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ACCOUNTING TO TEN: A SUMMARY RUNDOWN OF COMMON FORM ACCOUNTS

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HUBBARD V HUBBARD¹

THE CONTEXT

This article considers two instalments of the *Hubbard v Hubbard* litigation before former Chief Master Marsh to draw out the central principles applicable to common form accounts along with a number of more novel points considered across the two judgments.

THE FACTS - SUMMARY

1. As is inevitable with an accounting action the core of the case was highly fact specific and this article therefore does not delve into the facts in detail. The principles, and the warnings, are of far more general application.
2. The *Hubbard* litigation concerned an action for an account in common form in relation to the Defendants' dealings with three parcels of land at East Bergholt, Colchester, Essex held upon an express trust. The account action concerned the sales income generated by the trustees in developing the land and the expenses they claimed to have incurred and which they had charged to the Trust.

The trial involved 63 objects to the Defendants' account. The Court ultimately disallowed 22 heads of claimed expenditure (some of which were conceded). The trial judgment highlights the potentially disastrous consequences for trustees of a lack of documentary evidence coupled with witness evidence which lacks credibility.

The first of the two judgments considered D1's application to strike out C's claims or, alternatively, for summary judgment. The second judgment was the trial of the action (the applications having failed). Both are drawn together below.

¹ [2025] EWHC 855 (Ch) and [2024] EWHC 3123 (Ch)

THE LEGAL PRINCIPLES

Common Form Accounts

The following are drawn from [2025] EWHC 855 (Ch)

1. An account in common form is distinct from an account on the basis of wilful default.
 - a. The former is an account based upon what has actually been done with the trust assets, what they comprise and what recoverable expenses the trustees have incurred for which they wish to be indemnified.
 - b. By contrast, in an account taken on the basis of wilful default the court may investigate what ought, or ought not, to have been done and what the trust assets ought to comprise. Essentially the difference is between the 'is' and the 'ought'.
2. There are three stages to the taking of an account in common form.
 - a. Establishing whether there is a right to an account and, if there is, whether the court should exercise its discretion to make an order for an account to be taken;
 - b. the taking of the account;
 - c. whether consequential orders should be made. consequential orders do not follow automatically from the account being finalised.
3. There is no set form for the provision of accounts. The level of detail that the trustees must provide and the formality of the account statements are context specific. Both will vary with the size and nature of the trust and with whether the trustee is lay or professional.
4. In the context of a trust of land which contemplates development and sale, trustees are required to keep full records of income and expenditure and to retain them.
5. A trustee who fails to keep records, or destroys them, can expect only limited sympathy from the court, unless there is a full and clear explanation about what has happened and a careful attempt to explain entries in the account.
6. Where the destruction of records is recent, or where a cogent reason for the destruction of records is not provided, the court is likely to lean against trustees in favour of the beneficiaries.
7. The burden of proof varies according to the nature of objection:
 - a. Where the objection relates to income, the burden lies upon the beneficiaries;

- b. where it relates to expenditure and outgoings, the burden lies on the trustee. Here the beneficiaries have nothing they have to prove unless they rely upon evidence providing a reason to disallow expenditure; in that case they have to prove such evidence before it can be evaluated and added to the evidential mix.
8. It is not the court's role in taking a common form account to investigate whether services could have been obtained at a lower cost.
9. The following list of considerations was usefully provided at [47] of the second judgment:
 1. Is it plausible that the expenditure was incurred? Is it of a type which would be expected?
 2. Are there any documents which provide evidence of the expenditure being incurred and paid?
 3. Is there plausible oral evidence of the expenditure being incurred and paid, whether or not there are documents?
 4. If there is an absence of material documents, is there a good reason for that absence?
 5. What efforts have been made to locate and produce documents by the party upon whom the burden lies?
 6. Is the court able to reach conclusions about expenditure having been incurred and paid based upon the evidence (oral, documentary and inferential) taken together?
 7. If there is sufficient evidence of an item of expenditure being incurred, was it was incurred on behalf of the trust, as opposed to being for the personal benefit of the trustee?
10. If a trustee borrows it is necessary for them to show that the borrowing and therefore the interest that accrued was obtained for the purposes of the trust and not for personal use. If the power to borrow was misused for personal use it will not constitute an authorised dealing or proper expense.
11. Trustees can seek a “just allowance” for work and skill (*Rukhadze v Recovery Partners GP Limited* [2025] UKSC 10). The court doubted the principle extracted in Snell’s Equity from *Barnes v Ross* [1896] AC 625 and held that “*the decision does not establish the general principle that in the absence of records the court may make an allowance of a lesser sum than the specific amount claimed*” essentially an unevidenced “reasonable amount”.
12. The Defendant trustees claimed all expenses on an “all or nothing” basis. The Court accepted that it was possible make a lesser allowance but nonetheless held that “*it is not open to the court to make an allowance for an item of expenditure without some evidential basis*” and the court was “*not in a position to draw upon judicial knowledge or experience.*” If an allowance is to be made it must be grounded in evidence.

Strike Out, Summary Judgment and Abuse of Process

The following are drawn from [2024] EWHC 3123 (Ch)

1. A trustee's explanation must reach a threshold at which the beneficiary is given a reasonable understanding of the position such that an objection may, if appropriate, be made.
2. CPR rule 3.4(2) has no direct application to objections provided on the taking of an account.
3. As to summary judgment, the accounting exercise followed a declaration as to beneficial interests in relation to the parcels of land. The proceedings were therefore “beyond a stage at which judgment on the claim may be granted” such that summary judgment was not available.
4. Furthermore, the court held that it could not be said that there was a particular issue going forward that would be amenable to summary judgment; or that each objection to the account was an issue, or collectively they were an issue in respect of which summary judgment could be given.
5. The Court doubted, despite the parties’ acceptance of the point, that it had an inherent jurisdiction to strike out an account beyond normal case management powers. The court did however have an inherent jurisdiction to strike out for abuse of process.
6. The court does have case management powers to apply sanctions to improperly drawn grounds of objection and to provide terms such as that the objector is not entitled to proceed with a particular objection if it is not properly formulated, or that the accounting party is not entitled to provide evidence in respect of an objection if the response to it is not made clear.
7. Sanctions applied to non-compliance with orders for accounts are to be used sparingly if the court is to avoid having to conduct a trial or inquiry with unhelpful restrictions placed upon it, particularly if it is the defendant's responses to the objections that are struck out.
8. The court is always alive to the possibility that the account may be pursued as an “instrument of oppression” and that notion is more likely to be relevant to the exercise of the court's discretion whether or not to order that an account be taken, and whether the account should be on the basis of wilful default.
9. An account involving a large number of objections might be oppressive but the court would be alive to the time period covered by objections which may justify their volume.

10. The Claimants having raised 65 objections, unless they could all be said to fall at the coherence hurdle, or there were clear cases that were hopeless, it was wrong in principle for the court to be required to undertake a review exercise prior to the hearing of the account.

Practice and Procedure

1. Practice Direction 57AD does not apply directly to the taking of an account. It is open to the court when taking an account in the Business and Property Courts to make an order in relation to disclosure, adapting Practice Direction 57AD in an appropriate manner.
2. Even if disclosure orders are not made, where the burden is upon a trustee to justify an expenditure item it is plainly in that trustee's interests to undertake an extensive disclosure search.
3. The 'gold standard' of proof is where trustees provide an explanation why the expenditure was incurred in the amount claimed, an invoice(s) or other evidence of payment such as from a bank account held by the trustees and oral evidence about why the type of expenditure and the amount incurred is a proper expense of the Trust.
4. The older the expenses the more forgiving the court may feel inclined to be provided that the trustees have made a real effort to locate adequate documentary evidence and explained what steps they have taken.

TAKEAWAYS

The “gold standard” should be followed wherever possible. Where documentary evidence supporting an account is unavailable trustees would be well advised to explain a trust's history as carefully as possible, to explain the absence of documents and to describe expenditure by reference to historic practices where applicable.

Where a case is to be made for a just allowance in the absence of concrete proven expenditure, trustees should present evidence in support of such a case to allow the court to arrive at an evidenced reasonable figure.

The accounting process is designed to hold fiduciaries (and others) to their duties. The court will not allow procedural objections to lightly stand in the way of a full and fair process, nor will limitation objections be indulged at a preliminary stage save for in very clear cases.



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