

TRUSTEES' REMUNERATION

REPORT OF THE PROPERTY LAW AND EQUITY
REFORM COMMITTEE

Presented to the Honourable the Minister of Justice
in May 1973

REPORT OF THE PROPERTY LAW AND
EQUITY REFORM COMMITTEE ON THE
LAW RELATING TO TRUSTEES' REMUNERATION

To: The Minister of Justice

INTRODUCTION

Terms of Reference

1. The Committee has been asked to examine the law concerning the remuneration of trustees (other than "trustee corporations") engaged in administering trusts constituted by will or inter vivos settlement, and to make such recommendations for reform as it considers desirable.

Working Paper

2. After a preliminary consideration of this topic the Committee set out its tentative views in a working paper, which was circulated to interested parties in December 1971. The full text of this paper was also published in [1972] Recent Law 46. The working paper elicited a helpful response, and the Committee would like to thank all those who took the trouble to write to it. The names of those who made submissions are set out in the Appendix to this report. Although the Committee has not adopted every suggestion received, it gives an assurance that they were all carefully considered.

EXISTING LAW IN NEW ZEALAND

3. 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.

4. 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 make payment out of the trust property for such services.

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

(a) Trust Instrument

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

(b) 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*.

(c) 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.

(d) 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.

(e) 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.

(f) Custodian Trustee

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

THE LAW IN SOME OTHER JURISDICTIONS6. 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.

7. 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.

8. 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.

9. United States

[See generally, 3. Scott on Trusts, 3rd Edn. 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 rule 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 principal received and principal 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 and with 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 supports the view 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, it is generally thought 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.

REMUNERATION OF TRUSTEES IN NEW ZEALAND10. 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.

11. 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 that 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 apportion the amount awarded the trustees as it thinks fit.

12. 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 where the trustee is a solicitor, 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.

THE PRINCIPAL ISSUE

13. The present provisions in the Trustee Act are enabling rather than mandatory: that is to say, they give the Court power to award or deny remuneration in a particular case. In the Committee's view, the principal issue before it was whether the Act should be amended to entitle trustees to remuneration as of right. Preliminary discussions found the members of the Committee evenly divided, and the Committee set out the two sides of the issue in its working paper. It was interested to find a similar division of opinion amongst those who wrote to it.

14. To some extent the division of opinion amongst the members of the Committee reflected a similar difference as to the present attitude adopted by the Courts. Some of the members felt that the Courts start from the standpoint that a trustee is not entitled to remuneration unless he can show special (or even extraordinary) circumstances that would justify an award: in other words, that the Courts place too heavy an onus on the applicant trustee. Other members considered that the opposite is true; that the Courts have applied s.72 in a reasonable and liberal manner, and that they award remuneration whenever it is fair to do so.

15. Again, the differing attitudes were, at least partly, attributable to the fact that the members of the Committee were largely concerned with different types of trustee. In the majority of cases a trustee is a near relative or close friend of the deceased, and the principal asset of the estate is a house property. In such cases there is usually no question of remuneration for the trustee: the rule of equity that a trust is honorary is in accord with the reality of this situation. However, where the estate is large (and particularly where the principal asset is a farm or business) a trustee may be chosen for his expertise rather than for personal reasons, and the demands on his time and energy may be very considerable indeed. In cases of this type the general rule may well operate to allow a settlor to take unfair advantage of his trustee.

16. The Committee now sets out the opposing viewpoints as it saw them.

(a) Remuneration at the Court's discretion

The general rule that a trustee is not entitled to remuneration operates fairly in the majority of cases. If a testator or settlor wishes his trustee to receive remuneration he can make appropriate provision in the will or trust instrument. If a person is named as trustee but is not willing to accept the office he can decline to do so, or having accepted that office he can resign it. If he agrees to act as trustee, and the administration of the trust turns out to be more onerous than expected, he can apply to the Court under s.72 for appropriate remuneration.

Where expertise is required it is not necessary to appoint the expert as trustee: a trustee can (indeed, he must) seek such expert advice as he may require in the course of the administration of the

estate, and can pay for that advice out of the trust assets. Where the principal asset is a farm or business, provision can be made for the trustee to appoint a properly qualified manager.

(b) Remuneration as of Right

The duties of executors and trustees are becoming increasingly onerous in line with the increasing complexity of business and private affairs generally. However simple and small an estate may be, a trustee has definite duties and responsibilities to fulfil. The demands on his time and energy may be considerable and may make serious inroads into the amount of both that he can give to his own affairs, his family or his leisure activities.

The problem is particularly acute in respect of farming estates, especially if the farm has to be held for a considerable period of time (for example, during the lifetime of the widow). In such cases it is highly desirable to have a trustee who is himself an expert farmer. But in the absence of remuneration it will become increasingly difficult to find suitable people to act as trustees in these estates.

It is no answer to point out that provision can be made in the will for proper remuneration. The simple fact is that in many cases no such provision is made. Moreover, even if the testator addresses his mind to the point (or has it drawn to his attention by his solicitor) it is difficult, in the absence of any statutory guidelines, to know what provision should in fact be made. Nor is it an answer to say that he can decline to act: no matter how unfair the burden demanded of him may be, he may feel honour-bound to accept.

The present right to apply to the Court is unsatisfactory. As a trustee is not entitled to remuneration as of right, he may appear to be asking for something that is not rightfully his, and the application may be resented by the beneficiaries. The same "stigma" would not attach if the sole question for the Court to determine was that of quantum.

THE COMMITTEE'S PROPOSAL

17. From preliminary discussions on this issue it became clear to members of the Committee that if a formula could be devised whereby one rule would apply to what may be termed "personal" trustees and another to "expert" trustees, much of the dispute between them would be settled. The Committee had in mind a provision to the effect that where a trustee is appointed as a trusted relative or friend no remuneration would be payable as of right; but where a trustee is appointed because of his expertise in a particular field he should be entitled to charge his usual fee for his expert services, just as a solicitor can where a charging clause is included in the will or trust instrument. It was considered that such a provision could be difficult to draft but the Committee noted that this approach had been adopted in s.98(5) of the Trustee Act 1962 (W.A.) and accordingly it was decided to enquire whether any difficulties of interpretation had arisen under that provision. The Committee has been assured that no such difficulties have in fact been experienced.

18. Section 98(5) reads:

"In the absence of a direction to the contrary in the trust instrument, a trustee being a person engaged in any profession or business for whom no benefit or remuneration is provided in the trust instrument is entitled to charge and be paid out of the trust property all usual

professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust, including acts that a trustee, not being in any profession or business could have done personally;...."

For the reasons set out below, the Committee recommends the adoption of a similar provision in New Zealand.

19. Such a provision would apply in the absence of a direction to the contrary in the trust instrument. The Committee believes that when a person appoints a professional man (such as a solicitor or accountant) to be his trustee he expects that the trustee will charge his usual fee, yet the law at present requires express provision to be made in the trust instrument. Such provisions are often drawn too narrowly to be fair to the trustee, or too widely to be just to the beneficiaries. Moreover, in the common case of a solicitor preparing a will under which he is to be appointed a trustee, he is placed in the embarrassing position of having to ask the testator for what the law regards as a legacy.

20. The proposed provision would also overcome the other difficulties that arise from the law treating a provision for remuneration as a legacy. First, if the trustee, through ignorance or inadvertence, attests the will he is not entitled to recover the remuneration provided for him in the will. Second, if the estate is insufficient to meet all the legacies in full, the quantum of the trustee's remuneration will abate rateably and proportionately with the other legacies. In the extreme case where the estate is insolvent he will get nothing, notwithstanding that his duties may have been onerous and time-consuming.

21. This provision would also remove the possibility of injustice caused by the present fixed maximum, while at the same time providing an adequate safeguard against excessive charges. A professional trustee would not be free to charge whatever he liked; his charges would be regulated in accordance with the standards set by his own profession or business.

22. Nevertheless, the Committee recognises that a professional trustee would be in a different position in respect of the estate than he is vis-a-vis an ordinary client, in that he can simply deduct his charges from the estate assets in his hands. With this in mind, it has considered whether a professional trustee, before deducting his usual fees, should be required to prepare a full set of accounts for each beneficiary.

23. At present, the law does not require a trustee to render periodic accounts. He must, however, keep accounts and render an account to a beneficiary on demand. Where a beneficiary makes such a demand he must himself bear the necessary cost of supplying the accounts. A provision requiring a trustee to render accounts before deducting his fees might assist in minimising abuse. However, if the rendering of accounts were mandatory it would hardly be just to require the beneficiaries to meet the cost of supplying them, and this would have to become a charge on the estate. In some estates this would be fairly substantial, and would be hard to justify where none of the beneficiaries wanted accounts to be rendered. On balance, therefore, the Committee feels that the present right to demand accounts is sufficient, and that a mandatory provision would not be justified.

24. However, the Committee does consider that the accounts should show, as a separate item the full amount charged by the trustees during the period covered by the accounts, and, further, that a copy of the bill rendered for such fees should be supplied to a beneficiary demanding the same free of charge. This latter provision would place the beneficiary in the same position as any other person by whom fees are payable for services rendered.

OTHER RECOMMENDED AMENDMENTS

25. Whether or not all or any trustees are to be entitled to remuneration as of right, the Committee is unanimous that certain amendments to the present provisions are desirable.

26. Fixed Maximum

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. To some extent this particular problem is related to the main issue. If personal trustees are to be entitled to remuneration as of right it may be thought desirable that some maximum should be retained as their charges would not otherwise be controlled. If however the Act in respect of personal trustees is to remain as enabling then the Committee considers that in place of the fixed maximum percentage, and with the several

qualifications mentioned in paragraph 27 below, the Court should be allowed to award whatever is fair and reasonable.

27. Circumstances to be taken into account

Whether or not the basis of the award of remuneration is to be altered, the Committee recommends that s.72 should be 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 -

- (a) the amount and difficulty of the services rendered by the trustee;
- (b) the liabilities to which the trustee is or has been exposed, and the responsibilities imposed on him;
- (c) the skill and success of the trustee in administering the trust;
- (d) what is fair and reasonable in view of the size of the estate;
- (e) the time and services reasonably required of the trustee;
- (f) 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 to be varied so as to give trustees a right to remuneration, that right should be considered in the light of the above factors, certain of which may operate to diminish or even extinguish his entitlement.

28. Time at which remuneration may be awarded

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. But the rule can operate unfairly in the case of trusts extending over a period of years. With the qualifications set out in paragraph 27 above, the Committee sees 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. It recommends accordingly.

29. Apportionment

Section 72(3) gives the Court power to apportion trustees' commission where there is more than one trustee. The Committee recommends that the section should be amended to provide that trustees may agree upon the apportionment, and that in default of agreement the Court may itself apportion.

For the Committee



 Chairman

Dated this day of 1973

Members

Mr C.P. Hutchinson, M.B.E., Q.C. (Chairman)
 Professor G.P. Barton,
 Mr G. Cain
 Mr J.G. Hamilton
 Professor G.W. Hinde
 Mr L.H. McClelland
 Mr K.U. McKay
 Professor P.B.A. Sim
 Mr W.M. Taylor
 Mr R.G.F. Barker (Secretary)

APPENDIX

Submissions on the Committee's working paper were received from:

The Honourable Mr Justice Zelling C.B.E., Chairman of the Law Reform Committee of South Australia.

The Canterbury District Law Society.

The Law Society of the District of Auckland.

Mr A.R. Robinson, of Messrs Buddle Anderson Kent & Co., Wellington.

Wellington District Law Society.

The Public Trustee.

Mr P. Blanchard, of Messrs Grierson, Jackson & Partners, Auckland.

Manawatu District Law Society.

The Committee also acknowledges with thanks the assistance of Mr J.H. Wheatley of Messrs Wheatley & Son, Perth, Western Australia who answered its queries in respect of s.98(5) of the Trustee Act 1962 (W.A.).