

PROPERTY LAW AND EQUITY REFORM COMMITTEE

TRUSTEES' REMUNERATION

WORKING PAPER NO. 1

10 December 1971

I. PURPOSE

The purpose of this working paper is to examine the present law concerning the remuneration of trustees (other than "trustee corporations") engaged in administering trusts contained in the wills of deceased persons or in inter vivos settlements, and to make recommendations for reform, if this is considered desirable.

II. EXISTING LAW IN NEW ZEALAND

The general rule is that a trustee is not entitled to a salary or remuneration for services rendered, or for his time or trouble. This is in accordance with the rule of equity that trustees must not profit by their trust: Robinson v. Pett (1734) 3 P Wms 249. Equity looks upon trusts as honorary, and a burden upon the honour and conscience of the trustee. Trusts are not to be undertaken for mercenary reasons: Ayliffe v. Murray (1740) 2 Atk. 58.

This rule does not extend to expenses. Where the trustee has incurred out-of-pocket expenses s.38(2) of the Trustee Act 1956 provides that he may reimburse himself or pay all expenses reasonably incurred in the execution of the trusts out of the trust property. In addition, a trustee may employ other persons to render services, and to make payment out of the trust property for such services.

Exceptions to the general rule have been made in the following cases:

1. Trust Instrument

Where remuneration is expressly or impliedly provided for in the instrument of trust: see, for example, Stevens v. Dalrymple [1928] N.Z.L.R. 93.

2. Agreement

Where there is a special agreement between the trustees and the beneficiaries (the latter being sui juris) that the trustees shall be paid for their services.

The Courts are cautious in upholding such agreements and will refuse to enforce them where there appears the slightest sign of unfairness or undue pressure: Ayliffe v. Murray (supra). If the trustee should die before wholly performing his trust, his estate cannot recover on a quantum meruit.

3. The Court

Where the Court, under its inherent jurisdiction, exercises its discretion to allow remuneration.

The Court may also allow a commission or percentage under s.72 of the Trustee Act 1956 (as substituted by s.10 of the Trustee Amendment Act 1960). Further, under s.38(2) the Court has a discretion to allow the costs of professional services.

4. Special Statutes

Where the trustee is expressly authorised by statute to pay himself for his services. Examples are the Public Trust Office Act and the private Acts governing the different trustee companies operating in New Zealand.

5. Advisory Trustee

Where an advisory trustee is appointed. Section 49(5) of the Trustee Act 1956 provides that in certain cases, if remuneration or commission is payable to the trustee, it may be paid to both the responsible and the advisory trustee. Where the

responsible trustee is the Public Trustee or the Maori Trustee, the amount to be paid is determined by regulations made under the Public Trust Office Act 1957 or the Maori Trustee Act 1953, as the case may be. If the responsible trustee is entitled to fix his own remuneration he can also fix that of the advisory trustee. Otherwise, the remuneration of the advisory trustee must be fixed by the Court.

6. Custodian Trustee

Where a custodian trustee is appointed. Section 50(4) of the Trustee Act makes similar provision for the remuneration of custodian trustees.

III. THE LAW IN SOME OTHER JURISDICTIONS

1. England

A trustee is not entitled to remuneration for his services as trustee unless otherwise provided by the trust instrument. The general rule and its exceptions are similar to those in New Zealand.

Under s.42 of the Trustee Act 1925 where the Court appoints a corporation, other than the Public Trustee, to be a trustee the Court may authorise the corporation to charge such remuneration for its services as the Court thinks fit.

It is the practice for trust institutions to publish a scale of fees which usually include an acceptance fee, a withdrawal fee, an income fee and a management or investment fee.

2. Australia

The general rule, and the exceptions, are similar to those in New Zealand.

(a) New South Wales

Section 86 of the Wills Probate and Administration Act 1898-1954 empowers the Court in its Probate Jurisdiction on

passing accounts of a deceased's estate to allow a trustee such commission out of the assets for his pains and trouble as is just and reasonable.

(b) Tasmania

Section 58 of the Trustee Act 1898 provides that in any case where no provision is made for the remuneration of the trustee, whether in the trust instrument or otherwise, a judge in a summary way may allow him such remuneration for his pains and trouble in the execution of the trust as may be just and reasonable, and may also determine the fund out of which, or the persons by whom, the remuneration is to be paid.

(c) Victoria

Section 77 of the Trustee Act 1956 empowers the Court (or a Master) to allow a trustee out of the trust funds such commission or percentage not exceeding five per centum for his pains and trouble as may be just and reasonable.

(d) Western Australia

Section 98 of the Trustee Act 1962 is similar to s.72 of the New Zealand Trustee Act. But, in addition, s.98(5) provides that, in the absence of a contrary direction or other provision in the trust instrument, professional and business persons who are trustees are entitled to their normal charges.

3. Canada

(a) Alberta

The general rule is that a trustee is entitled to such fair and reasonable allowance for his pains and trouble, and for his time expended in or about the trust estate, as a District Court shall allow: s.51 of the Trustee Act 1955. But this is subject to any express provision in the trust instrument: s.53.

In addition, a trustee who is a barrister and solicitor is entitled to profit costs for any professional work done in connection with the trust: s.54.

(b) British Columbia

Section 89 of the Trustee Act 1960 empowers the Court to allow a fair and reasonable allowance (not exceeding 5% of the gross aggregate value, including capital and income) for his pains and trouble.

(c) Ontario

Where the compensation payable to the trustee has not been fixed by the trust instrument, the judge, upon the passing of accounts, has power under s.23(2) of the Trustee Act 1960 to fix the amount payable.

(d) Prince Edward Island

The general rule is set out in s.30 of the Trustee Act 1951. Trustees are entitled to such fair and reasonable compensation for their pains and trouble as the Court determines.

4. United States

[See generally, 3. Scott on Trusts, 3rd Ed. para. 241 et seq.]

(a) General Principles

The law in the United States refers to "compensation" and this term is employed in this paragraph.

Originally, the general rule throughout the United States was the same as it is in New Zealand. However, it has since been changed in all States, either by statute or by Court decision, so that trustees are now entitled to remuneration as compensation for their services.

(b) Statutory Provisions

The general principle is reasonable compensation for services, although there is no uniformity in determining what is reasonable. In some States the compensation is prescribed in terms of a fixed percentage of income received and of income paid out, and usually in addition, a fixed percentage of principle received and principle paid out. The percentages are often on a

sliding scale, the larger the estate, the smaller the percentage. In some States, the statutory percentages are regardless of the amount and difficulty of the services rendered. In others, there is a statutory scale with a fixed maximum but the Court may award less.

(c) Court exercising supervisory jurisdiction

Where the amount of compensation is not fixed by statute the Court may determine what amount is reasonable in the circumstances. In so doing, account is taken inter alia of:

- (i) the amount and difficulty of the services rendered by the trustee;
- (ii) the risks run by the trustee and the responsibility imposed on him;
- (iii) the skill and success in administering the trust;
- (iv) what is fair in view of the size of the estate;
- (v) the manner and promptitude in which the estate has been settled;
- (vi) the time and service required.

(d) General

(i) Extra services: Where there is no statutory provision fixing a trustee's remuneration, a trustee who renders professional or other services not usually rendered by trustees in the administration of the trust may be awarded extra compensation for such services. The weight of authority is that a trustee is entitled to extra compensation for such services to the extent that the Court thinks fit.

(ii) Terms of the trust: The general principle is that where the amount of compensation is fixed by the terms of the trust instrument, the trustee is entitled only to that amount. In circumstances where the trustee's duties have become more onerous, however, the Court may award a greater sum.

(iii) Several Trustees: Where there is no fixed statutory percentage, the general view is that each trustee is entitled to receive reasonable compensation for the services rendered by him. The amount each receives is normally less than a sole trustee would receive. The aggregate may be greater.

(iv) Successive Trustees: Where a trustee ceases to be a trustee before he has completed his administration of the trusts, he or his estate receives such remuneration as is reasonable in all the circumstances.

IV. REMUNERATION OF TRUSTEES IN NEW ZEALAND

1. The Court's Inherent Jurisdiction

This jurisdiction can seldom be invoked because it is only available in exceptional circumstances. It is not further discussed in this paper.

2. Under Statute

In the absence of special provisions in the trust instrument or an agreement with the beneficiaries, an application to the Court under ss 38(2) and 72 of the Trustee Act 1956 provides the only means by which a trustee can claim remuneration.

These provisions give the Court a discretion whether or not to award remuneration. Under s.72 the amount which may be awarded to a trustee or his personal representatives is such commission or percentage for his services as may be just and reasonable, but limited so that the total amount allowed all persons who are or have been trustees shall not exceed five per centum: s.72(1). Unless the Court otherwise orders, the allowance is made only on termination of the trust. The Court has the power to divide the amount awarded the trustees as it thinks fit.

3. Empowering clauses

A trustee who renders professional services has no right to reward for those services in the absence of any provision in the trust instrument or order of the Court.

However, wills frequently contain clauses empowering the trustee to charge. The charges so authorised commonly extend in the case of professional men to their professional fees, and sometimes, in relation to such trustees and others, to remuneration for time and trouble.

In the case of professional fees the amount is subject to supervision by professional bodies, or, in the case of solicitors, by means of taxation of bills of costs. In relation to charges for time and trouble the Court has a supervisory jurisdiction.

In the majority of cases empowering clauses do not specifically indicate the amount of remuneration.

V. COMMENTS AND SUGGESTIONS

In respect of the present statutory provisions in New Zealand the Committee offers for consideration the following comments and suggestions:

1. These provisions are enabling; that is to say, they give the Court power to award remuneration. The preliminary issue is whether the Act should be framed so as to entitle trustees to an award of remuneration -

(a) as of right, or

(b) where in the circumstances it is just and reasonable that remuneration should be paid.

The adoption of the first alternative would involve discarding the historical approach to the matter followed in the Commonwealth countries, and adopting the United States position where "compensation" is allowed to trustees as of right. The second approach would need only a greater emphasis of a trustee's right

to apply to the Court for an award.

The Committee is evenly divided on the relative merits of these two approaches and would welcome expressions of opinion.

2. Section 72 has a fixed maximum percentage which may be awarded. This has disadvantages. Where there are more trustees than one, all of whose services are meritorious, the amount of remuneration to each may be less than justice requires. It is the practice of the Court generally to deduct from the amount of remuneration the fees payable to solicitors, land agents and others whose services are retained and paid for. In some cases this leaves no real margin to reward a trustee. The duties of executors and trustees have become more onerous since the statutory provisions were first enacted. Business and private affairs are now more complex.

This particular problem might be thought related to that mentioned in paragraph 1; so that if the statutory provisions are to provide an entitlement to trustees it may be thought desirable that some maximum amount should be imposed. If the Statute is to remain as enabling then the Committee has the tentative view at present that in place of the fixed maximum percentage and with the several qualifications mentioned in paragraph 3 below, the Court should be allowed to award what is fair and reasonable.

3. Whether or not the basis of the award of remuneration is altered, it is suggested that s.72 could be usefully amended to provide that the Court, in considering what is fair and reasonable, should have regard to all circumstances which seem to be relevant, and in particular to -

- (i) the amount and difficulty of the services rendered by the trustee;
- (ii) the liabilities to which the trustee is or has been exposed, and the responsibilities imposed on him;

- (iii) the skill and success of the trustee in administering the trust;
- (iv) what is fair and reasonable in view of the size of the estate;
- (v) the time and services reasonably required of the trustee;
- (vi) whether any remuneration which might otherwise have been awarded should be refused or reduced by reason of delays in administration occasioned, or which could reasonably have been prevented, by the trustee.

If the section is varied so as to give trustees a right of remuneration that right should be considered in the light of the above factors, certain of which may operate to diminish or extinguish his entitlement.

4. Section 72(2) contemplates an award on the termination of the trusts unless the Court otherwise orders. This was perhaps intended to secure speedy administration and to enable the Court to consider what was available. This principle can operate unfairly in the case of trusts extending over a period of years. With the qualifications set out in paragraph 3 above, there seems to be no reason why an award should not be made at any time and from time to time, including an award for a future period subject to satisfactory safeguards.

5. Section 72(3) gives the Court power to apportion trustees' commission where there is more than one trustee. It is thought that the section should expressly provide that trustees may agree upon the apportionment and that in default of agreement the Court may itself apportion.

VI. RESERVATION

The provisions of section 72 have no application to trustee corporations which have statutory rights to charge at fixed rates prescribed by their own legislation with which the Courts have no right to interfere: Re Spedding (deceased) (1966) N.Z.L.R. 447. This paper does not purport to deal with this situation.

SUBMISSIONS

The suggestions put forward in the present working paper are tentative only. The Committee would be grateful for any suggestions or constructive criticisms. It requests that submissions be sent to:

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
Wellington,

on or before 31 March 1972.
