NSW CIVIL & ADMINISTRATIVE TRIBUNAL
(Guardianship Division)

Tribunal Members' Training Seminar

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Financial Management and Remuneration

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INTRODUCTION

1. It is a great honour to address a gathering of members of NCAT's Guardianship Division. This is the place where the heaviest loads of the State's "protective" business are borne. I speak before an audience of those who bear those burdens.

2. I have been invited to address the general topic of "Financial Management and Remuneration", with particular reference to judgments I have published as the Protective List Judge, sitting in the Equity Division, of the Supreme Court of NSW.

3. I mention this, not only to define the parameters of my talk, but to excuse references to my own work. Judges, no less than others, generally have more than enough to be modest about.

4. Nevertheless, it is true that I have been called upon over the past year to address large questions about the remuneration of managers of protected estates and, in the course of doing so, I have been compelled to search for first principles.

5. That search did not, however, begin with me, and it is unlikely to end with me. Questions about the status of protected estate managers as fiduciaries, and the circumstances in which they can be rewarded for their services as fiduciaries, are larger than the here and now, or any of us.

6. What I have to say about the topic I have been assigned has been said in the published judgments themselves. Prudence dictates that I live within the parameters they have established and, to the extent that I may stray outside, I must regard myself as a trespasser on public policy questions that are for others to decide.

RECENT JUDGMENTS : THE "ABILITY ONE" PROCEEDINGS, etc

7. The principal judgment I have delivered is *Ability One Financial Management Pty Ltd v JB by his Tutor AB* [2014] NSWSC 245 (17 March 2014). It foreshadowed what became *Re Managed Estates Remuneration Orders* [2014] NSWSC 383 (2 April 2014).

8. The *Ability One* judgment contains a "Summary Overview" (at paragraphs 265-274) and a set of "Practice Rulings" (at paragraphs 278-290) that provide a template of what was decided. *Re Managed Estates Remuneration Orders* is a short judgment that ties in with what appears in the *Ability One* judgment at paragraphs 275-277.

9. With the benefit of experience in both the Supreme Court and the Guardianship Tribunal, these judgments provide guidelines for dealing with an application for the appointment of a **private** manager **for reward**, recommending that the regulatory functions of the NSW Trustee be engaged in the process at two levels. First, upon a determination whether the prospective manager is a "suitable person" for appointment. Secondly, if an appointment is made, in supervision of the manager's level of remuneration.

10. Both judgments can, and probably should, be read in light of *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247 (17 March 2014), nominally a probate judgment. It confirmed that any "entitlement" to remuneration a fiduciary such as an executor, trustee or protected estate manager may have is not an absolute "right", but an expectation of a discretionary, concessional "allowance" from an estate.

11. On the way to decision in the *Ability One* judgment, I also published two ancillary judgments:

    (a) Of these, the most significant is *M v M* [2013] NSWSC 1495 (11 October 2013), basic propositions from which have been reproduced in the *Ability One* judgment at [35] as a summary of non-exhaustive "guidelines" that might be consulted upon a consideration of questions about the identity of a manager of a protected estate. ***M v M*****,** reaffirmed by ***Ability One***, confirms that a manager can be removed from office "without cause", with the consequence that nobody has an absolute, vested interest in the office of manager.

    (b) *JMK v RDC and PTO v WDO* [2013] NSWSC 1362 (19 September 2013) provided, by its discussion of interlocutory orders in proceedings related to the *Ability One* proceedings, an opportunity for identification of issues to be determined in the *Ability One* judgment. It also did two more concrete things. First, it reaffirmed the importance to administration of the State's protective business of the monitoring role performed by the NSW Trustee. Secondly, it pointed towards a method of dealing summarily with an application for the appointment of a private manager for reward, by contemplating that the appointment of the NSW Trustee as a receiver and manager (a protected estate manager by another name) could aid an investigation of the suitability of the prospective private manager, permitting the NSW Trustee to provide a report on the suitability of the nominee.

12. In the course of moving towards the larger debate in the *Ability One* proceedings (with the benefit of submissions from the NSW Trustee, the Financial Services Council and the Law Society of NSW as well as the parties to the proceedings), I had another occasion to explore the nature of the Supreme Court's protective jurisdiction, and the legislative and administrative framework within which it operates, in *PB v BB* [2013] NSWSC 1223.

13. The immediate stimuli for the *Ability One* judgment were the judgments of Justice Richard White (my predecessor as the Court's Probate and Protective List Judge) in *GDR v EKR* [2012] NSWSC 1543 (14 December 2012) and *CC v RAM* [2012] NSWSC 1555 (14 December 2012).

14. At the end of his tenure as the Court's Probate and Protective List Judge, White J passed on to me the task of working through the question whether the *Ability One* companies should be authorised, retrospectively and prospectively, to retain remuneration from the protected estates under their management. He substantially eased my burden by laying down the legislative, historical and jurisprudential parameters within which that question had to be determined. I remain indebted to him for that.

15. His Honour's judgment in *GDR v EKR* identified a need for the question of "remuneration" to be reviewed by the Court, arising from a dozen or so decisions (with one exception, determined by the Guardianship Tribunal) in which one or the other of the two related "*Ability One"* companies – not licensed trustee companies – had been appointed to management of protected estates with an expectation (unattended by lawful authorisation) of commercial reward.

16. His judgment in *CC v RAM* identified a need for a more general consideration of the liability in financial managers, and their advisers, to account to a protected estate under their management for collateral benefits (such as commission) received from their investment of estate assets.

17. A protected estate manager is generally not entitled to take, receive or retain remuneration beyond that disclosed

to, and authorised by, the Court (with the benefit of members of the family of the protected person having had an opportunity to consider the reasonableness of the fact, and level, of remuneration).

HOLT v PROTECTIVE MANAGER : A PARADIGM SHIFT

18. Taken together, the judgments I have published have been profoundly affected by the judgment of the Court of Appeal in *Holt v Protective Commissioner* (1993) 31 NSWLR 227, and subsequent legislative developments, that have provided opportunities for private managers to manage protected estates.

19. As junior counsel in *Holt v Protective Commissioner*, I have particular, personal memories of how the Supreme Court's protective jurisdiction was managed before (and for some time after) the Court of Appeal's liberalisation of the principles to be applied in identification of the manager of a protected estate.

20. Suffice to say, for the present, that there was a strong, practical presumption in favour of **public** administration of any protected estate possessed of significant assets. In the wake of *Holt v Protective Commissioner*, that presumption has been, largely, abandoned.

21. "Public" administration in this context refers to the management of estates by either:

    (a) the holder of a public office traceable back to the Court's own Master in Lunacy (ie, the Protective Commissioner, the statutory predecessor of the NSW Trustee and Guardian); or

    (b) a licensed trustee company, authorised by legislation to act as manager of a protected estate for reward.

22. Prospective managers not within either of these classes were, and are, described as “private” managers. That is so, whether they are in the **business** of estate management or not, and whether they are members of the **family** of a protected person or not.

23. The regulatory requirements that govern “public” managers continue to underwrite their attractiveness. However, there is greater scope for others (including members of a protected person’s family) to assume the role of a manager. *Holt v Protective Commissioner* liberalised the principles to be applied in selection of a manager.

24. That liberalisation, coupled with an emphasis on consultation with the family of a protected person in the selection of a manager and in supervision of the work of a manager, provides a check on the quality of services, and the fees, of all managers.

25. There is an element of choice for family, NCAT and the Court, not earlier present. Hopefully, it serves as a moderating influence on all managers.

THE CHARACTER OF THE OFFICE OF A PROTECTED ESTATE MANAGER : THE ANALYTICAL POINT OF COMMENCEMENT

26. The office of a protected estate manager has long been classified as a fiduciary office, a gratuitous one, for the benefit of the protected person whose estate is under management, and subject to supervision by the Court.

27. A protected estate manager cannot legitimately take, receive or retain **unauthorised** remuneration from an estate under management. A fiduciary is not entitled, **without due authority**, to profit from his, her or its fiduciary office.

“ENTITLEMENTS” TO REMUNERATION : FIDUCIARY LAW AS A STARTING POINT

28. With the benefit of a legislative warrant, supplemented from time to time by orders of the Court, a public manager has long been able to charge remuneration for its performance of services as manager of a protected estate.

29. Absent a legislative warrant or a court order, a “private” manager has been unable, legitimately, to be remunerated for management services.

30. This remains a principal starting point for an understanding of the *Ability One* judgment. Without any *mala fides*, the *Ability One* companies were managing protected estates, and taking remuneration from those estates (with the approval of the NSW Trustee), without any authority, grounded in a court order or legislation, allowing them to do so.

31. An ancillary point to notice is that NCAT (in common with the Guardianship Tribunal it absorbed) has no legislative power to authorise a protected estate manager to take, receive or retain remuneration from an estate under management.

32. Section 115 of the *NSW Trustee and Guardian Act* 2009 NSW provides for the Supreme Court and (to a more limited extent) the NSW Trustee a limited legislative warrant for making an order for remuneration, “of a specified amount”, in favour of the manager of a protected estate, from the estate. It does not, however, provide a legislative basis for a general order for remuneration of a protected estate manager.

33. If any general authorisation for remuneration of a private manager is to be granted, it must be by way of an order grounded in the Court’s inherent jurisdiction – perhaps coupled, as I ultimately found in *Ability One* read with *Re Managed Estates Remuneration Orders*, with a court order grounded upon the power in the Court (under the NSW Trustee and Guardian Act) to give directions to the NSW Trustee.

34. If an application is made to NCAT for the appointment of a private manager for reward, an appropriate response, based on the *Ability One* judgment, would be for the Tribunal to appoint the NSW Trustee, with an invitation to the applicant to apply to the Court for the appointment of the prospective private manager. The Court may, then, direct the NSW Trustee to provide a report in aid of consideration whether the nominee is a suitable person for appointment, and the terms of any appointment.

THE PURPOSE OF THE FIDUCIARY OFFICE OF A PROTECTED ESTATE MANAGER

35. Another related "starting point" for understanding the *Ability One* judgment is an appreciation that: (a) the protective jurisdiction is governed by its purpose (the protection of a particular person in need of protection because unable to manage his or her own affairs); and (b) in many if not most cases, a protected person is, through medical as well as legal incapacity, "absent" from any practical process of negotiation of a manager's remuneration.

36. A purposive exercise of protective jurisdiction places the protected person at the centre of the stage even if, physically, off it.

THE GUIDING PRINCIPLE OF PROTECTIVE JURISDICTION DECISION-MAKING

37. A third related "starting point" is that an exercise of protective jurisdiction requires that the Court (or, indeed, any decision-maker exercising such jurisdiction or a protective function) act in the best interests, and for the benefit, of the protected person.

38. In today's world the possibility that it may be in the best interests, and for the benefit, of a protected person that a manager be remunerated is not remote from community expectations or ordinary experience.

39. It must be a very rare case, however, that would justify as beneficial, and in the interests of a protected person, an arrangement for a manager to take, receive or retain more remuneration than is fair and reasonable.

THE FUNCTIONAL SIGNFICANCE OF ANALYTICAL STARTING POINTS

40. These “starting points” (all flowing from characterisation of the office of a protected estate manager as “fiduciary”) confront any assumption, common to everyday life, that a manager of property has a “right” to remuneration.

41. The *Ability One* judgment makes that point by reference to judicial pronouncements drawn from legal history and modern times.

42. There is functional significance in the lessons of history.

43. A rule that maintains that the manager of a protected estate has no **right** to remuneration, **and** a manager’s **acceptance** of an office based upon that rule, enable the Court, and regulatory authorities acting under the supervision of the Court, to maintain control over a manager’s conduct.

44. If the manager of a protected estate were held to have a right to remuneration in competition with or superior to **the protected person’s fundamental right to protection**, not only would there be a conflict between the manager’s interests and duty but, it is not difficult to imagine, managers might soon think that an estate exists to serve them rather than their office to serve it.

45. When, by an order of the Court, a manager is “**allowed**” remuneration out of an estate under management, the remuneration takes the form of a **concession** from the prohibition under the law of fiduciaries on a fiduciary taking, receiving or retaining an unauthorised profit from the fiduciary office.

46. In the case of a protected estate manager, the prohibition on unauthorised remuneration provides a foundation for regulatory control of the manager, whether that control be exercised by the Court, a statutory tribunal such as NCAT or a public administrator such as the NSW Trustee.

QUANTIFICATION OF REMUNERATION ALLOWANCES

47. Establishment of that "bottom line" in public administration is only part of the story, however.

48. A problem that must confront anyone responsible for public oversight of the management of protected estates is how, and according to what principles, **can** decisions be made about the **quantification** of remuneration to be allowed in favour of a manager considered worthy of remuneration?

49. As will be found in the *Ability One* judgment, *Re Managed Estates Remuneration Orders* and *Re Estate Gowing* read together, I found answers to these questions located, as I choose to believe, in **principle** and **process**.

50. As to principle, I have held that a protected estate manager has no right to remuneration but only an expectation of a discretionary, concessional allowance; any "entitlement" to that allowance is conditional upon the manager's due performance of management obligations, and recognition that it can be no more than what is "fair and reasonable"; and a manager can be removed or replaced without cause, so that nobody has an absolute, vested interested in the office of manager.

51. As to process, I have determined that, by authorising the NSW Trustee to make administrative decisions about remuneration, the Court can (whilst maintaining its supervisory jurisdiction) direct dissatisfied, interested parties into the review processes administered by NCAT.

52. Whether, and to what extent, this regime bears fruit, only time will tell.

53. I do not exclude the possibility that legislative intervention may be necessary, or desirable.

54. Each of us must, however, endeavour to work constructively with the materials to hand, within the limits of our authority, respecting the traditions of the jurisdiction which, collectively, we administer.

GCL