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ENTITLEMENTS TO REMUNERATION OF A FIDUCIARY AS AN ACCOUNTING PARTY

by

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I. CONCEPTS

1 In his legal history text entitled *The Duty to Account : Development and Principles* (Federation Press, Sydney, 2016) , Dr James Watson of the NSW Bar propounds a theory that "the duty to account" lies at the heart of the law of trusts, and much else.

2 He develops that theory by a close examination of old English case law relating to the common law action of account and its successor in equity.

3 He focuses on the first stage of any inquiry: "Who is an accounting party?"

4 He answers that question by saying that, *prima facie*, an accounting party is a person who deals with property of another person "to the use or on behalf of" another person.

5 The expression “accounting party” includes (and can, loosely, be equated with) what is more often described as a “fiduciary”, although (as Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (5th ed, 2015) at paragraphs [26.005] – [26.015] and [26.085] demonstrate) the expression “accounting party” is the broader of the two concepts.

6 To the extent that the concept of a “fiduciary” can usefully be defined, the definition is similar to that of Dr Watson’s definition of “a party liable to account”. This is apparent in Sir Anthony Mason’s classic exposition of the fiduciary concept in *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 1 at 96-97.

7 In conformity with common law methodology in dealing with conceptual problems, Australian law sidesteps definitional dilemmas in this area by two strategic approaches to the problem how best to define a “fiduciary”.

8 The first approach is to speak of conventional relationships that inherently involve a liability to account. “Established categories of fiduciary” include trustees and beneficiaries, solicitors and clients, agents and principals, and legal personal representatives (executors, administrators and trustees).

9 The second strategic approach is to say that the classes of relationships open to be characterised as “fiduciary” are not closed; to refer back to high level abstractions about the nature of a fiduciary relationship; and to say that everything depends on the facts of the particular case. In this realm, an illustrative reference may be made to *Johnson v Buttress* (1936) 56 CLR 113 at 134-135, which, incidentally, illustrates the close relationship in equity jurisprudence between accountability for a breach of a fiduciary duty and liability to have a transaction set aside for undue influence.

10 This affinity of concepts can have practical importance in a case in which, although parties might have a relationship which falls within an “established category”, business is transacted outside the parameters of that relationship. *Hartley v Woods* [2017] NSWSC 1420 provides an illustration of this. A

person who held an enduring power of attorney did not deploy that instrument in persuading his elderly principal to confer benefits on him but, rather, allowed her to effect impugned transactions herself.

[A convenient summary of equitable principles governing undue influence can be found in *Quek v Beggs* (1990) 5 BPR [97405] at 11,764-11,765].

11 Although one sometimes sees attempts to define "fiduciary duties" as if they were terms of a contract, the simplest conception of such duties is to approach them through the prism of the concepts of "fiduciary" and "liability to account". An obligation to act on behalf of another person, *and not for oneself*, translates into:

(a) a duty not to take, receive or retain an unauthorised profit or gain from a fiduciary office; and

(b) a duty not to place oneself in a position of conflict between one's duty to "the beneficiary" and one's own interests.

12 Approaching the duties of a fiduciary in this way leads, logically, to the ideas that:

(a) a fiduciary office is *prima facie* a *gratuitous* one (*Willett v Futcher* (2005) 221 CLR 627 at 631[8] and 636[28], citing *Robinson v Pett* (1734) 3 P Wms 249; 24 ER 1049); and

(b) any "entitlement" to remuneration (if it be charged against property under management of the fiduciary) is, or may be, no more than an *allowance* from the property on an accounting by the fiduciary for the fiduciary's stewardship of property (*Ability One Financial Management Pty Ltd and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [67]-[89]).

13 Because the fiduciary office is, *prima facie*, a gratuitous one any taking, receipt or retention of remuneration by a fiduciary without authority involves a breach of duty.

14 This is the starting point for consideration of any "entitlement" (or, perhaps more accurately, presumed entitlement) of a fiduciary to remuneration:

(a) there is no "entitlement" to remuneration unless it is authorised by:

(i) each person (sometimes described as a "beneficiary", sometimes described as a "principal") to whom fiduciary duties are owed;

(ii) statute; or

(iii) the Court.

(b) insofar as it depends upon an order of the Court, any such entitlement is in nature discretionary.

(c) insofar as any entitlement to remuneration is in the nature of an accounting allowance, strictly accounts need to be taken, or anticipated, in allowing for remuneration to be taken, received or retained by the fiduciary.

15 At this point, there is often a clash between legal theory and community expectations, and between both and the practicalities of a formal accounting process.

16 Over recent years, there has been an increasing commercialisation of relationships in the provision, through a fiduciary, of services once routinely provided gratuitously. People who perform such services increasingly expect to be paid. They are increasingly unlikely to perform services, or to expose themselves to claims in negligence or the like, unless paid. There are, or may

be, substantial administrative problems in supervision of “fiduciaries” in a world affected by pressures towards commercialisation.

17 Although the commercialisation of society has gathered a pace in recent decades, it can be seen at play in 19th century English law if one looks to the historical antecedents of:

(a) the *Probate And Administration Act* 1898 NSW, section 86, which authorises awards of “executor’s commission.”;

(b) the *Trustee Act* 1925 NSW, section 85, which authorises the Court to excuse a breach of trust where a trustee (broadly defined) has acted honestly and reasonably and ought fairly to be excused; and

(c) the *Trustee Act* 1925 NSW, section 63, which provides a summary procedure for the provision of “judicial advice”.

18 Something of that history can be found in *Macedonian Orthodox Community Church v Bishop Petar* (2008) 237 CLR 66 and *Re Estate Late Chow Choo Poon* [2013] NSWSC 844; remembering that (as noted in *Re Estate Gowing* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32,763) a fiduciary in breach of his, her or its duties may, by reason of such a breach, be disentitled to remuneration.

19 Legislative provisions governing executor’s commission, excusable breaches of trust and judicial advice provide a conceptual template for dealing with problems of remuneration of fiduciaries. They provide comparatively summary procedures for an assessment of “commission”, granting relief in cases of innocent breaches of duty and providing for protection against liability for breach where difficult decisions must be made. They are, in combination, protective of an “entitlement” to remuneration because any such “entitlement” might be lost if a fiduciary has been in breach of duties owed as a fiduciary.

20 The legislative provisions are sometimes seen as freestanding constructs. However, they are probably best seen as statutory procedures designed to facilitate summary decision-making which, absent legislation, an exercise of equity jurisdiction might render unduly cumbersome. Historically, parliaments have intervened to counterbalance the tendency of lawyers to encumber the jurisdiction of courts with undue complexity.

21 Viewed through the prism of a gratuitous fiduciary office, and a need for a dispensation from a breach of fiduciary duties, "authorization" of remuneration by a "beneficiary" can be problematic where there is not a limited number of fully-informed beneficiaries competent to waive what would otherwise be a breach of duty.

22 One example of this can be seen in a claim to executor's commission absent authorisation in a will. By definition, the primary "principal" (the testator) is dead. His or her testamentary beneficiaries may be a disparate group not easily consulted by an executor, administrator or trustee, or they may include a minor.

23 The problem is more acute in the context of a claim to remuneration by the manager of a protected estate. A person in need of protection often, if not always, lacks the mental capacity requisite to providing fully informed consent to what would otherwise be a breach of fiduciary duty.

24 Company liquidators and trustees in bankruptcy provide a contrast with these probate and protective jurisdiction cases insofar as a liquidator or trustee in bankruptcy, under legislation governing those offices, may operate with the approval of all interested persons, including creditors.

II. PRACTICAL PROBLEMS WITH ENTITLEMENTS TO REMUNERATION

25 Although a fiduciary may have resort to statutory procedures for summary decision making about remuneration, there remains the problem of how, fairly and efficiently, to make summary decisions about an entitlement to, or assessment of, remuneration.

26 Where there is a contest about a fiduciary's entitlement to remuneration, it is often important to ground debate in an understanding of the purpose served by the fiduciary's office and the object of decision making about the performance of the fiduciary's functions. Otherwise, decision making tends to become bogged down in competing claims, and narratives, about rights and obligations.

27 This is a problem encountered particularly in probate proceedings, in which an application for executor's commission is made, in the first instance, to the Court's "Probate Registrar" in connection with the passing of accounts.

28 It is less of a problem in protective proceedings because remuneration orders are comparatively rare; most remunerated managers are licensed trustee companies (whose "entitlements" to remuneration are generally governed by the *Corporations Act* 2001 Cth); and the NSW Trustee generally has, or develops, an established administrative relationship with any manager authorised to receive remuneration.

29 However, practical problems in dealing with a claim by a fiduciary to remuneration occur across a broad spectrum of cases. That this is so may be illustrated (in relation to remuneration of a liquidator by reference to section 473(3) of the *Corporations Act* 2001) by the Court of Appeal's judgment in *Sanderson as Liquidator of SAKR Nominees Pty Ltd (in Liq) v SAKR* (2017) 93 NSWLR 459. Upon an assessment of remuneration, reasonableness may be a touchstone, with flexibility allowed in determining what is reasonable recompense for work done. Nevertheless, any endeavour to fast-track decision making about remuneration tends to expose any decision made to procedural challenges.

30 Whether a fiduciary is to be remunerated; if so, how remuneration is to be assessed; and how a remunerated fiduciary is to be supervised in the performance of duties are important questions affecting the performance of fiduciary functions. An entitlement to remuneration, or merely an entitlement to claim remuneration, may, by its very nature, establish a profound conflict

between a fiduciary’s duty and interest: *Law Society of NSW v Foreman* (1994) 34 NSWLR 408 at 435E-436C.

31 The fact, or potentiality, for such conflict, in a dynamic setting, implicitly directs attention to the need for there to be a regime for the regulation of fiduciaries.

32 Different fiduciaries are exposed to different regulatory regimes. Sometimes, a regulatory regime may seek to regulate a fiduciary’s “entitlement” to remuneration indirectly, by increasing a fiduciary’s exposure to competition, rather than by direct regulation.

II.A The Protective Jurisdiction

Authorising Remuneration

33 Until the decade or so following *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 241-243, the management of protected estates – particularly large ones – was confined largely to the Protective Commissioner (now the NSW Trustee) and statutory trustee companies (now largely governed by the *Corporations Act,* and called “licensed trustee companies”).

34 Over a period of about 20 years or so following *Holt v Protective Commissioner*, the NSW Parliament, the NSW Trustee and, incidentally, the Court (from the perspective of protected persons and their families) “liberalised” or “privatised” protective estate management. This involved treating the NSW Trustee more as a manager of last resort than as a manager of first resort; allowing more estates to be managed by private persons; and promoting self-help arrangements through the deployment of enduring powers of attorney.

35 An incident of broadening the range of permissable managers was to introduce competition for the NSW Trustee and licensed trustee companies which had, before that time, dominated the provision of protective estate services.

36 Broadening the base of persons regarded as suitable for appointment as a protected estate manager involved consideration of questions of remuneration. Those questions, in that context, were considered at length in *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245, necessarily read together with *Re Managed Estates Remuneration Orders* [2014] NSWSC 383.

37 Those two judgments explain the principles, and articulate the procedures, currently governing the appointment of a "private manager for reward"; that is a manager other than the NSW Trustee or a licensed trustee company.

38 Every year since the *Ability One* judgment the Court has published a report styled "*Re Managed Estates Remuneration Report*" designed to bring to public notice the occasions upon which this regime has been implemented: [2014] NSWSC 1652; [2015] NSWSC 1463; [2016] NSWSC 1416; and [2017] NSWSC 1818.

Changing a protected estate manager

39 Upon a theory that the remuneration sought by a protected estate manager might be moderated by the availability of competitors, it is important to note that no manager has a vested right to remain in that role: *M v M* [2013] NSWSC 1495 at [50]; *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245.

40 Many protected persons, their carers and families develop working relationships with particular members of staff engaged by an institution such as the NSW Trustee, a licensed trustee company or a professional manager for reward. A change in staffing arrangements can, not uncommonly, provoke dissatisfaction with a manager,

41 In that context, when there has been a takeover of a licensed trustee company by another corporate group, the Court has insisted that each affected protected person be given notice of the change, and an opportunity to consider whether an application should be made for a change of manager

(or, if a claim is made of present fitness for self management, a revocation of management orders): *Re LSC and GC*   2016] NSWSC 1896 at [40]-[41]; *SLJ v RTJ* [2017] NSWSC 137 at [20]-[26]; *Re TLH, a protected person* [2017] NSWSC 737 at [8]-[13].

42 Protected persons and their families need to feel a valued part of any management regime even if (by the nature of protected estate management) they cannot "own" it entirely. Small grievances grow if left unattended.

Jurisdiction to excuse breaches of fiduciary duties

43 In the corporate takeover cases, there has been occasion to make orders relieving managers of breaches of fiduciary duty attending the taking, receiving or retention of remuneration by a company, with doubtful authority, purporting to act as a protected estate manager.

44 That jurisdiction (essentially an exercise of the Court's inherent protective jurisdiction by analogy with the *Trustee Act*, 1925, section 85) is explained in *C v W (No. 2)* [2016] NSWSC 945, followed in *Downie v Langham* [2017] NSWSC 113.

II.B The probate jurisdiction

45 Questions about the remuneration of a legal personal representative generally arise in connection with a claim for "executor's commission" made by reference to the *Probate and Administration Act* 1898, section 86.

46 An explanation of the nature and historical origins of the Court's jurisdiction can be found in *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247; 11 ASTLR 128; 17 BPR 32,763. A grant of commission is a discretionary allowance, on the passing of accounts, ultimately determined by reference to the criterion of what is "just and reasonable", although a common practice is to calculate the quantum of commission to be allowed by reference to percentages of particular accounting categories.

47 *Re Estate Ford; Application for Executor's Commission* [2016] NSWSC 6 provides an example of constraints that attend an assessment of commission referable to a small estate.

48 Claims for commission and, in particular, the process of passing accounts involve logistical problems. The process is laborious. Accounts submitted by legal personal representatives, and objections taken to accounts, are often not well prepared, with a consequence that a registrar might be required to devote substantial time and scarce resources to the preparation and review of requisitions as well as the formal process of considering accounts.

49 For some years, a motion for the passing of accounts and commission has been dealt with by a registrar in chambers. It may be that consideration should be given to such motions being dealt with, more summarily than they presently are, by a registrar sitting in open court. It may be that such motions should be referred out to an assessor. Practitioners should be prepared to consider these, and other innovative, procedural approaches in an appropriate case.

II.C Problems In Dealing With Informal Fiduciary Arrangements

50 Special problems attend the management of an incapable person's estate through the informal expedient of an enduring power of attorney. That is because experience teaches that lay attorneys (fiduciaries by another name) not uncommonly do not understand, let alone respect, the boundaries of fiduciary office. Not uncommonly they take, not only remuneration for services ostensibly rendered, but also the incapable person's property generally. In some quarters, an enduring power of attorney is perceived to be a licence to steal. Not uncommonly, property, once taken, is dissipated well before anyone gets the court.

51 Cases of this description are potentially very complex. *Smith v Smith* [2017] NSWSC 408 provides an illustration of complexity, together with references to authorities on a number of topics.

52 The special problems that arise in dealing with an incapable person in this context focus on the following topics:

(a) As authoritatively established by *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423, and confirmed by *Clay v Clay* (2001) 202 CLR 410 at 428-430, the standard of accounting required of a "guardian" (using that expression, in its broadest sense, to include a protected estate manager) depends on the Court's assessment of whether a guardian has been dutiful in pursuit of the purposes for which the guardian was appointed.

(b) Issues relating to accounting (not limited to remuneration) may require consideration whether there should be an order excusing a breach of fiduciary duties: *C v W (No. 2)* [2016] NSWSC 945; *Downie v Langham* [2017] NSWSC 113.

(c) Whether or not services have been provided gratuitously, but particularly in cases in which gratuitous services have been provided, it might be necessary to consider whether an *ex gratia* payment should be made out of the estate of an incapable person: eg, *Protective Commissioner v D* (2004) 60 NSWLR 513; *JPT v DST* [2014] NSWSC 1735.

53 Examples of the *Countess of Bective* principles in operation can be found in *Crossingham v Crossingham* [2012] NSWSC 95 at [15]-[36]; *Woodward v Woodward* [2015] NSWSC 1793; *Downie v Langham* [2017] NSWSC 113.

III. CONCLUSION

54 Problems about the remuneration of a fiduciary, and the associated problem of ensuring a fiduciary's accountability, generally need to be resolved by close attention to facts in the context of general principles applied to particular fiduciaries working within a particular regulatory regime.

55 For that reason, there is need for familiarity with both general concepts and the regulatory regimes through which they find expression in the particular case.

GCL

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