ACCOUNT OF PROFITS

Michael Todd QC
Erskine Chambers

Scope of this Presentation

- Duty to Account
- Availability of an Account
- Obtaining and taking the Account

Duty to Account

- At common law:
  - quasi-fiduciaries;
  - bailiffs, guardians, receivers;
  - joint tenants and tenants in common
- The contractual duty
- In equity
  - Fiduciaries

Availability of an Account

- Fiduciaries: **Boardman v Phipps** [1967] 2 AC 46
- Accessories: **Novoship (UK) Ltd v Nikitin** [2014] EWCA Civ 908
- Infringement of IP and breach of confidence
- Breach of contract: **AG v Blake** [2001] 1 AC 268

Fiduciaries

- **Mothew v Bristol & West Building Society** [1998] Ch 1

  "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence."

- **Hospital Products Ltd v United States Surgical Corporation** (1984) 156 CLR 41

  "(A) fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."

The Rationale for the Duty

- **Hospital Products Ltd v United States Surgical Corporation** (1984) 156 CLR 41

  "The relationship … is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position"

The Right to an Account

- **Libertarian Investments Ltd v Thomas Alexej Hall** [2014] 1HKC 368; FACV 14/2012

    - Fiduciaries are accounting parties.
    - Beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account.
    - Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right.

The Nature of the Right

- Order for an Account is enforcement of an obligation

- Not a remedy for a wrong

- An Account is the means by which a beneficiary/principal requires a fiduciary to justify his stewardship of trust property: **Ultraframe (UK) Ltd v Fielding** [2006] FSR 17 para [1513]

Order for an Account

- CPR 25.1(1)(o)
  - The Court may make an interim Order for an Account
- CPR25.1(4)
  - The Court can make such an Order whether or not there is a claim for a final remedy of that kind
- RSC 1965, O43 r1(1):

  "Where a writ is endorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has acknowledged service of the writ or after the time-limited for acknowledging service, apply for an order under this rule."

Taking the Account

- **Libertarian Investments Ltd v Thomas Alexej Hall** [2014] 1HKC 368; FACV 14/2012
  - An order for an Account is merely the first step in a process which enables the beneficiary / principal to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good.
  - It does not in itself provide the claimant with a remedy.
  - The fiduciary must show what he has done with the trust property.

Surcharging the Account

- **Ultraframe (UK) Ltd v Fielding** [2006] FSR 17 para [1513]
  - If the beneficiary is dissatisfied with the fiduciary's dealings with trust assets, he may surcharge or falsify the account.
  - The Beneficiary surcharges the Account when he alleges that the fiduciary has not obtained for the benefit of the trust all that he might have done.
  - If the allegation is proved, then Account is taken as if the fiduciary had received, for the benefit of the trust, what he would have received if he had exercised due care and diligence.

Falsifying the Account

- **Ultraframe (UK) Ltd v Fielding** [2006] FSR 17
  - The Beneficiary falsifies the Account by alleging the fiduciary has misapplied trust property e.g. by making an unauthorised investment.
  - If the allegation is proved, the Account will be taken as if the expenditure had not been made; and as if the unauthorised investment had not formed part of the assets of the trust.
  - If the unauthorised investment has appreciated in value, the beneficiary may choose not to falsify the account: in which case the asset will remain a trust asset and the expenditure on it will be allowed in taking the account.

Compensation and Profits

- **Libertarian Investments Ltd v Thomas Alexej Hall** [2014] 1HKC 368; FACV 14/2012
- Upon the taking of the Account:
  - Where there is a deficit, the fiduciary must make good in specie or by the payment of money (equitable compensation).
  - Where a trust asset has increased in value, the fiduciary must account for any profit.
  - In both cases, the compensation and the account of profits is restitutionary or restorative.