

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2012

Claim No. AXA HCV 2009/0051

In the matter of the Estate of
Henry Beresford Kydd, deceased

BETWEEN:

PALMAVON WEBSTER
Lawful attorney of Ian Donaldson Mitchell
(Personal Representative of the Estate of
Henry Beresford Kydd, deceased)

Appearances: Mr. Courtney Abel and Ms. Eustella Fontaine for the Applicants
Mr. Gerhard Wallbank for the Respondent

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2011: December 14
2012: April 16
July 2
.....

JUDGMENT

Introduction

[1] **BLENMAN, J:** This is an application by Mrs. Molly Hodge (referred to as Mrs. Hodge) on behalf of herself and some of the beneficiaries of the Estate of Henry Beresford Kydd, deceased, to vary a Without Notice Order that was obtained by Ms. Palmavon Webster (referred to as Ms. Webster), the lawful attorney of Mr. Ian Donaldson Mitchell QC, who was the Executor of the Estate of Henry Beresford Kydd, deceased. The application is strenuously opposed by Ms. Webster acting in the capacity mentioned herein.

Issues

- [2] The issues that arise for the Court to resolve are as follows:
- (a) What, if any, was the agreement between the beneficiaries and the Executor, Mr. Ian Donaldson Mitchell QC, in relation to the remuneration?
 - (b) Alternatively, was it 5% of the value of EC\$4,900,000 or was it 5% of the value of the Estate as accepted by the Registrar for probate purposes?

Background

- [3] Mr. Henry Beresford Kydd died leaving a Will in which he appointed Mr. Ian Donaldson Mitchell QC, as he then was, as the Executor of his Estate. Mr. Kydd was survived by several relatives who are the beneficiaries of the Estate, together with one Mrs. Pansy Richardson.
- [4] Mr. Ian Donaldson Mitchell QC, who was an eminent Attorney-at-law, dutifully commenced the administration of the Estate. The question of the fees for the services that were provided had to be determined between Mr. Mitchell and the beneficiaries. The matter is one of some antiquity and it appears that the administration of the Estate of Mr. Kydd was fraught with difficulties and interspersed by litigation. It was ultimately agreed that Mr. Mitchell QC would be paid 5% of the value of the Estate for his services as the Executor of the Estate.
- [5] Mr. Mitchell, however, subsequently left the practice of law and gave over much of his practice to the firm Webster Dyrud Mitchell.
- [6] Mr. Mitchell QC gave the power to Ms. Palmavon Webster, with the consent of the beneficiaries, to act as his lawful attorney for the purpose of administering the Estate. Ms. Webster took over the administration of the Estate in place of Mr. Mitchell. Indeed, Ms. Palmavon Webster who is an Attorney-at-law and a

managing partner in the firm Webster Dyrud Mitchell, acted as the attorney for Mr. Ian Donaldson Mitchell QC in the continuation of the administration the Estate of Henry Beresford Kydd.

- [7] As stated earlier, Ms. Webster took over the administration of the Estate. At that time the Estate was valued at EC\$4,900,000. At the heart of this dispute is whether the administrator's fees are to be 5% of the value of the Estate using the figure EC\$4,900,000 or 5% of the value that was used for the probating of the Estate, namely, \$25,406,802.
- [8] In 2007 Letters of Administration of the Estate was duly granted to Ms. Palmavon Webster in the above mentioned capacity.
- [9] The Estate consists of several parcels of land.
- [10] However, the administration of the Estate became very protracted for very diverse reasons which are not very material to the matter that is engaging the court's attention. As alluded to earlier, the value of the Estate, for purposes of probate was EC\$25,406,802 and the Estate was finally administered using the value of EC\$25,406.802.
- [11] It appears as though issues of the remuneration for the Administrator's services that Ms. Webster had provided were discussed with the beneficiaries. To date, the Estate has not been completely administered and the beneficiaries have not paid Ms. Webster any money for the administration of the Estate. As a consequence, Ms. Webster, in her above capacity, caused a claim to be filed in the court, without giving notice to the beneficiaries, in which she sought a number of orders.
- [12] The main order that Ms. Webster, acting in the above capacity, sought was that she was entitled to 5% of the value of the Estate of Henry Beresford Kydd, together with other orders. The matter was heard by a differently constituted

court, without notice to any of the beneficiaries, and an order was made on 21st July 2009, which included the following:

- (1) That the Claimant is entitled to 5% of the value of the Estate of Henry Beresford Kydd as remuneration.
- (2) All lands comprising the Estate of Henry Beresford Kydd, deceased, are assets properly applicable for the payments of the testator's debts including the Applicant's/Claimant's remuneration.
- (3) The Applicant/Claimant is properly entitled to alienate by sale such lands as it deems necessary to satisfy the outstanding debts due from the Estate, including but not limited to the Applicant's/Claimant's remuneration which is provided for under the Will and subsequently by the agreement of all beneficiaries.
- (4) All or some of the lands comprising the Estate of Henry Beresford Kydd be valued for the purpose of determining the amount due and owing to the Applicant/Claimant as remuneration and that the costs of such valuation be borne by the Estate.
- (5) Lands sufficient to meet the liabilities of the Estate including the remuneration owing to the Applicant/Claimant be alienated by sale by private treaty and net proceeds applied to the settlement of such debts which stand owing by the Estate.
- (6) Costs summarily assessed in the sum of US\$1,000 to be paid out of the Estate.

[13] The beneficiaries were unaware that the court had made the above Order. However, the relationship between the parties seem not to be as good as it could have been and the beneficiaries instructed their attorney, Mr. Courtney Abel, to request that Ms. Webster expedite the administration of the Estate. Mr. Abel wrote to Webster Dyrud Mitchell, based on his instructions, whereupon he received a reply which indicated that Ms. Webster, acting in the abovementioned capacity, had obtained the Without Notice Order of the 21st of July 2009. It is noteworthy that the Without Notice Order did not indicate that the 5% remuneration for the

administration of the Estate was to be based on the valuation of EC\$4,900,000 or on any sum for that matter. The beneficiaries appeared to have been taken by total surprise. They immediately moved to have the Order set aside or varied.

The Application

- [14] Indeed, it was in those circumstances that Mrs. Hodge, on behalf of some of the beneficiaries of the Estate of Mr. Kydd filed an application to have the court vary the Without Notice Order. Alternatively, they sought to have the order set aside.

Grounds of the Application

- [15] The main grounds of the application are (a) that the order was made without any notice to the beneficiaries and (b) none of the beneficiaries were served with the claim before the hearing. They also allege that (c) in obtaining the Without Notice Order Ms. Webster has failed to disclose material information to the court. On this latter basis, they seek to have the court set aside the Without Notice Order or at the very least, vary the Order.
- [16] Ms. Webster, in the above capacity, strenuously resists the application.

Evidence

- [17] Mrs. Hodge is the sole witness on behalf of the beneficiaries. She deposed to affidavits in support of the application to vary the Without Notice Order. She asserted, among other things, that had the beneficiaries been provided with the opportunity to be heard, it is very unlikely that the court would have made the order it did. Mrs. Hodge has placed before the court a number of exhibits including letters dated 23rd December, 1997 and one dated 19th February, 1998 from Mr. Mitchell which she says clearly show that the beneficiaries and the Executor had agreed that Mr. Mitchell would have been paid remuneration of 5% on the value of the Estate of EC\$4,900,000.

- [18] In support of the application for the variation of the Order, Mrs. Hodge deposed on behalf of the beneficiaries that they have reached agreement with Mr. Mitchell that he was to be paid 5% of the value of the Estate which at that time was EC\$4,900,000.
- [19] Mrs. Hodge stated that the beneficiaries maintain that from a close reading of the correspondence that were exchanged between Mr. Mitchell and their attorney, Mr. Courtney Abel, it would be clear that the agreement in relation to the remuneration for the services as to the Executor that was reached was in relation to EC\$4,900,000 and not EC\$25,406,802.
- [20] Mrs. Hodge was cross-examined at length. She also placed before the court other documentary evidence.
- [21] Mrs. Hodge told the court that in a meeting that was held between Mr. Mitchell and the beneficiaries of the Estate, including herself, it was agreed that the Executor's fees were to be 5% of the then agreed value of the Estate of EC \$4,900,000. The beneficiaries knew that the Estate at the time of the agreement was valued at EC\$4,900,000. She says that this was confirmed in correspondence between Mr. Mitchell's chambers and Mr. Courtney Abel or Caribbean Associated Associates. Mrs. Hodge maintained under strenuous cross-examination by learned counsel Mr. Wallbank that the agreement that the beneficiaries had reached with Mr. Mitchell (who was their friend) was that he would be paid 5% of the \$4,900,000. Also, Mrs. Hodge says that she and the other beneficiaries have expended the sum of US\$67,000 in order to get Ms. Webster to fully and finally administer the Estate, all to no avail.
- [22] The beneficiaries, she says, were unaware that Ms. Webster had obtained the Without Notice Order of 21st July, 2009. Mrs. Hodge said that it was not until approximately two years after Ms. Webster had obtained the Without Notice Order and when they had instructed Mr. Abel to write to Ms. Webster to bring the

administration of the Estate to finality, he wrote to Ms. Webster, that Mr. Abel was provided with a copy of the Without Notice Order dated 21st July, 2009. This was in March, 2011. To date, the beneficiaries have not been served with a copy of the Without Notice Order.

[23] Mrs. Hodge says that, in fact, the first time that any of the beneficiaries became aware that Ms. Webster had intended to utilise a valuation other than the sum of EC\$4,900,000 was in March 2011 when Ms. Webster indicated to the beneficiaries' counsel, Mr. Abel, that she had planned to use the valuation of EC\$25,406.802 in order to calculate the 5% that was due as remuneration. Mrs. Hodge was adamant that Mr. Mitchell had agreed to charge the beneficiaries 5% of the value of EC\$4,900,000 and no more.

[24] Mrs. Hodge, on behalf of the beneficiaries, urges the court to vary the Without Notice Order which Ms. Webster had obtained. In addition, Mrs. Hodge asks the Court to vary the order insofar as it enables Ms. Webster to sell a portion of the land by private treaty in order to obtain the remuneration that was agreed to in addition to any other fees. Further, Mrs. Hodge objects to the Order which permitted that all or some of the lands comprising the Estate of Henry Beresford Kydd be valued for the purpose of determining the amount due and owing to Ms. Webster.

[25] As alluded to earlier, the main basis for the application for the variation is Mrs. Hodge's complaint that Ms. Webster did not disclose all of the materials which she had in her possession which includes the other valuations of the Estate. Mrs. Hodge says that Ms. Webster also did not disclose all of the correspondence between Mr. Mitchell and Mr. Abel, from which it was clear that the agreement between Mr. Mitchell and the beneficiaries was that he would charge 5% of EC\$4,900,000. Mrs. Hodge asserts that had the learned Judge been presented with all of the relevant material, she would not have made the Without Notice Order. The effect of the Order is to enable Ms. Webster to treat with the Estate in

any manner she deems fit by selling portions of the land. On this basis Mrs. Hodge says that the Order is draconian and should be varied.

[26] Ms. Webster, acting in the above capacity, filed affidavits in opposition to the application for the variation of the Without Notice Order. She also gave oral evidence in the expressed capacity. Ms. Webster denies that there was any agreement between Mr. Mitchell and the beneficiaries that Mr. Mitchell would have used the sum of EC\$4,900,000 in order to calculate the remuneration of 5% for his services as the executor of the Estate. She said that the valuation of EC\$4,900,000 was submitted to the Registrar for the purpose of administering the Estate but it was rejected. She said that in administering the Estate they encountered various difficulties and the Registrar did not accept the valuation of EC\$4,900,000. Ms. Webster states that in any event, during the application for the administration of the Estate, the Registrar had directed that a new valuation should have been used. The valuation of the Estate in the sum of EC\$25,406,802 was the value that was accepted by the Registrar for the purpose of obtaining Letters of Administration of the Estate and this was after they were forced to obtain several valuations. Ms. Webster disputes that Mrs. Hodge did not have knowledge that the valuation which the court accepted was EC\$25,406,802. In fact, she says that an associate of the firm of Webster Dyrud Mitchell had communicated this valuation to Mrs. Hodge.

[27] Also, Ms. Webster provided the court with documentary evidence. She too was cross-examined at length. More importantly, Ms. Webster asserts that the agreement that Mr. Mitchell had reached with the beneficiaries is in relation to the use of EC\$4,900,000 was for the purpose of applying to the court for Probate/Letters of Administration in relation to the Estate. There was no agreement between Mr. Mitchell and the beneficiaries that he would use the figure of EC\$4,900,000, which is a very old valuation of the Estate, in order to calculate his fees.

- [28] In relation to the reason why she did not alert the beneficiaries about the existence of the Without Notice Application for the Order, Ms. Webster says that in her legal opinion there was no need to notify the beneficiaries of the application since it was a non-contentious probate matter. In any event, Ms. Webster says that the learned trial Judge did not order that the application for the Without Notice Order that was obtained be served on the beneficiaries. Ms. Webster disputes that she suppressed or failed to provide the learned trial Judge with material information. She says that she had placed all of the relevant information before the court in obtaining the Without Notice Order.
- [29] Further, Ms. Webster maintains that the Order which was granted was properly granted and merely reflects most of the powers that she already has as an Administrator. It also reflects the agreement that was reached between the parties, namely, that the executor would be paid 5% of the current value of the Estate. She therefore urged the court not to accede to the request of the beneficiaries to discharge or vary the Without Notice Order.
- [30] Further, Ms. Webster maintains that the court should not vary the Without Notice Order that was made. She says the Order which was granted correctly reflects the agreement that was reached between the beneficiaries and Mr. Mitchell. Ms. Webster says that Mrs. Hodge has never challenged the valuation of EC\$25,406,802 that was submitted. The beneficiaries have not paid her any fees for her services as the Administrator and it is clear that they did not intend to do so. Ms. Webster says that in order to get directions from the court for the payment of her fees it was out of prudence that she made the Without Notice Application. In her professional opinion, there was no need to give notice of the application to the beneficiaries, neither did she see any need to serve a copy of the Without Notice Order on them. This explains the reason why they only learnt of its existence nearly two years after it was issued.

- [31] Ms. Webster vigorously disputes that there was any agreement between the beneficiaries and Mr. Mitchell as to the value that would have been used for calculation of his remuneration. The only agreement was in relation to the percentage, 5% of the current value of the Estate for the purpose of applying for probate. She maintains that the valuation of EC\$4,900,000 was agreed to be used for the purpose of obtaining probate of the Estate and not for the purpose of the determination of Mr. Mitchell's remuneration as the Executor.
- [32] Ms. Webster stated that she encountered several difficulties in the process of administering the Estate and that some of the delays were occasioned as a result of Mrs. Hodge's attitude. In fact, even after Letters of Administration of the Estate had been obtained some of the beneficiaries continued to dispute the validity of the Will. She says that her firm had several meetings with Mrs. Hodge in which she discussed the market value of the property which formed the subject matter of the Estate. It is therefore not correct that Mrs. Hodge was unaware that a new valuation for EC\$25,406,802 had been obtained. In addition, Ms. Webster insists that an associate of her law firm, Morjorn Wallock, met with Mrs. Hodge and discussed the new valuation that was used for probate purposes. Ms. Webster complains that the Estate has to date not paid her any fees for the services that she has rendered as the Administrator. She says there is no indication that the beneficiaries are willing to pay for the services and this was the primary reason why she filed the Without Notice Application.
- [33] Ms. Webster maintains that in her legal opinion there was no need to inform the beneficiaries or to give them notice that she was in the process of applying for the Without Notice Order. She is adamant that the letters to which the beneficiaries refer in no way indicate that there was any agreement between Mr. Mitchell and them that he would be paid 5% of the EC\$4,900,000. The clear agreement was that he would have been paid 5% of the assessed value of the Estate. In support of her contention, she referred to a letter from Ms. Pansy Richardson. While the valuation of the Estate for EC\$4,900,000 was submitted to the Registrar, that

value was rejected by the Registrar and she was required to submit other valuations, which she did. The valuation that was eventually accepted by the Registrar is the one for EC\$25,406,802. Ms. Webster insists that only two letters are relevant to the question of the agreed remuneration.

- [34] On completion of the trial and at the close of the case, but before the decision could have been rendered, Ms. Webster applied to the court to re-open the case in order to place before the court additional documents which she indicated had been located subsequent to the trial of the matter. Despite strenuous objection by learned counsel Mr. Abel, in the exercise of my discretion and in the interest of justice, I directed that the case be re-opened thereby enabling Ms. Webster to place before the court some additional letters that were written in 1993 which Ms. Webster indicated would shed tremendous light on the nature of the agreement that was reached between Mr. Mitchell and the beneficiaries in relation to the remuneration for his services. Once the case was reopened, the court, also in fairness to the beneficiaries, at the request of the beneficiaries, allowed them to place further documents before the court including a letter from Mrs. Pansy Richardson.

Court's Analysis

- [35] I have perused the documentary and oral evidence that has been placed before the court and I have given careful consideration to the very helpful submissions of learned.

Review of the Evidence

- [36] I have given deliberate consideration to the evidence of both Mrs. Hodge and Ms. Webster. As alluded to earlier, both of them were vigorously cross-examined by the respective counsel for the opposing side. Mrs. Hodge struck me as a fair, honest and forthright elderly lady who was very credible. It is clear that she had a good professional relationship with Mr. Mitchell and holds him in very high regard. I believe her when she said that they are friends. I have no doubt that she is a

forthright and very reliable elderly lady (87 years old) who, for the most part, has a fairly good memory and recollected several important matters including the very important meeting between Mr. Mitchell, herself and the other beneficiaries at which there was confirmation of his fees of 5% on the value of the Estate, using the valuation of EC\$4,900,000.00. Mrs. Hodge was very fair and pleasant when she testified about the transaction. She definitely was not upset even with Ms. Webster.

[37] She is a reliable and credible witness who, throughout the vigorous cross-examination by learned counsel Mr. Wallbank, remained calm, polite and respectful. A very pleasant, elderly lady who seemed to have absolutely nothing personal against Ms. Webster. Mrs. Hodge portrays the picture of a peaceful, elderly lady who simply wants to bring to finality the administration of the Estate and who wants to pay what the beneficiaries had agreed, but nothing more. I do not for one moment believe that she harbours any ill will towards Ms. Webster or the firm of Webster Dyrud Mitchell. Be that as it may, it seems as though initially, Mrs. Hodge seemed to have had a lot of regard for Ms. Webster and in fact it was Mrs. Hodge who had recommended that Ms. Webster continue the administration of the Estate. Mrs. Hodge seems no longer to hold Ms. Webster in high regard as she used to. She said that Ms. Webster is being disingenuous.

[38] I believe Mrs. Hodge when she told the court that she and the other beneficiaries had agreed with Mr. Mitchell in a meeting that was held, the sum of EC\$4,900, 000 which was the value of the property which would have been used for the purpose of calculating the Executor's fees. Also, I believe Mrs. Hodge when she told the court that after Mr. Mitchell had initially indicated that his fees were going to be 5%, her brothers had enquired of Mr. Mitchell about these fees. This caused Mr. Mitchell to convene the meeting at his chambers with the beneficiaries in order to ensure that there was agreement that his fees/remuneration of 5% of the value of the Estate would have been paid.

[39] I have no reason to disbelieve Mrs. Hodge when she said that she and the other beneficiaries, including Pansy Richardson, have no difficulty with respect to the distribution of the Estate. Equally, I believe her when she told the court that in the meeting that was held between Mr. Mitchell and the beneficiaries, that there was consensus in relation to Mr. Mitchell's fees. The few matters that Mrs. Hodge did not recollect very clearly are of no moment. Clearly, they do not go to the root of the claim and neither do they in any way detract from her credibility insofar as it relates to what was agreed by Mr. Mitchell and the beneficiaries.

[40] On the other hand, Ms. Webster under cross-examination did not paint a good picture. She was very evasive and argumentative in the face of very piercing cross-examination by learned counsel Mr. Abel. She was clearly at a disadvantage since she did not have personal knowledge of the agreement. I have no doubt that Ms. Webster had no personal knowledge of many of the matters of which she spoke. She was not as convincing as she could have been had she been personally involved in the discussions between Mr. Mitchell and the beneficiaries which culminated in the agreement. Most of the evidence that Ms. Webster gave was speculative and this is to be understood since she was not privy to the matters to which she testified. I am afraid that I could only attach very little weight to her oral evidence. It is noteworthy that much of what she said in chief did not stand up well under vigorous and unrelenting cross-examination by Mr. Abel. It is clear that Ms. Webster was in a difficult position since she was not a part of the negotiations between Mr. Mitchell and the beneficiaries but sought to speak to matters of which she knew very little.

[41] Ms. Webster also, interestingly under cross-examination, indicated that if the present value of the Estate is EC\$50,000,000, then she is entitled to be paid 5% of the EC\$50,000,000. She says it is the current value of the Estate which is relevant for the purposes of determining the Executor/Administrator's remuneration. In addition, when Ms. Webster was pressed in cross-examination, it became clear that the real reason for her having obtained the Without Notice

Order was her anticipation of the possible objection by the beneficiaries to her receiving 5% of EC\$25,406,802. I have no doubt that she was uncomfortable with the Order she obtained and this contributed to her reluctance to share the terms of the Order with the beneficiaries.

[42] It is noteworthy that Ms. Webster had only one month before obtained the valuation of the Estate for EC\$12, 000.00 from the same valuer from whom she subsequently obtained the valuation in the sum of EC\$25,406,802. This latter valuation was utilized in order to obtain the Letters of Administration of the Estate, and all of this was done unbeknownst to the beneficiaries.

[43] In passing, I state that it is interesting that having obtained the Without Notice Order two years earlier, Ms. Webster did not see it fit to inform the beneficiaries that she had obtained such a far reaching Order. I accept that Ms. Webster has since rendered an invoice for her remuneration plus disbursements. She calculated her remuneration at 5% of the value of the estate of EC\$25,406,802. The invoice has remain unpaid. It is unacceptable that after so many years of work that the beneficiaries have not paid Ms. Webster any remuneration for her services as Administrator of the Estate.

Nature of Agreement

[44] I come now to address the nature of the Agreement. In my view, in order to determine the nature of the agreement between the parties, I must examine a number of letters, namely: the letter of 19th May 1993 from Mr. Mitchell to Mr. Abel; the letter dated 12th August 1993 from Mrs. Pansy Richardson to Mr. Mitchell confirming her agreement that Mr. Mitchell should charge 5% of the assessed value of the Estate; the letter dated 23rd December 1997 from Mr. Mitchell to Mr. Abel; and the letter dated 9th February 1998 from Mr. Abel to Mr. Mitchell.

[45] I am of the view that the letter from Mrs. Pansy Richardson to Mr. Mitchell which is dated 12th August 1993 and in which she confirmed her agreement that Mr.

Mitchell should charge 5% of the assessed value of the Estate must be read together with the other letters. Chief among the other letters are the letters from Mr. Mitchell to Mr. Abel dated 23rd December 1997. In this letter Mr. Mitchell stated as follows:

"I believe that the only outstanding matter is the question of the agreement that I should charge my normal professional fee of 5% of the value of the Estate. If you would confirm that this is acceptable to your clients I shall obtain a current valuation and proceed with the applications."

[46] The next important letter is that of 9th February 1998 from Mr. Abel's office which stated:

"Further to your letter dated 23rd December 1997 we now confirm on behalf of our clients that they agree to you charging your normal professional fees of 5% of the value of the estate of their uncle Henry Beresford Kydd to probate and administer this estate. We would be grateful if you would let us have a copy of the current valuation."

[47] The other important letter is that of 19th February 1998, in which Mr. Mitchell replied to Mr. Abel's letter of 9th February 1998 and stated as follows:

"Thank you for your letter of 9 February. I confirm that I shall apply shortly to the High Court for a grant of probate of the Will. I intend to use the valuation of 17 May 1993 (EC\$4,900,000) for the purposes of this application."

[48] I agree with learned counsel Mr. Abel that the above three letters are very relevant to the court's determination of the agreement between Mr. Mitchell and the beneficiaries with regard to his remuneration. I do not accept the submissions urged upon the court by learned counsel Mr. Wallbank that the reference to the valuation of EC\$4,900,000 was made after the parties had already agreed the basis for remuneration. Equally, I do not agree that the agreement is contained

only in the two letters of 23rd December 1997 (Mr. Mitchell to Mr. Abel) and 9th February 1998 (Mr. Abel to Mr. Mitchell respectively).

[49] I am fortified in my view above, based on the cogent evidence of Mrs. Hodge in relation to the discussion and agreement that Mr. Mitchell and the beneficiaries reached at the meeting that was convened in his chambers.

[50] Further, based on a close reading of the letters coupled with the cogent evidence that was presented by Mrs. Hodge, I am ineluctably driven to conclude that the agreement reached between Mr. Mitchell and the beneficiaries was that he would receive as remuneration 5% of the value of \$EC4,900,000. It is clear that that was the agreement between the parties. I believe Mrs. Hodge that this Agreement was confirmed between the parties in the oral meeting that was subsequently held between Mr. Mitchell and the beneficiaries. Accordingly, I have no doubt that Mr. Mitchell and the beneficiaries agreed that he would have been paid remuneration in the sum of 5% of the value of EC\$4,900,000.

[51] I reiterate that I do not agree that the parties had already agreed, as urged by Mr. Wallbank, the basis for the remuneration and therefore the agreement is contained only in the two letters of 23rd December 1997 (from Mr. Mitchell to Mr. Abel) and 9th February 1998 (from Mr. Abel to Mr. Mitchell). I do not agree with learned counsel Mr. Wallbank's submissions that it was only after Mr. Abel had agreed that Mr. Mitchell should charge 5% of the value of the Estate that Mr. Mitchell stated his intention to use the EC\$4,900,000 valuation for the purposes of making the application for probate. The documentary evidence does not support the position contended for by Ms. Webster that it was only after Mr. Mitchell obtained Mr. Abel's confirmation of agreement in relation to his fees, only then he would obtain a valuation which would be current.

[52] For the sake of completeness, it is important to state that a close examination of the affidavit in support of the application which Ms. Webster placed before the

court in order to obtain the Without Notice Order indicates that Ms. Webster had sought and obtained an order to have some or all the property which form a part of the Estate of Henry Beresford Kydd valued. In fact, Ms. Webster deposed that she did not know the value of the property and needed to have some or all of it valued in order to determine the amount of her remuneration. It is clear that at the time when Ms. Webster filed the Without Notice Application she did not intend to use the value of EC\$4,900,000 since at the date of filing the application she clearly knew of the valuation of EC\$4,900,000. Neither did she intend to use EC\$25,406,802 to calculate her remuneration since she was already aware of the valuation of EC\$25,406,802 which she had in fact used to apply for probate of the estate. This is one of the orders to which the beneficiaries strongly object and wish to have varied.

- [53] The above must be viewed against the background that Ms. Webster told the court that if the present value of the property is EC\$50,000,000, she would be entitled to receive 5% of EC\$50,000,000.00.
- [54] It has given the court cause for pause, the fact that during vigorous cross-examination by learned counsel Mr. Abel, Ms. Webster revealed that she had subsequently obtained far higher valuations of the property which form the assets of the Estate, but in her view they were not relevant and therefore she did not produce them to the court.
- [55] With the utmost respect, I opine that the order of the learned Judge is very open ended and far reaching. I agree with learned counsel Mr. Abel that the effect of the order is to permit Ms. Webster to treat with the Estate in any way she desires. This can hardly be acceptable or fair. I do not propose to repeat much of the submissions that Mr. Abel urged on the court in relation to this aspect of the case since nothing would be gained from my doing so apart from repeating Mr. Abel's criticisms of Ms. Webster.

[56] It is important that I state in passing that in an effort to bolster her position, Ms. Webster seemed to also be relying on correspondence from Mrs. Pansy Richardson which indicated that Mr. Mitchell would have been paid 5% of the assessed value of the estate. It was against that background that I am to determine whether I should vary the Without Notice Order and the manner in which I should do so, or whether I should discharge it altogether.

Material Nondisclosure

[57] Learned counsel Mr. Wallbank submitted that Ms. Webster, in obtaining the Without Notice Order, disclosed all of the relevant material to the learned Judge. Mr. Wallbank asserted that when the Letters of Administration was obtained the valuation that was utilized was EC\$25,406,802, that is the only valuation with which, quite properly, the Judge should have been concerned. There was no need to place the other intervening valuations before the court. Further, Mr. Wallbank argued that Ms. Webster placed before the court the correspondence that gave rise to the agreement for the payment of remuneration to the extent of 5% of the value of the Estate. Mr. Wallbank advocated that Ms. Webster has disclosed all of the relevant information and the court should not vary the Order.

[58] Learned counsel Mr. Abel argued that Ms. Webster in obtaining the order failed to disclose material information to the court. Mr. Abel said that Ms. Webster omitted to place critical evidence before the court. Significant in this regard, are the relevant letters which indicate that Mr. Mitchell had agreed to charge his normal professional fee of 5% of the value of the Estate which valuation was understood to be EC\$4,900,000. Mr. Abel further said that Ms. Webster failed to disclose to the court that there were other valuations subsequent to the EC\$4,900,000 and before the valuation for \$25,406,802, which were lower than the latter valuation.

[59] Significantly, Mr. Abel said that on a clear construction of the letters passing between himself and Mitchell's Chambers it is clear that Mr. Mitchell agreed to charge 5% of the value of the Estate of which valuation was understood to be

EC\$4,900,000. Also, Ms. Webster has failed to provide the court with those relevant letters. Mr. Abel argued that had the court seen those letters, it is very unlikely that it would have made the very wide and far reaching order which it did.

[60] Based on my findings in relation to the agreement between Mr. Mitchell and the beneficiaries, it is evident that I am not of the view that Ms. Webster placed all of the relevant material before the court in order to obtain the Without Notice Order. I am of the considered opinion that all of the correspondence in which the question of fees were discussed should have been placed before the learned Judge in order for a determination to be made in relation to the agreement of the remuneration. Accordingly, I accept Mr. Abel's submissions that Ms. Webster failed to place before the judge all of the relevant information/correspondence. In addition, Ms. Webster had an obligation to provide the court with all of the valuations of the Estate. It is very likely that had the court been provided with all of the valuations, the learned trial judge may well not have made such a wide and far reaching order.

[61] I am afraid that there was an obligation on Ms. Webster to disclose all of the material to the learned Judge in obtaining the Without Notice Order. Included in the material that should have been disclosed are all of the valuations that she had for the Estate together with all of the relevant letters that were exchanged between Mr. Mitchell, the beneficiaries and Mr. Abel.

[62] In those circumstances, I agree with learned counsel Mr. Abel that there was material nondisclosure. Once I have concluded that there was material nondisclosure it is irrelevant whether the omission was deliberate or innocent. In the face of the material non-disclosure, the judge is duty bound to discharge the Without Notice Order without enquiring into the merits of the matter. See *R. v. Kensington Income Tax Commissioners* [1917] 1 KB 486.

[63] In view of the above, I am of the respectful view that the Without Notice Order should be discharged or at the very least be varied on the basis of the material non-disclosure by Ms. Webster. The justice of this matter, in my view, requires that the Order should be varied as distinct from being discharged. I do not consider that the interests of justice would be served by a discharge of the Order.

[64] If I am wrong insofar as I have ruled that the Order should be varied, I propose to now address the other salient issues that are raised.

Review of Charging Fee

[65] In his closing arguments, learned counsel Mr. Abel urged the court to review the Agreement that was reached between Mr. Mitchell and the beneficiaries that he would have been paid 5% of the value of the Estate. Mr. Abel submitted that even though there was that Agreement, it was unlawful and unenforceable since it violated the provisions of the Anguilla Bar Association (Remuneration Non-Contentions Business) Rules. Mr. Abel also submitted that it was unlawful for Mr. Mitchell to have charged the Estate fees as the Executor, since he was performing the function of the Executor/Solicitor. I did not form the view that this position was taken by Mrs. Hodge on her own volition. In fact, and for what it is worth, it is clear to me that Mrs. Hodge still holds Mr. Mitchell in high esteem. She did not for one moment give me the impression that she was seeking to have the court revisit the Agreement which the beneficiaries had arrived at with Mr. Mitchell.

[66] Be that as it may, I accept the submissions of learned counsel Mr. Abel that a testator may by his Will authorise his executor to be paid for professional work or for work which an ordinary lay executor could have done in person without the assistance of a professional man but to entitle a solicitor to the latter charges there must be clear words in the Will. See **Harbin v. Darbin** (No. 1) (1860) 20 Beavan 325 54 ER – Re **Chappre Newton v. Chapman** (1884) 27 Ch D 584.

[67] In **Clarkson v. Robinson** [1900] 2 Ch 722, the testator directed 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 the 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."

It was held that this clause enabled a trustee to charge for any work done for the Estate in the course of his profession 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.

[68] Alternatively, learned counsel Mr. Abel posited that the Anguilla Bar Association (Remuneration for Non-Contentious Business) Rules 1995 lay down a maximum fee of 2% declining to 1%. Mr. Abel argued that the beneficiaries did not have standing to agree to a higher remuneration fee.

[69] For his part, learned counsel Mr. Wallbank advocated that the agreement between Mr. Mitchell and the beneficiaries was valid and should be enforced. There was no breach or violation of any law or legal principles in the circumstances which obtained – namely, the parties having agreed that Mr. Mitchell would be paid 5% of the value of the Estate.

[70] I am not of the view that the principle enunciated in *Clarkson v. Robinson* *ibid*, is of assistance to the beneficiaries even though it was cited on their behalf. To the contrary, it supports the position of the executor. Neither, I do not accept learned counsel Mr. Abel's submissions that the charging clause in the Beresford Kydd's Will, namely, "I appoint Ian Donaldson Mitchell, Solicitor of the Valley to be my Executor allowing him to charge his normal professional fees for work done for my

Estate”, is not a sufficient clause to enable an executor to be remunerated for probating and administering an Estate.

[71] It is the law that a testator is entitled to authorise his executor to be paid for professional work or for work which an ordinary lay executor could have done in person without the assistance of a professional man. In the case at Bar, the testator in his Will clearly authorised Mr. Mitchell to charge for his services as the executor; this Mr. Mitchell did and the beneficiaries accepted his charge. There is no legal duty on a solicitor not to charge higher fees than that provided as the minimum fees in Anguilla, Remuneration for Non-Contentious Business Rules 1995. What is critical is the need for an agreement. Clearly, the parties were in agreement. While there is no doubt in my mind that Ms. Webster discussed her fees with the beneficiaries, I do not believe that they do not want to pay her. Even if there was some discussion in relation to the areas of land to be sold in order to pay the fees I am of the view that should the beneficiaries be in the financial position to pay lawful fees without having to sell any part of the land they should be able to do so. This is consistent with the recent indication from the beneficiaries through their counsel to Ms. Webster (by way of letter.) This position was also reinforced in oral submissions.

[72] Further, I have carefully reviewed the authorities to which Mr. Abel refer and I am not of the considered view that the beneficiaries could not have agreed, as they have, to pay Mr. Mitchell 5% of the value of the Estate as remuneration for his services as the Executor. I am of the view that there is nothing which prevented the parties from agreeing to Mr. Mitchell charging 5% of the value of the Estate. I do not hold the view that Mr. Mitchell did anything wrong in charging 5% of the value of the Estate as his remuneration.

[73] I accept learned counsel Mr. Wallbank’s submission that the Anguilla Bar Association (Remuneration for Non-contentious Business) Rules, 1995 provide at

clause 2 that the fees are minimum, unless otherwise provided by the Rules. The Rules do not provide otherwise.

[74] In the circumstances, there was absolutely nothing to prevent Mr. Mitchell from charging a higher fee to which the beneficiaries agreed. I am not of the considered view that Mr. Mitchell was only entitled to charge for his fees 2% of the value of the Estate (based on the agreed valuation of EC\$4,900,000) up to US\$1,000,000 and 1% thereafter on a valuation of the Estate of EC\$4,900,000. Clearly, the beneficiaries and Mr. Mitchell entered into an agreement that he would be paid 5% of the value of \$4,900,000 and this agreement is entirely enforceable and valid.

[75] I have no doubt that the beneficiaries are willing to pay the fees that they have agreed with Mr. Mitchell. Their objection is to being asked to pay 5% of the current value of the Estate or 5% of EC\$25,406,802 as distinct from 5% of the value of the Estate at \$4,900,000. It is a cause for concern that the beneficiaries were not aware of the valuation of US\$25,406,802. Even though there is no legal duty on the Administrator to do so, prudence dictated that in the face of such an astronomical increase in the value of the Estate in the space of a few years the Administrator ought to have brought this to the attention of the beneficiaries. I do not share Ms. Webster's view that there was no prejudice to the beneficiaries. It is apparent that depending on the value of the Estate that is used for the purpose of the payment of the remuneration it will impact on the amount of fees that are to be paid. Ultimately, if they have to pay very high fees, they may need to sell part of the land which forms part of the Estate to do so.

[76] Equally, it is only right that Ms. Webster be paid immediately for the services she has provided to the Estate in her capacity as the Administrator of the Estate. It has given the court cause for pause that to date the beneficiaries have not paid any money to the Administrator. This has to be remedied in short order.

[77] For the sake of completeness, I accept learned counsel Mr. Abel's submissions that the reasons that Ms. Webster provided to the court in seeking the Without Notice Order does not seem to be the real reasons. There simply was no disagreement between Ms. Webster and the beneficiaries in relation to her receiving remuneration of 5% of the value of the Estate, neither was there any dispute that the assets of the Estate are properly applicable for the payment of the testator's debts including Ms. Webster's remuneration, neither is there any evidence that at that time there was a lack of consensus between the beneficiaries in relation to the Administrator being able to sell a portion of the lands to pay the outstanding debts due from the Estate.

[78] Having reviewed the totality of circumstances, it is evident that one of the real reasons for Ms. Webster having applied to the court is to have the court sanction the payment of remuneration to Ms. Webster of 5% of the current value of the Estate. This incidentally is not the same even as 5% of the value of EC\$25,406,802 which is the value of the Estate that was used for probate purposes. I must bear in mind that Ms. Webster told the court, in her Without Notice Application, that she did not know the current value of the Estate, coupled with the fact that she told Mr. Abel during cross-examination that if at the date of trial the Estate is valued at EC\$50,000.000 she is entitled to receive as remuneration 5% of this value. Be that as it may, I do not propose to say anything further on that subject of the case.

Set off

[79] Mrs. Hodge in her application for the variation of the Without Notice Order dated 21st July 2009 asked the court to set off the sum of US\$67,000 which she claimed the beneficiaries of the Estate expended in trying to get Ms. Webster to fully and finally administer the Estate. Ms. Webster takes issue with this aspect of the application and maintains that there is no evidential basis upon which the court could accept that this is so. Learned counsel Mr. Wallbank advocated that the court should not accede to the request since there is no indication as to the nature

or circumstances in which this alleged payment was made. Mr. Wallbank says there is no evidence as to whom the money was paid and for what purpose.

- [80] I totally accept learned counsel Mr. Wallbank's submission that Mrs. Hodge's claim for the set off of US\$67, 000 is completely unspecific and unsubstantiated. I also agree that Mrs. Hodge has failed to discharge her burden of proof in relation to this aspect of the claim and therefore cannot succeed.

Denial of Remuneration

- [81] In his closing arguments, learned counsel Mr. Abel urged the court to prevent Ms. Webster from receiving any remuneration for the services that she has rendered over and above her legal fees. Mr. Abel posited that Ms. Webster has acted unreasonably in the conduct of the proceedings and in administering the Estate. He says that Ms. Webster delayed the administration of the Estate; obtained a Without Notice Order; held on to the Without Notice Order for almost two years before it was extracted by the firm of Caribbean Associated Attorneys; obtained an order which was self-serving and only dealt with her remuneration. I am unclear as to the basis upon which I could make such an Order and therefore will not accede to learned counsel Mr. Abel's request.

Costs

- [82] Mr. Abel invited the court to order that the costs of the application be borne by Ms. Webster personally since she has acted unreasonably. Mr. Abel posited that Ms. Webster has failed to adopt the normal disinterested and independent attitude proper to a trustee and therefore her costs ought to be disallowed and costs should be awarded against Ms. Webster personally. Mr. Abel is adamant that Ms. Webster ought to be penalised in costs and the court should order her to expeditiously proceed with the proper administration of the Estate of Henry Beresford Kydd.

[83] For his part, learned counsel Mr. Wallbank reiterated that Ms. Webster did no wrong in seeking the directions of the court in the Without Notice Application. He said that even if there was any non-disclosure, and in his view there was none, it was not deliberate. Mr. Wallbank argued that the costs should be limited to EC\$14,000 and should come out of the Estate as priority over a final distribution.

[84] As a general rule, the costs should follow the event, so that the successful party is usually awarded its costs. There are circumstances in which a court, acting judicially, could depart from the general rule.

[85] Looking at the matter in the round, I am definitely not of the view that Ms. Webster, in filing the Without Notice Application, acted unreasonably. Even though Mrs. Hodge, acting on behalf of the beneficiaries has prevailed in her application to have the order varied, I am not of the view that this is an appropriate case in which to make a costs order against the unsuccessful party. Accordingly, each party is ordered to bear its own costs.

Sale of Property

[86] There is clear indication from the beneficiaries that they are willing to pay the remuneration of 5% of EC\$4,900,000. They have also indicated their desire not to sell any portion of the lands to meet these fees. They do not seem to be objecting to paying Ms. Webster her legal fees either.

[87] It seems to me very fair that if they are in a position to meet those costs without Ms. Webster having to sell any portion of the Estate, I should allow them to do so. Therefore, the Without Notice Order should be also varied in order to facilitate this.

Conclusion

[88] In the premises, the application by Mrs. Molly Hodge against Ms. Palmavon Webster, Lawful Attorney for Ian Donaldson Mitchell, Personal Representative of the Estate of Henry Beresford Kydd, deceased, is hereby granted.

[89] It is ordered that the order dated 21st July 2009 and entered on 28th August 2009 is varied as follows:

1. Paragraph 1 is varied to read 5% of the value of the Estate in the sum of EC\$4,900,000 as remuneration as agreed.
2. Paragraphs 3, 6, 7 and 9 of the Order are deleted.
3. Paragraph 4, the claimant shall be paid remuneration fees of 5% of the value of the Estate of EC\$4,900,000 as agreed.

[90] The beneficiaries are to pay Ms. Palmavon Webster, the lawful attorney of Mr. Ian Donaldson Mitchell (Personal Representative of the Estate of Henry Beresford Kydd, deceased) the Executor's remuneration in the sum of 5% of EC\$4,900,000 within 21 days of this judgment. Should the beneficiaries fail to comply with this Order, Ms. Webster is entitled to have a portion of the property valued by a valuer agreed to between herself and the beneficiaries and thereafter to sell that portion of the property in order to liquidate the Estate's indebtedness to her for the services that she has provided to the Estate.

[91] It is further ordered that Ms. Palmavon Webster, in the above capacity, shall take immediate steps to fully and finally administer the Estate.

[92] Each party is to bear its own costs.

[93] The court gratefully acknowledges the assistance given by learned counsel.

Louise Esther Blenman
Resident High Court Judge