OBTAINING JUDICIAL ADVICE IN WILLS AND ESTATE MATTERS

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Executor or trustee

The topic for the lecture based upon this paper and the subject of the series of lectures of which it forms part, means that this paper will be focused upon executors bringing applications for judicial advice. There is a whole body of complex law devoted to the question of when an executor becomes a trustee of some or all of the assets in an estate and some wills create trusts with the executor as trustee. This paper will not touch on those topics as an executor who is not a trustee in the sense of either of these mentioned categories can still seek judicial advice in the circumstances discussed below. Also, references in this paper to trustees can be regarded as including executors (and for that matter administrators) and vice versa.

The executor's right to approach the court for advice

The nature of an application for judicial advice is described in *Ford and Lee; the Law of Trusts*[1] in the following terms:

> statutes and provisions of long standing deriving from the *Law of Property and Trustees' Relief (Lord St Leonard's) Act 1858 22 & 23 Vic C 35 and from s 9 of the Law of Property Act 1860 23 & 24 Vic C 38* … enable trustees to seek the advice and directions of the court. Trustees may approach the court if they are

[1] Thomson Reuters, online version [17.160]

in doubt as to any course of action they are contemplating, whether it concerns the rights of beneficiaries, the performance of any duty or the exercise of any discretion; and sometimes it is their duty to do so.

In *Marley v Mutual Security Merchant bank & trust Co Ltd* 1991] 3 All ER 198 Lord Oliver of Aylmerton said at 201:

> A trustee who is in genuine doubt about the propriety of any *contemplated* course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court.

Sources of the power to provide advice and interstate differences

I do not propose to discuss arguments about inherent powers or powers deriving from jurisdictional provisions such as ss 22 and 23 of the Supreme Court Act 1970 (NSW) as this paper is about the practicalities of bringing applications and each of the states and territories has a more defined source of power that is invariably relied upon by practitioners. Those sources of jurisdiction to provide judicial advice fall broadly into two classes.

(i) Trustee Act legislation:

The power is contained in trustee legislation in NSW, Queensland, Western Australia, South Australia and the ACT. In NSW it is in s 63 of the Trustee Act 1925 and there are provisions similar to s 63 in Queensland (Trusts Act 1973, ss 96 and 97), South Australia (Trustee Act 1936, s 91 and the Administration and Probate Act 1919, s 69), Western Australia (Trustees Act 1962, ss 92 and 95) and the ACT (Trustee Act 1925, s 63)).

(ii) Supreme Court Acts

In Victoria, Tasmania and the Northern territory the jurisdiction is derived from their respective Supreme Court Acts (in Victoria, the powers are contained in r 54.02 and r 54.03 of the Supreme Court (General Civil Procedure) Rules 2005. In Tasmania it is contained in Regulation 604 of the Supreme Court Rules 2000 and in the Northern Territory from Order 54 of the Supreme Court Rules).

In the ACT and NSW, the executor may inquire of the court in respect of the interpretation of the trust. In Queensland and Western Australia, the court may consider the exercise of any power or discretion vested in the executor.

In Queensland and Western Australia, the provisions refer to the obtaining of directions as opposed to the Trustee Act 1925 (NSW) where the executor may seek the Court's "opinion advice or direction". There is probably little or no practical difference as the court never directs on these applications, it "approves or permits a course of conduct" with the usual form being that "the executor 'would be justified' in taking certain action."[2]

The Macedonian Trust Case

Although it was a case that was specifically concerned with section 63 of the Trustee Act 1925 (NSW), the decision of the High Court in *Macedonia Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonia Orthodox Diocese of Australia and New Zealand* [3] ("the Macedonian Trust case") is the leading authority in relation to judicial advice questions in Australia.

Gummow ACJ, Kirby, Hayne and Heydon JJ, referred in their joint judgment to the various sources of jurisdiction to provide judicial advice in each of the states and territories[4] and set out a number of propositions[5] which have been accepted around the country as being of general application (in addition to the case next cited see also eg. *Re Fast (as executors of Will and trustees of estate of Rockman dec'd)*[6], *Latchford v Laine*[7], *Ban v Public Trustee of Queensland*[8]). Gray J prepared a useful summary of the propositions, accepting their applicability in South Australia, in the Supreme Court of South Australia decision of *EM Squared P/L v Hassan*[9]:

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[2] *Ford & Lee: The Law of Trusts* Thomson Reuters, online version [17.160]
[3] (2008) 237 CLR 66
[4] at fn 40
[5] at [54] to [76]
[6] [2015] VSC 780 at [9]
[7] [2018] WASC 207 at [54]
[8] [2015] QCA 18 at [54]
[9] [2010] SASC 62 at [12]

- —Provisions conferring powers to the court are not to be subject to implied limitations.
- —Section 63 contained no implied limitations on the power to give advice.
- —The only jurisdictional bar to relief pursuant to section 63 or its equivalent, is that the applicant must point to the existence of a question respecting the management or administration of trust property or a question respecting the interpretation of the trust instrument.
- —Nothing in section 63 limits or mandates consideration of discretionary factors.
- —The procedure pursuant to section 63 and its equivalents is summary in character.
- —The provisions operate as an exception to the court's ordinary function of deciding disputes between competing litigants as they afford a facility of giving "private advice" as the function of the advice is to give personal protection to the trustee.
- —Section 63(2) precludes any trustee, who acts in accordance with the private advice, from being held liable for breach of trust in the event that in conventional proceedings it is later held that the legal position does not correspond with the advice given, so long as the proviso to section 63(2) is satisfied.
- —The application of section 63 will tend to vary with the type of trust involved and as a consequence the context of the application for advice will be important.
- —Section 63 has a relationship to rights of indemnity. Provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.

When is it appropriate to seek judicial advice?

The circumstances in which an application for judicial advice is available were set out by Hallen J in *Application by Marilyn Joy Cottee; Estate of Gwenyth Shirley Smith*[10] quoting Dal Pont and Chambers, *Equity and Trusts in Australia and New Zealand*, 2nd ed at p 688:

> This statutory jurisdiction is intended essentially for private advice by the court to trustees as to what course of action they should follow where they are in doubt as to the propriety of the action contemplated. The applicant must place before the court all relevant evidence such that the court is fully informed as to the matter in issue. Three situations in which an approach to the court is particularly useful are where (a) the issue is whether legal proceedings ought to be instituted or defended; (b) it is desired to effect an early distribution of an estate; and (c) the trustee is in doubt as to the extent of her or his powers under the trust instrument.
>
> Types of advice which may be sought include questions in connection with the rights and interests of beneficiaries or creditors, jurisdictional queries, whether further inquiries should be made in certain circumstances, the ascertainment of any class of beneficiaries or creditors, the furnishing of accounts, the settling of minor administration problems, and the approval of dealings with the trust property.
>
> The procedure should not be used to determine substantive issues, such as issues of interpretation of the trust document which involve the question of breach of trust by any of the trustees; for the purpose of securing additional powers for the trustees; and for resolving a contest between the trustees or other parties to a trust. Nor should it be used to determine respective rights of beneficiaries. These are matters in respect of which beneficiaries are entitled to initiate proceedings.

[10] [2013] NSWSC 47 at [31]

Guidance is also given in *Application by Sonya Sarkis*[11]:

> There appears to be no distinction between the provision of judicial advice for either the prosecution or the defence of litigation: *Bovaird v Frost* [2009] NSWSC 917 at [32] and *Frost and Fallon* [2011] NSWSC 591 and *Re Estate of Heywood* [2010] SASC 247; *Loblay v Loblay* [2013] NSWSC 1195; *Stephens v Chee* [2015] QSC 138; and *Coore v Coore* [2013] QSC 196. The law therefore seems to be clear that a trustee should seek judicial advice before either defending or instituting proceedings and the failure to do so may result in the trustee engaging in the proceedings at its own risk as to costs: *Wooster v Morris* [2013] VSC 594 ...
>
> It is open to a trustee to seek judicial advice as to whether to settle proceedings. Judicial advice proceedings should not be used to settle disputes between parties to a trust and the distinction should be maintained between deciding whether it would be proper for a trustee to sue or defend proceedings and deciding the issues tendered in the proceedings that it is proposed to institute or defend: *Macedonian Church* at [111].

These comments follow what Gummow ACJ, Kirby, Hayne and Heydon JJ, in their joint judgment in the Macedonian Trust case [12] said about whether a prudent executor should be seeking advice when faced with litigation:

> 70 A necessary consequence of the provisions of s 63 of the Act is that a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings. In deciding that question a judge must determine whether, on the material then available, it would be proper for the trustee to defend the proceedings. …
>
> 71 In short, provision is made for a trustee to obtain judicial advice about the prosecution or defence of litigation in recognition of both the fact that the office of trustee is ordinarily a gratuitous office and the fact that a trustee is entitled to an indemnity for all costs and expenses properly incurred in performance of the trustee's duties. Obtaining judicial advice resolves doubt about whether it is

[11] [2015] NSWSC 1369 at [53] & [54]

[12] at [70] to [72]

> proper for a trustee to incur the costs and expenses of prosecuting or defending litigation. No less importantly, however, resolving those doubts means that the interests of the trust will be protected; the interests of the trust will not be subordinated to the trustee's fear of personal liability for costs.
>
> 72 It is, therefore, not right to see a trustee's application for judicial advice about whether to sue or defend proceedings as directed only to the personal protection of the trustee. Proceedings for judicial advice have another and no less important purpose of protecting the interests of the trust.

The Judges went on to highlight that giving advice in relation to defending litigation "is radically different from deciding the issues that are to be agitated in the principal proceeding. The two steps are not to be elided. In particular, the judicial advice proceedings are not to be treated as a trial of the issues that are to be agitated in the principal proceedings."[13] This principle applies equally of course to advice about prosecuting and settling litigation.

Preliminary conduct before making the application for advice

Once it is apparent to the executor that a dispute has arisen and an application for judicial advice may be required, it is prudent to obtain an opinion from counsel on the question or questions. In many matters the executor will not want the beneficiaries involved in any application to the Court and will seek the advice on a truly "private" basis as is discussed later in this paper. But where it is appropriate to show the advice to beneficiaries, it will perhaps serve to resolve the dispute without the need for the application to the court or at least to crystalise and narrow the issues in dispute.

In *Re Estate Late Chow Cho-Poon; Application for judicial advice*[14] Lindsay J referred to the importance of the opinion in this context:

> 116 … an expression of opinion by counsel in a formal memorandum of opinion may, if not the subject of legal professional privilege, provide a firm foundation upon which persons interested in the due administration of a trust may decide

[13] Macedonian Trust case at [74]

[14] [2013] NSWSC 844 at [116] to [119]

> whether (and, if so, how) they should seek to participate in proceedings commenced as an application for judicial advice ...
>
> 118 The availability of a formal memorandum of opinion from counsel, prepared in anticipation of a s 63 application, may, at least in some cases, either forestall any need for an application to Court being pressed or establish parameters within which a dispute about the due administration of a trust may be litigated.
>
> 119 In some cases it might result in a consensus. In others, it might crystallise questions in dispute. In yet others, it might fall short of establishing a consensus but, with an intimation that a trustee proposes to act upon it absent any application by an interested party for curial relief, it could provide a foundation for the trustee to "build an estoppel" against interested parties who acquiesce in the trustee's action.

How is the application brought?

I do not propose to deal with quirks of practice and procedure and rules of court in different states as this paper and lecture are about general considerations. In addition to the appropriate initiating process (a summons in NSW) the application will potentially also require a memorandum of opinion, a statement of facts and evidence by affidavit (or perhaps witness statement).

The memorandum of opinion

The court will usually expect the application for judicial advice to be accompanied by a memorandum of opinion. The author must of course be a lawyer with appropriate expertise and although it is usually provided by a barrister, the provider can be a solicitor.

In *Re Estate Late Chow Cho-Poon; Application for judicial advice*[15]Lindsay J noted that:

> Neither s 63 nor rules of court referable to s 63 mandate a requirement that a memorandum of opinion be provided in support of a s 63 application. Nor can

[15] [2013] NSWSC 844 at [109]

> it be said that every application must be accompanied by such a memorandum, whether provided by counsel or by a lawyer practising otherwise than at the Bar. Quite possibly, the Court could not *compel* counsel to express an opinion of this type: Cf, *Application of Forsyth* [1984] 2 NSWLR 327 at 334F-335F and 227A. Nevertheless, in practice importance may attach to such an opinion for a variety of reasons.

However, he also noted the assistance the court can gain from a well drafted opinion and the potential benefit to the executor in the proceedings (at [110] & [113]):

> 110 … in practice the speed and efficiency with which an application for judicial advice can be dealt with derives from a combination of the efforts of *both* the legal profession *and* the Court.
>
> 113 The procedural objectives of speed and efficiency served by judicial advice proceedings cannot, in many cases, be achieved unless the Court is presented with the assistance of a memorandum of opinion by an independently-minded lawyer who, out of court, has studied the problem to be solved, examined the factual context critically, analysed competing contentions in a comprehensive legal context, and worked out a solution that commends itself to his or her professional judgement, a judgement upon which the Court can responsibly be invited to rely.

As is the case in NSW, nothing in the relevant legislation in the other states and territories mandates the need for an opinion, but there is an expectation on the part of the courts because of the assistance it can provide.

The contents of the opinion depend of course on the nature of the problem and the facts which give rise to it. Generally however, all relevant facts should be identified and considered, along with the application of the relevant legal principles and authorities to those facts. A reasoned conclusion as to the course to be followed by the executor must be expressed[16].

[16] *Re Application of NSW Trustee & Guardian* [2014] NSWSC 423 at [30]

The court will have particular expectations of the opinion in an application by the executor as to whether they are justified in prosecuting or defending litigation (often called a “Beddoe application” after *In re Beddoe* [1893] 1 Ch 547). In such an application all the court does is to reach a view as to whether the opinion satisfies it that there are sufficient prospects of success to warrant the executor in proceeding with the litigation. The opinion must address the facts necessary to support the legal conclusions reached and must demonstrate that the propositions of law relied upon for those conclusions are properly arguable. Whether, in light of the opinion, there are "sufficient" prospects of success calls for another judgment, founded upon such considerations as:

- the nature of the case and the issues raised;
- the amounts involved, including likely costs;
- whether the likely costs to be incurred by the executor are proportionate to the issues and the significance of the case;
- the consequences of the litigation to the parties concerned;
- in the case of a charitable trust, any relevant public interest factors.[17]

The statement of facts

The use of a written statement by a trustee was set out in the original Lord St Leonards Act (see above and see [37] Macedonian Trust case). The legislation in the ACT (s 63(3) Trustee Act) refers to the use of a written statement and in Queensland s 96(1) Trusts Act refers to the use of a written statement of facts. In NSW s 63(3) Trustee Act refers to the use of a written statement. In South Australia Rule 80 of the Probate Rules 2015 permits the use of a written statement in matters involving less than $500,000.

[17] *Re application of Macedonian Orthodox Community Church St Petka Inc [No 3]* [2006] NSWSC 1247 at [80] – approved by the High Court in the Macedonian Trust Case at [162]

Hallen J referred to the role of a statement of facts (or written statement) and what must be established by the executor in *Application of Gnitekram Marketing Pty Limited*[18]:

> In order to ensure that, if directions are given, the trustee is properly protected by the order, it must ensure full disclosure of relevant matters, even if the case is to proceed with the participation of beneficiaries as defendants. It is not necessary for the trustee … [to] … "prove" facts according to a certain standard of proof to enable findings of fact to be made as would be the case in adversarial litigation …
>
> … It is not the role of a statement of facts necessarily to set out the arguments relied upon in favour of, or against, any particular advice or direction sought. Ultimately, it is a matter for submission and argument and not the statement of facts to set out the competing arguments as to what advice should be given.

Hallen J's comments about the required level of proof explain the historical reasons for the use of a statement of facts. It makes it easier and less costly for an executor to bring an application than it might otherwise be by a strict application of the rules of evidence.

The statement of facts must make full disclosure and be truthful. At [79] in the Macedonian Trust case it was noted that:

> It is very common in judicial advice applications for the court to be invited to give advice on the basis of facts, whether proved by affidavit as contemplated by s 63(4) or alleged in a "written statement" or "other material" as contemplated by s 63(3), which are contested and controversial. As Palmer J said, a "judicial advice application ... is founded upon facts stated to the Court by the trustee, untested by adversarial procedure, and assumed by the Court to be true" – although "only for the purpose of the application."

At [80] in that decision it was also noted that the safeguard against the facts being put before the court being incomplete or false, was that the trustee would lose the protection otherwise afforded for acting on the advice.

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[18] [2010] NSWSC 1328 at [17]

Evidence

As noted above this paper will not deal with quirks of practice and procedure in the various jurisdictions. What follows therefore are just some general comments in relation to evidentiary considerations.

In *Re Estate Late Chow Cho-Poon; Application for judicial advice* [19] Lindsay J reflected upon the questions of the form that the material before the court should take given that the NSW section permits reliance on a statement of facts and/or evidence by statement or other form. At [188] Lindsay J noted (referring to [60] in the Macedonian Trust case):

> … (a) the fact that a court may rely on a written statement of the trustee, or use other material "instead of evidence" by reason of s 63(3), gives rise to discretionary considerations of substantial weight where the question for advice is in form or substance an application which will determine or affect questions that could also be resolved in ordinary adversarial litigation; and (b) the Court may properly decline judicial advice if, for example, a contested construction suit, constituted by the disputing parties and resolved by a judge acting on evidence, appears to be more apt to the resolution of a question concerning the interpretation of a trust instrument; but (c) the discretion of the Court to consider applications brought under s 63 is not yoked to a general first principle that, where there is a contest or where there are adversaries, it is not appropriate to give advice."

In the ACT s 63(4) Trustee Act says that it is not necessary to adduce evidence by affidavit or otherwise in support of the application. Section 63(3) permits the use of a written statement.

There are no equivalent provisions creating the same discretion as exists in NSW and the ACT, as to the form of the evidence in the legislation in the other jurisdictions (apart from the discussion above in relation to the use of statements of fact). My research

[19] [2013] NSWSC 844

suggests that the use of affidavits in those jurisdictions is the norm, but presumably they all have other sources of general dispensation powers in relation to evidence.

At least in NSW and the ACT, it is suggested that each matter should be assessed to determine what form the evidence should take (if not proceeding by statement of facts or written statement alone) and whether a witness statement (where permitted) is sufficient or the nature of the matter means that some or all of the evidence should be by affidavit. For example, in an application in which the value of property is an issue the court may be more likely to expect sworn evidence as to valuation. Alternatively, a direction could be sought at the first directions hearing as to whether evidence should be by statement or affidavit.

Who should be given notice of or joined to the application?

The position for each jurisdiction is:

a) The legislation does not require the giving of notice of the application to anyone unless the court directs otherwise in NSW (s 63(4) but note that ss (8) does require notice to persons prejudiced if the executor is going to distribute in accordance with the advice given, unless the court directs otherwise), the ACT (s 63(4) Trustee Act with an equivalent in ss(5) to the NSW ss(8)) and SA (s 69(2) Administration & Probate Act);

b) The requirement is for service on all persons interested or such of them as the court thinks expedient in WA (s 92(2) Trustees Act) and Queensland (s 96(2) Trusts Act);

c) Any executor or administrator not a party to the making of the application is to be joined as a respondent as are any persons whose rights or interests are sought to be or may be affected, in Tasmania (reg 605 Supreme Court Rules); and

d) The legislation does not require the giving of notice of the application to anyone unless the court directs otherwise and any executor or administrator not a party to the making of the application, is to be joined as a respondent in the Northern

> Territory (Order 54.03 Supreme Court Rules) and Victoria (Order 54.03 Supreme Court (General Civil Procedure) Rules).

Anyone served who then participates in the application does not become a party. the proceedings remain a “private” application by the executor.

Of course, the executor will want to give notice to beneficiaries in circumstance where they want them bound by the outcome (as to which see later in this paper). However, in some matters such as applications for approval in relation to litigation the executor is likely to not want any beneficiaries on the other side in the litigation to be involved.

Hallen J discussed how issues of privilege might be dealt with in *Application of Gnitekram Marketing Pty Limited* [20]:

> If a beneficiary of the trust is a party to the litigation about which directions are sought, with an interest opposed to that of the trustees, that beneficiary should be a defendant to the trustees' application, but any material which would be privileged as regards that beneficiary in the litigation should be put in evidence as an exhibit to the trustee’s witness statement, and should not be served on the beneficiary. However, if the trustee’s legal representatives consider that no harm would be done by the disclosure of all, or some part, of the material, then that material should be served on that defendant. That defendant may also be excluded from part of the hearing, including that which is devoted to discussion of the material withheld.

In NSW, despite the above comments, it is suggested that it is appropriate for the originating process to seek directions as to joinder and giving notice of the proceedings so that this can be dealt with at the first directions hearing.

[20] [2010] NSWSC 1328 at [17]

Jurisdictional questions and refusal to give advice

There is only one jurisdictional bar to the Court granting Trustee Act 1925 (NSW), s 63 relief, namely the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument and there is nothing in s 63 which limits its application to non-adversarial proceedings[21]. The same jurisdictional bar exists in the legislation in the ACT, WA, Queensland, SA and probably Victoria[22], Tasmania and the Northern Territory.

The court is not bound to give advice.[23] The court will not give advice about a matter that is substantially commercial.

Particular care may need to be exercised in dealing with questions relating to the construction of trust instruments (the will in an estate matter). The fact that a question of construction may involve controversy, referable to underlying facts or law, can be a ground for the refusal of relief under section 63. But the terms of s 63(1) expressly contemplate that judicial advice can be sought, and given, in relation to the interpretation of a trust instrument[24].

A different test may apply to executors being sued in proceedings that criticise their conduct. In those circumstance the Court may refuse to give judicial advice because the legal proceedings are not solely concerned with the management or administration of the estate or the interpretation of the trust instrument but with the conduct of the executor.[25]

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[21] Macedonian Church case [56] to [58]

[22] see *Re Fast (as Executors of Will and trustees of estate of Rockman dec'd*) [2015] VSC 780 at [11]

[23] see *Re Application of Perpetual Trustee Company Limited* [2003] NSWSC 1185 per Young CJ in Eq, at [8] and *Application of Perpetual Trustee Company Ltd* [2003] NSWSC 1185 at [8] – [9]

[24] *Re Estate Late Chow Cho-Poon; Application for judicial advice* [2013] NSWSC 844 at [44]

[25] *Re Australian Pipeline Ltd* [2006] [2006] NSWSC 1316; (2006) 60 ACSR 625 at [23] and *Application by Sonya Sarkis* [2015] NSWSC 1369 at [55]

Nature and effect of the advice given

The court does not make a "decision" as such – rather the court's usual form of order is "that the executor would be justified in ….. ".

In all the statutory jurisdictions, provided the executor acts in accordance with the advice or directions and that the relevant facts are substantially as submitted on the application, she or he shall be deemed to have discharged her or his duty as executor in the subject matter of the application (Trustee Act 1925 (ACT), s 63(2); Trustee Act 1925 (NSW), s 63(2); Trusts Act 1973 (Qld), s 97; Trustee Act 1936 (SA), s 91; Administration and Probate Act 1919 (SA), s 69; Trustees Act 1962 (WA), s 95). As to the jurisdictions where the power derives from the Supreme Court Acts (Victoria, Tasmania and the Northern Territory), there is no express provision, but it is suggested that the consequences in terms of protection available are effectively the same.

Parties represented on the application will be bound by the judicial advice and directions given. The advice proffered on an ex parte application is personal to the executor and cannot bind persons claiming against the estate.[26]

Costs and the executor's right to an indemnity out of the estate

It is suggested that very broad propositions as to how the executor can expect costs questions to be dealt with are as follows:

1. The Court will usually order that the executor's costs be paid out of the estate if the court is prepared to entertain the application, thinks it was reasonable to seek the advice and gives advice one way or the other.
2. An executor who fails to obtain the advice of the court may be required to pay the costs of the proceedings on the grounds that they were "not properly incurred".[27]
3. If the court declines to give any advice the court may still be prepared to order that the executor's costs be paid out of the estate if, for example, the court was of the view that it was not clear cut as to whether such an outcome would occur

[26] *The Laws of Australia* Thomson Reuters, online version at [15.14.860]

[27] *Ford and Lee: The Law of Trusts* online version, [17.280]

and the judge thought that the executor had still acted reasonably in bringing the application.

The question of costs is a little more complex where it is a Beddoe type application seeking advice on prosecuting, defending or settling litigation. There is in these applications two questions as to costs – whether the executor should have their costs of the advice application paid out of the estate and whether the executor should be entitled to have their costs in the proceedings paid out of the estate. It is suggested that the former would be dealt with having regard to the general propositions set out above but as to the latter the court will look closely at the nature of the substantive proceedings to consider whether they are concerned with allegations of breach of duty or negligence or suchlike on the part of the executor. Some judges have advanced as a general proposition, that the court should not order these costs to be paid from the estate and that the question should await the conclusion of the substantive proceedings.[28] Other judges have seen an immediate order as appropriate[29]. A detailed discussion of the consideration of such matters is set out in the Macedonian Trust case at [69], [84] – [88] and [103].

What if judicial advice is not given?

In this circumstance the executor might consider:

1. An appeal, but to succeed on appeal they would have to overcome the barriers presented against an appeal from an exercise of judicial discretion as set out in *House v The King*[30] (see [190] in the Macedonian Trust case where the Judges urged appellate courts to be very cautious in interfering with the decisions of first instance judges on advice applications, because of the importance of the availability of the procedure and for it to remain a low cost source of assistance on how to proceed).

[28] *Re Australian Pipeline* [2006] NSWSC 1316 at [26] and *Application of Gnitekram Marketing P/L* [2010] NSWSC 1328 at [17] and [30]

[29] eg. *PILT Nominees P/L v Baltama P/L* [2009] NSWSC 656

[30] (1936) 55 CLR 499 at 505

2. If the executor proceeds with the intended course of conduct and is then at risk of being found to have been in breach, an application can be made for relief excusing the executor from liability, provided the executor acted honestly and reasonably (section 85 Trustee Act (NSW) and the equivalent sections in the trustee acts of the other states and territories being (ACT) s 85; (NT) s 49A; (Qld) s 76; (SA) s 56; (Tas) s 50; (Vic) s 67; (WA) s 75)

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