-minded to put in the enabling clause anything which would entitle him to such a extravagant charge and that it would require very clear words to induce the court to accede to such general construction.<sup>38</sup> His Lordship argued in support of his judgment that a trustee or executor should not employ and ought not to employ a solicitor to do things which he could properly do himself and he stressed that any person whose fortune it was to be a trustee or executor had many things to do which he could not properly throw on his solicitor.<sup>39</sup>

The fact that the enabling charging clause in the Will or Trust is compendiously drafted does not necessarily mean that the court will allow the professional executor-trustee to pass all types of bills whether for professional services or not. The yardstick is simply this can it be deduced from the face of the records that the testator had given a *carte blanche* that will enable all and sundry bills to be passed? Except the answer is in the affirmative the court will disallow those bills charged for services that are not strictly professional.

In *Clarkson v. Robinson*,<sup>40</sup> the testator J. P. Robinson by his Will

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<sup>38</sup> *Ibid.* at p. 586

<sup>39</sup> *Ibid.* at p. 587

<sup>40</sup> (1990) 2 Ch. 722.

dated 25th February, 1891 appointed Clarkson, Architect, Goddard, gentleman, Rabbidge, Chartered Accountant, Wineham, gentleman and Hitchins solicitor to be trustees and executors of his Will. He bequeathed the sum of £500, free of duty, to each one of them who accepted the trusts. He empowered his trustees to sell his businesses or continue to carry on the same or convert the same into a company, to sell and to lease and manage real and leasehold estate until sale and to employ agents. He directed in a rather compendious enabling clause that: any trustee or executor hereunder being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for any business done by him or his firm in relation to any management and administration of my estate, and carrying out the trusts, powers and provisions of this my Will, whether in the ordinary course of his profession or business or not, and although not of a nature strictly requiring the employment of a solicitor or other professional person.<sup>41</sup>

Upon the testator's death the trustees took possession of and carried on the businesses and managed the property and for this purpose held weekly meetings which usually took more than two hours each. They claimed to make a charge against the state for time taken by these attendances in addition to professional charges for work done by any of them for the estate.

In 1896 one of the businesses at Oxford Street, London was sold with the sanction of the court to a company formed for that purpose. The trustees continued their meetings and it was admitted they had managed the estate to great advantage and at a large expenditure of time and labour on their part.

Their charges had been paid and appeared in their accounts as disbursements. Counsel for the testator's children approved of the course taken by the trustees and supported the application for payment. Counsel for infants grandchildren also supported. The Master of Taxation disallowed the charges and submitted same for the consideration of the court as to whether the payments to the trustees were proper to be allowed.

The Court held, *inter alia*, that the clause enabled trustee to charge for any work done for the estate in the course of his professional or business, whether done in the ordinary course or not in the ordinary course thereof but did not authorize him to charge for work done outside his profession or business. It is the humble view of this writer that the argument of Buckley J. in support of the ratio of his judgment appears tendentious, far-fetched and lopsided. His view is that the words in the charging clause: **“and be paid all charges usual in the professional or business done”** should be construed to mean: “and be paid all charges usual in the provision or business for any business done.” His Lordship continued by saying that the words: **“whether in the ordinary course of**

<sup>41</sup> Ibid at page 725



**his profession or business or not**” should be construed to mean: “whether in the ordinary course of his profession or business or not in the ordinary course of his profession or business or ... in the course of his profession or business whether in the ordinary course thereof or not in the ordinary course thereof...”<sup>42</sup>

In my humble opinion, His Lordship seemed to have concentrated on the phrase **usual professional or business** and felt that any other words or phrase in the clause must be seen, read and qualified with that primary phrase. The thrust to his argument is deduced in the following quote from his judgment:

...it appears to me that under this clause you must see whether the work done is done in the profession or in the business of the trustee or executor who is seeking to charge for it; and if it be work done in the course of that business, then, notwithstanding he is a trustee or executor, he is entitled to the charge usual in his profession, if it be a profession, or usual in his business, if it is business. You are not to see whether the work has been done in the ordinary course of his profession or business, you are to see whether in fact it has been done in the course of his profession or business .... You are simply to see whether in fact, in the course of his business, he did work for which it is usual to make a charge.<sup>43</sup>

**(iii) It is possible under a well drawn Enabling/Charging Clause for the professional executor/trustee to charge for both professional and non-professional charges.**

Although, the court will jealously guard the rule which restricts the right to charge only in respect of professional services, it may nonetheless allow a solicitor or other professional to charge for non-professional services if the enabling clause on the point is plain and unambiguous and does not admit of any other interpretation. An instance of such allowance could be seen in *re Fish Benneth v. Benneth*<sup>44</sup> the testator appointed Benneth and his solicitor Herbert Gosnell, executors and trustees and bequeathed to Gosnell if he should accept the offices the sum of £200. He declared as follows in the Will: the said H. C. Gosnell, and every other person to be hereafter appointed a trustee of my Will who may be a solicitor and professionally employed in matters relating to the trusts of my will; shall be entitled and is

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<sup>42</sup> *Ibid.* at pp. 724-5

<sup>43</sup> *Ibid.* at p. 725.

<sup>44</sup> (1893) 2 Ch. 413

hereby authorized to retain and receive out of the trust premises, his usual professional costs and charges as well by way of remuneration for business transacted by him or his partner or partners personally or by his or their clerks or agents (including all business of whatever kind not strictly professional, but which might have been performed in person by a trustee not being a solicitor) as costs and charges out-of-pocket in the same manner as if the said H. C. Gosnell, and every other person aforesaid, had not been a trustee or trustees hereof, but had been employed and retained by the trustees hereof as solicitor in the matter of the trust.

In an action brought by the wife and the children of the deceased (except one) it was contended that considerable sums were charged by Mr. Gosnell against the estate for business done by him including charges for his trouble in matters not strictly professional. It was held that, although a legacy was given to Mr. Gosnell in his capacity of trustee, he was entitled under the enabling charging clause to charge for his trouble as well as to make professional charges for business done by him as a solicitor.

The argument of the plaintiff was that considering the legacy of £200, the clause must then be construed to mean that the money was for his trouble in matters which were not solicitor's work and that the trustee should therefore be at liberty to charge his professional costs. The Court of Appeal disagreed with this line of reasoning because the clause which enabled the trustee to charge for his trouble as well as for his professional costs as a solicitor was not confined to Mr. Gosnell alone but to any trustee who was a solicitor. The legacy of £200 was given to Mr. Gosnell alone not to any other trustee who was a solicitor. The court therefore concluded that the construction to be put on the clause was such as to enable Mr. Gosnell to charge, not only for his professional services, but for his trouble as a trustee and also to have his legacy.

**(iv) Where the testator or settlor expressly and plainly authorizes the professional executor/trustee to charge for professional and non-professional services, the fact that the executor/trustee raises the bill, gets approval for payment from his co-executors/trustees and indeed gets paid, does not preclude the *cestuis que* trust and residuary legatees from investigating the solicitor's costs and charges except the enabling clause forbids such investigation**

Executors and Trustees should be prepared at all times to have their profit costs scrutinized and investigated by residuary legatees and *cestuis que* trusts. They cannot regard the amount payable to them as settled and approved for all cases simply because their co-executors and trustees had signified their consent by signing the cheques or making the money over.

In *Re Fish* which was discussed earlier on, two executors, Bennett and Gosnell were appointed by the testator the later being a solicitor given the authority to charge for his trouble as well as professional services. He

had alleged such bills have become due to him for costs in respect of the administration of the estate. The court as we had observed held that this particular trustee in the light of the construction given to the enabling charging clause could charge for professional and non-professional services. The executor was however of the view, so his lawyer argued in court, that since his co-trustees had signed the cheques thus approving the charges, the plaintiffs could not investigate the bills.

The court of Appeal reversing the judgment of Wright J. held that in the absence of special power in the Will trustees cannot settle the amount payable out of the estate to one of themselves, so as to bind the *cestuis que* costs and charge investigated. Lindley L. J. explaining the reasoning of the court said:

I cannot think that, in the absence of special power given to them by the instrument creating the trust, two trustees can settle accounts between themselves and then tell the *cestuis que* trust. "The accounts are settled, and you have nothing to do with them." I never heard of such a proposition before, and it would be an extremely dangerous one. Testator might of course, put clauses into their Wills to enable trustees to do it; but there is no such clause here, and in the absence of such a clause I cannot hold that any of these accounts have been settled so as to be binding upon the *cestuis que* trust.<sup>45</sup>

From the dictum of the Lord Justice in general and the decision of the court in particular it does appear that a testator or settlor can direct that charges and fees agreed by the executors and trustees should not be investigated by those entitled under the Will or Trust.

**(v) Solicitors drawing up Wills or other instruments which confer authority on them to charge for loss of time and also for professional services in respect of administration of estates or trusts must ensure that instructions were actually received from the testator or settlor as the case may be**

The duties vested in executor/trustee are of fiduciary nature. Accordingly an executor/trustee must not allow his duties and interest to conflict. He is expected to exercise proper vigilance on anyone who is to be paid out of the estate for work or services performed for the estate. It is extremely difficult to police one's own acts. It is preferable not to put oneself in such an awkward situation where work and duty conflict. But if whatever nature rendered for the estate, the court will want to enquire that the appointor in fact conferred much right on the executor-trustee. Lawyers who drafted the Will should not insert a compendious charging

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<sup>45</sup> *Ibid.* at p. 421

testator has expressly instructed them to insert such a wide clause. Kay J. in *Newton v. Chapman*<sup>46</sup> observed:

It would require very clear words to induce me to accede to such an application as that, and it seems to me that when this gentleman drew that Will he was too high-minded to put in it anything which would entitle him to make such an extravagant charge.

It is humbly observed that His Lordship was not quite charitable to the lawyer who drafted the Will. Arguably, clear words may, in law, be sufficient proof of testator's intention, yet morally, it might be good practice to write explaining to the testator the general stand of the court on the issues and request his confirmation that the position had been carefully explained to him and that nonetheless he the testator understood and believed it would be in the best interest of his estate to insert such a clause as would enable his lawyer to charge for loss of time. One wonders what weight the court would give to the letter in an attempt to interpret a clause that is not so plain and clear!

## **Conclusion**

In the main, this Paper has identified the salient points which preclude the executor-trustee from raising his bills for the actualization of the Will any more than he is given by the Testator/Settlor. These points emerge historically from the principles of equity as seen the Lord Chancellors of both the ecclesiastics and Law; much later fused into the abiding Common Law, the last strands of the erstwhile British holdings on the Nigerian psych and legal reasoning. In more specific ways, this Paper has not only outlined but analyzed the thematic issues involved in the remuneration (if any) awaiting the solicitor-trustee in recompense for his professional skills in administering the Will.

In concrete terms, it is considered safe for us to conclude that both at law and at equity an executor/trustee even though a professional cannot charge for his time and care expended in the administration of the estate or trust. He is not allowed to pay fees for the partnership and being a partner he is entitled to share therein. If it were otherwise he would be getting through the back door what was denied him through the front door. He is allowed to pass work to his partners and pay their bills if it can be shown that he cannot benefit in any way from the fees.

It is, however, permissible that an executor/trustee be entitled to reimbursements for any legitimate expenses incurred in the affairs of the estate or trust. Apart from the rule in *Cradock v. Piper* and the inherent jurisdiction of the court, the executor-trustee can charge his professional fees if there is express authority in the Will or in the Trust instrument to enable him do so.

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<sup>46</sup> (1884) 27 Ch.D. 585 at p. 586

From the analysis, it can be detected that the courts usually construe very restrictively any enabling charging clause. To extend the executor/trustee's right to charge for mere loss of time and other non-professional services, no matter how his troubles may be, the enabling charging clause must be express and plain and the solicitor who drafted the Will and who would later take advantage of the clause therein must ensure that the testator actually and in fact conferred such express powers in the Will or Trust instrument.

Finally, solicitors, executors and trustees, howsoever they come, should be prepared to have the services and charges investigated by legatees, *cestuis que* trust or beneficiaries, as the case may be.