ACCOUNTS IN EQUITY

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The term "account" embraces the liability of a party to disgorge money or property that could not be claimed through a common law claim for damages or a right to equitable compensation. For example, a partner must account to the partnership for secret profits earned in connection with the partnership activity. Through an order for an accounting, a plaintiff can obtain a remedy that will often be more valuable than any compensation for loss or damages which might be legally available. An order for an account of profits (when available) allows the wronged plaintiff to elect to adopt the defaulting party's wrongful conduct and take the benefit of it.

There is an obvious cross-over between an account in equity and an account of profits. An account of profits is best understood as one flavour of account. An "account of profits" is really a two-stage process: that of an enquiry into the quantum of profits and the ordering of payment to the plaintiff.[1] Thus, where a plaintiff is entitled to profits, it is still necessary to undertake the process of taking an account in order to determine the amount owing.

[1] *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 at [84] per Campbell J.

The remedy of an account of profits arising from a breach of an equitable[2] or statutory right (which I have called an "account of profits") should be distinguished from circumstances in which accounts are commonly ordered in connection with common law rights (which I have called "procedural accounts").[3] An example of procedural accounts is the taking of accounts on the dissolution of the partnership; there are no "profits" to be determined, just the amount to which each partner is entitled. However, an account may be a blend of both types of account, such as where a partner has been earning secret profits and an overall account of the partnership is needed.

The availability of the remedy

There are three broad categories of power to order an account:

1. If the plaintiff makes out a claim in equity, then the entire armoury of equitable remedies is available, and the plaintiff may have an account if it is necessary to give effect to the equitable right. Thus, while the remedy is discretionary,[4] the availability of account in aid of an equitable right is not confined to discrete categories, and will be readily available in the case of default by a person holding na interest in property on behalf of another.
2. There are various examples of a statutory right to an account of profits in intellectual property legislation, drawing upon equitable principles.[5]
3. Theoretically at least, the courts of common law have the power to order that an account be taken to determine the amount owing at common law,[6] although the remedy at common law has long since fallen into disuse. A court of equity will order the taking of an account in aid of a common law right in

[2] An exception is the tort of passing off, in which an account of profits is regularly allowed. In this paper, that tort is discussed in the same context as an account for a breach of an equitable right.
[3] In *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6, Austin J drew a distinction between accounts of administration, being for the establishment of the overall administration of an enterprise or fund, and an account of profits, being a remedy for specific equitable wrongdoing.
[4] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559-560; [1995] HCA 18, although the court noted that the remedy is granted or withheld in accordance with settled equitable principles.
[5] Section 115(2) of the *Copyright Act 1968* (Cth); s 75(1)(b) of the *Designs Act 2003* (Cth); s 122(1) of the *Patents Act 1990* (Cth); s 126 of the *Trade Marks Act 1995* (Cth); s 56(3) of the *Plant Breeders' Rights Act 1994* (Cth); s 27(2) of the *Circuit Layouts Act 1989* (Cth).
[6] Although an account of the profits earned by the defendant is generally seen as an equitable remedy: *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34.

certain discrete circumstances, such as on the dissolution of a partnership[7] or in an agency relationship.[8]

Account in aid of an equitable right

As already noted, an account is available where a plaintiff establishes a right to relief under an established equitable doctrine, and the remedy is necessary or appropriate to give effect to that right. Most commonly, the remedy will encompass an order for the payment of money closely akin to restitution, such as a trustee who uses trust funds for their own purposes. Equity will fashion the form of the account to suit the particular circumstances of the case,[9] paying particular regard to the nature of the right which has been infringed.[10]

A fiduciary will be required to account for profits earned in breach of a fiduciary duty even where the fiduciary has acted honestly and reasonably.[11] As account is not concerned with the damage caused to the plaintiff, it will generally be irrelevant that the plaintiff could not have earned the profit.[12] Thus, where a company lacked the funds[13] or the skill[14] to take up an opportunity, the director who benefited personally is still liable to account.

Account in aid of a statutory right

Intellectual property statutes emerged from, and continued to be informed by, equitable principles. However they give rise to a number of special considerations.

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[7] *Mulherin v Quinn Villages* [2007] QSC 231 at [20] per Muir J, although it should be noted that in many cases an account in a partnership dispute will emerge from a breach of fiduciary duty from one of the partners. This means that in a partnership dispute, an account may be ordered as a procedural mechanism to determine what is truly owed by and to each of the partners, and a defaulting partner may have to account for profits wrongfully made.

[8] *Warman International Ltd v Dwyer* (1995) 182 CLR 544; [1995] HCA 18.

[9] *Warman International Ltd v Dwyer* (1995) 182 CLR 544; [1995] HCA 18.

[10] *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25.

[11] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 577; [1995] HCA 18.

[12] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558; [1995] HCA 18, although Deane J warned in *Chan v Zacharia* (1984) 154 CLR 178 at 205; [1983-84] ANZ ConvR 691 against the over-enthusiastic and unnecessary statement of broad general principles of equity in terms of inflexibility so as to convert doctrines of equity into an instrument of hardship and injustice in individual circumstances.

[13] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, where a director took up a subscription offer when his company did not have the necessary funds.

[14] *Boardman v Phipps* [1967] 2 AC 46, where a solicitor was held accountable for the profit that he made even though he acted bona fide, in the interests of the trust, and that the opportunity would not have been availed but for his skill and knowledge.

One factor that may affect the plaintiff's election is the notion that damages will often be assessed by reference to a notional licence fee for the rights infringed,[15] whereas an account may put the plaintiff in a better position than they could have been in when selling the item themselves.[16]

The holder of intellectual property rights must demonstrate that the defendant knew of those rights when the profit was acquired in order to get an account of profits.[17] The mere fact of registration of an intellectual property right does not fix the defendant with constructive knowledge.[18] However some statutory rights include a modification of the general rule as to the availability of an account.[19] It should be noted that the legislation confers a discretion to refuse the remedy, and traditional equitable considerations will still play a role in granting or withholding an account of profits.[20] A lengthy absence of complaint may lead to a limited period of account,[21] or even preclude an account of profits remedy on the basis of laches or acquiescence.[22]

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[15] *CAJ Armadio Constructions v Kitchen* (1991) 23 IPR 284 per Debelle J; *Autodesk Australia Pty Ltd v Cheung* (1990) 94 ALR 472 (although in that matter, Wilcox J did not take the usual "licence fee" approach).

[16] *Colburn v Simms* (1843) 2 Hare 543 at 560; 67 ER 224.

[17] *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34 per Windeyer J; *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1987) 79 ALR 299 at 320, with the exception of copyright: s 115(3) of the *Copyright Act 1968* (Cth).

[18] *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25; *Slazenger & Sons v Spalding & Brothers* [1910] 1 Ch 257 at 261 per Neville J, but see *Edward Young & Co v Holt* (1948) 65 RPC 25 where the defendant could easily have checked industry product lists and was put on inquiry by a customer query.

[19] Although s 126 of the *Trade Marks Act 1995* (Cth) does not prescribe how the discretion is to be exercised, it is said to be in line with the remedy available in equity: *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 31-34 (a decision on s 65 of the *Trade Marks Act 1955* (Cth)), s 123 of the *Patents Act 1990* (Cth); s 57 of the *Plant Breeder's Rights Act 1994* (Cth); s 115(3) of the *Copyright Act 1968* (Cth); s 75(2) of the *Designs Act 2003* (Cth); s 27(3) of the *Circuit Layouts Act 1989* (Cth).

[20] Except, perhaps, in copyright where the use of the word "entitled" in s 115(3) of the *Copyright Act 1968* (Cth) arguably leads to the absurd result that the discretion to refuse the remedy is ousted. See, however, Ricketson S and Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, Pyrmont, looseleaf service) at [2.105].

[21] *Lever Brothers, Port Sunlight Ltd v Sunniwite Products Ltd* (1949) 66 RPC 84 at 102 (although the point was conceded), *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 (account limited to the period that the defendant knew of the plaintiff's rights, with the onus of demonstrating knowledge on the plaintiff), *International Scientific Communications Inc v Pattison* [1979] FSR 429 at 439 per Goulding J, compare *Edward Young & Co Ltd v Holt* (1948) 65 RPC 25.

[22] *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* (1985) 84 FLR 101 at 129; *Electrolux Ltd v Electrix Ltd* (1953) 70 RPC 158, *Orr v Ford* (1989) 167 CLR 316 (as to general principles for laches). The question of whether the defence is available where a statutory right to an account of profits exists under intellectual property legislation was surprisingly left open by Lockhart J in *Masterton Homes Pty Ltd & Masterton Homes (NSW) Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417 at 425.

The measure in cases involving statutory rights, such as copyright or trade mark,[23] is the profit attributable to the use of the plaintiff's intellectual property.[24] However, the defendant may have to account for the entire profits connected with an infringing component where that component is an essential item of the product.[25] Where the infringing item is only a component of the product sold the defendant may not have to account for the entire profit. Before the election for an account is taken, it will be useful to determine whether the infringing component is so critical to the product sold that the entire profit should be accounted for, or merely the part referable to the infringing component.[26] In this context it falls to the party accounting to show the cause of each part of the profit.[27] Different considerations apply where there is a complex ongoing business of which infringing items form only a part.[28]

Account in aid of a common law right

The remedy of account is available in a discrete number of classes of equity's auxiliary jurisdiction in aid of a legal right. Broadly speaking, an account will be available where there is a relationship of confidence, such as agent,[29] dissolved partnerships,[30] mortgagor/mortgagee,[31] or where a party would otherwise be denied an effective remedy.[32] However, it is not available in Australia for breach of contract,[33] although the House of Lords suggested otherwise.[34]

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[23] For example, in *Dubiner v Cheerio Toys & Games Ltd* (1966) 55 DLR (2d) 420, the apportionment of profits attributable to the trade mark was twenty percent.

[24] *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 38; *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101; [1993] HCA 54. In *Leplastrier and Co Ltd v Armstrong Holland Ltd* (1926) 26 SR (NSW) 585 at 590, the plaintiff was not entitled to the profits attributable to the attachments to the infringing invention.

[25] *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101; [1993] HCA 54.

[26] *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101; [1993] HCA 54.

[27] *Dart Industries Inc v Décor Corp Pty Ltd* (1993) 179 CLR 101 at 118, 134; [1993] HCA 54; *Robert J Zupanovich Pty Ltd v B & N Beale Nominees* (1995) 59 FCR 49 at 68 per Carr J.

[28] *Hagan v Waterhouse* (1992) 34 NSWLR 308 at 356-357 per Kearney J.

[29] *Asset Risk Management v Hyndes* [1999] NSWCA 201; *De Bussche v Alt* (1878) 8 Ch D 286.

[30] *Kraft v Kupferwasser* (1991) 23 NSWLR 236.

[31] *Adams v Bank of New South Wales* [1984] 1 NSWLR 285, although note that this is somewhat of a hybrid category because a mortgagee's duties are duties in equity: *Medforth v Blake* [2000] Ch 86; *Yorkshire Bank plc v Hall* [1999] All ER 879; *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646; [2004] NSWSC 114.

[32] It is sometimes said that an account will be available where not ordering an account would be abortive to the plaintiff's rights because the defendant wrongfully prevented the plaintiff's rights from being accrued (*London Chatham & Dover Railway Co v South Eastern Railway Co* [1892] 1 Ch 120 at 140, (affirmed [1893] AC 429)) or where accounts are too complicated to be taken at law (*Fluker v Taylor* (1855) 3 Drew 183; 61 ER 873). See also *Davis v Hueber* (1923) 31 CLR 583 at 595-596 per Higgins J for the historical basis upon which equity would "interfere" and order an account.

[33] *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at 196; [2001] FCA 1040 per Hill and Finkelstein JJ (obiter) with whom Emmett J agreed, *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 at [83].

[34] *Attorney-General v Blake* [2001] 1 AC 268.

Leaving aside accounts for profit, which are not usually granted as a remedy in aid of common law rights,[35] the remedy of account describes a process by which the amount payable by one person to another is ascertained. Where a plaintiff knows that she is owed an amount of money,[36] but is not in a position to be able to determine the amount of money[37] (such as an agent who has received and disbursed money on the principal's behalf), the account is useful in forcing the agent to explain the state of affairs rather than the defendant having to determine it through discovery.[38] Such an account is sometimes referred to as an account in common form so as to distinguish it from an account on a wilful default basis.

It is convenient to draw out a number of particular types of account:

a) *Partnership accounts:* Like other fiduciaries, partners must keep full and true accounts of the partnership, disclose opportunities[39] and account for private profits.[40] A partner will generally be entitled to an account on the dissolution of the partnership, or where a breach of fiduciary duty has occurred.[41] In the case of a partnership that trades on after a partner dies or leaves, this involves working out what has been earned from the assets of the partnership and making just allowances for the exertions of the continuing partners.[42]

b) *Deceased estates:* As with any trustee, a trustee of a deceased estate[43] will be liable in equity to account for the receipts and disbursements in connection with trust property.[44] An executor or other personal representative also has a

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[35] However, remedies in the nature of restitution are available for some torts, see Hastie P, "Restitution and Remedy in Intellectual Property Law" (1996) 14 (1) *Australian Bar Review* 6 at 20-26.
[36] Generally speaking something that the plaintiff must establish to be entitled to an account, but see *Mulherin v Quinn Villages* [2007] QSC 231 at [17]-[21] per Muir J.
[37] *Doss v Doss* (1843) 3 Moo Ind App 175 at 196-197; 18 ER 464 at 471-472.
[38] An obvious exception to this somewhat artificial distinction is the obligation on a trustee to account. In the absence of a breach of fiduciary duty, the account that will be taken will follow the same procedure as procedural accounts in aid of common law rights
[39] *Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384.
[40] Section 29(1) of the *Partnership Act 1892* (NSW).
[41] *Longstaff v Keogh* (1877) 3 VLR (E) 175.
[42] *Fry v Oddy* [1999] 1 VR 557 at 570; [1998] VSCA 26.
[43] However, where the executor or administrator completes that role and becomes a trustee, there is still an ongoing obligation to account.
[44] While a trustee is not bound to file accounts in a specific period (*Will of Harkness* (1926) 43 WN (NSW) 63) trustees of deceased estates are subject to rules and procedures that don't apply to other trustees, for example, s 85(1A) of the *Wills, Probate and Administration Act 1898* (NSW); *Supreme Court Rules 1970* (NSW), Pt 78 Div 11. Note also s 102 of the *Trustee Act 1925* (NSW), which is the position in equity in any event.

duty to keep books of account which record the administration of the estate.[45] While accounts are no longer required to be filed in the vast majority of estate matters, where there is an order for accounts to be filed, there is a process by which they can be reviewed by the court (passing accounts). Careful attention must be given to the rules[46] and legislation[47] which impose specific obligations, including as to form, content and procedure.[48]

c) *Mortgagor and mortgagee:* It has been said that if a mortgagor insists on an account, a court will not order foreclosure[49] without the account being taken.[50] A subsequent mortgagee,[51] guarantor[52] or any other person with an interest in the equity of redemption[53] also has the right to call for an account subject to the requirement that they offer to redeem the mortgage or seek an order for redemption.[54] The relationship of banker and customer, in the absence of a mortgage, is not considered a confidential relationship for which an account could be ordered.[55] A mortgagee in possession is liable to account for the rents and profits received from the property,[56] but not where the mortgagor

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[45] *Estate of Orre* (unreported, Supreme Court of New South Wales, Powell J, 19 December 1991); *Estate of Instone* (unreported, Supreme Court of New South Wales, Powell J, 23 August 1993); *Re Craig* (1952) 52 SR (NSW) 265; *Wills Probate and Administration Act 1898* (NSW), s 85(1AA).
[46] *Supreme Court Rules 1970* (NSW), Pt 78 r 71-87, which prevail over the UCPR.
[47] *Wills, Probate and Administration Act 1898* (NSW), especially ss 85-87. For more information see Geddes R, Rowland C and Studdert P, *Wills, Probate and Administration in New South Wales* (1996, LBC Information Services) at [85.25]-[85.27].
[48] Sections 85 and 87, *Wills, Probate and Administration Act 1898* (NSW); Form 96, 115 and 116A of the Supreme Court Forms are relevant examples. See also *In the Will of White* (1908) 8 SR (NSW) 582 at 585-586.
[49] Foreclosure as a mortgagee remedy has largely fallen into disuse, but the mortgagor's cause of action for an account continues to be important in cases where the mortgagor, subsequent mortgagees or sureties seek to make a claim for loss arising from the conduct of the mortgagee.
[50] *Talyor v Mostyn* (1883) 25 Ch D 48.
[51] *Adams v Bank of New South Wales* [1984] 1 NSWLR 285; *General Credits Ltd v Wenham* (1989) 18 NSWLR 570; *Tomlin v Luce* (1889) 41 Ch D 573.
[52] *Mead v Lord Orrery* (1745) 3 Atk 235 but see *GE Capital Australia v Davis* (2002) 180 FLR 250; [2002] NSWSC 1146 as to the impact of s 420A of the *Corporations Act 2001* (Cth).
[53] *National Westminster Finance New Zealand Ltd v United Finance & Securities* [1988] 1 NZLR 226 at 234; *Tomlin v Luce* (1889) 41 Ch D 573 at 575-576, on appeal (1889) 43 Ch D 191 at 194; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 at 966 (a decision that has not found favour in this country on the nature of duties to the mortgagor); *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 at 544; *Parker-Tweedale v Dunbar Bank (No 1)* [1991] Ch 12.
[54] *General Credits Ltd v Wenham* (1989) 18 NSWLR 570 at 572; *Tannock v North Queensland Securities Ltd* [1932] St R Qd 285 at 291 per Macrossan SPJ (appeal dismissed). A mortgagor may have to pay the balance of the debt into court before obtaining an account: *Scandinavian Pacific Ltd v Burke* (1991) 5 BPR 11,846. Note that an account can be pleaded defensively to the largely disused remedy of foreclosure.
[55] *Foley v Hill* (1848) 2 HLC 28; 9 ER 1002 (possible exception for long or complicated accounts).
[56] See *Parkinson v Hanbury* (1867) LR2HL 1 at 8-9.

remains in possession.[57] However, in some cases an account may be available after the relationship of mortgagor and mortgagee comes to an end.[58]

Practical and procedural issues

To appreciate the procedural aspects of an account, is necessary to keep in mind that an account in equity is both a remedy and a process. The purpose of an account, fundamentally, is to determine the amount that must be paid by the defendant to the plaintiff. Through this process, a party who is under an obligation to explain his treatment of property in which someone else has an interest will usually be ordered to file accounts. Such an order will often be accompanied by a direction enabling the interested party to test the accuracy of the account through cross-examination and legal argument as to the proper inclusion of items in the account.[59] This is the process by which the account is "taken" by the court, which may involve referring the matter to an associate justice or registrar for determination of the amount owing. In this context, a reference to an account, taking accounts or liability to account usually refers to the process by which the amount owing by one party to another is determined.

An account of profits is an alternative remedy to damages. The plaintiff will be required to elect between the two remedies.[60] However, the plaintiff is entitled to be fully informed, including the use of the court's procedures for discovery, before making an election.[61] In the usual circumstances where a right to an account of profits and a right to common law damages arise independently from the same facts, the court will adjust the taking of accounts to ensure that there is no double counting.[62]

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[57] *Higgins v York Buildings Co* (1740) 2 Atk 107; 26 ER 467, *Drummond v Duke of Saint Albans* (1800) 5 Ves 433; 31 ER 667; *Ex Parte Wilson* (1813) 2 Ves & Bea 252; 35 ER 315; *Ex Parte Calwell* (1828) 1 Mol 259.

[58] *Hartl v Cowen* [1993] 2 Qd R 633 at 638, but after the exercise of the power of sale, the action is one for equitable compensation or equitable damages: *Ultimate Property Group Pty Ltd v Lord* (2004) 60 NSWLR 646 at 652; [2004] NSWSC 114; *Commonwealth Bank of Australia v Hadfield* (2001) 53 NSWLR 614; [2001] NSWCA 440.

[59] Known as surcharge and falsify, or charge and error.

[60] *Warman International Ltd v Dwyer* (1995) 182 CLR 544; [1995] HCA 18; *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521.

[61] *LED Builders Pty Ltd v Eagle Homes Pty Ltd (No 3)* (1996) 70 FCR 436 at 450, compare *Dr Martens Australia Pty Ltd v Bata Shoe Co of Australia Ltd* (1997) 75 FCR 230.

[62] *House of Spring Gardens Ltd, Armourshield Ltd & Sacks v Point Blank Ltd* [1984] IR (Irish) 611; [1985] FSR 327.

It has been said that an account of profits is usually ancillary to the granting of an injunction[63] or, that the right to an account was dependent on the right to an injunction.[64] However, there are examples of an account being ordered where injunctive relief is not sought, even in an intellectual property context.[65] The link between injunction and account would appear to remain an unhappy appendage on the law of this country[66] and it is prudent to seek a permanent injunction in the claim for relief where an account is claimed. Clearly if an injunction is refused on discretionary grounds such as delay or lack of clean hands, then it is likely that an account of profits will also be refused.[67]

Where a person holds property on behalf of another, such as a trustee or mortgagor, the Court may order that the account be taken on a wilful default basis.[68] Where a wilful default basis is ordered, the accounting party must account for what he would have received by way of income or profits if it had not been for the default,[69] and must bring to account every instance of misconduct, whether specifically raised in the proceedings or not.[70] An account on a wilful default basis is grounded on misconduct, but is not confined to cases of conscious wrongdoing.[71] The party seeking the account on a wilful default basis must demonstrate at least one instance of wilful default.[72]

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[63] *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6 at [43] (overturned on appeal (2002) NSWLR 146; [2002] NSWCA 22).

[64] *Smith v London & South-Eastern Railway Co* (1854) Kay 408; 69 ER 173; *Price's Patent Candle Co Ltd v Bauwen's Patent Candle Co* (1858) 4 K & J 727; 70 ER 302. However, all that was needed to get an account was a case where some sort of injunction could have been available if pressed: *Parrott v Palmer* (1834) 3 My & K 632 at 642; 40 ER 241.

[65] In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 31, Windeyer J ordered an account of profits where an injunction was not available at that stage of proceedings, but would have been available at the commencement of the proceedings. His Honour was of the view that s 65 of the *Trade Marks Act 1955* (Cth) (in almost identical terms to s 126 of the *Trade Marks Act 1995* (Cth)) was to be construed such that an account of profits was ordinarily ancillary to an injunction.

[66] *Deplin v Nargol Holdings* (2002) Aust Contract R 90-147; [2002] NSWSC 422 at [69] per Windeyer J.

[67] Parkinson P, *The Principles of Equity* (2nd Ed, LBC Information Services, 2003), p 953.

[68] *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6 at [41] per Austin J, citing *Re Tebbs* [1976] 1 All ER 858 at 863. Austin J's conclusion that the failure to keep accounts by a trustee was sufficient to order an accounting on a wilful default basis was overturned: *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22.

[69] *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6 at [39], overturned on appeal, but without affecting that analysis: *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22.

[70] *Bartlet v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 546 (although Brightman LJ emphasised the difference in the scope of the account in cases of wrongful omission and active breach of trust), *Gava v Grljusich* [1999] WASC 13 at [22].

[71] *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 546.

[72] *Sleight v Lawson* (1857) 3 K & J 292; 69 ER 1119; *Meehan v Australia Men's Health* (2002) 54 NSWLR 146; [2002] NSWCA 22; *Russell v Russell* (1891) 17 VLR 729.

While it is theoretically possible for the court to undertake the task of compiling the account from the evidence, the rules and practice of the court provide that in most cases, the accounting party will be ordered to file and verify his account and the court will simply adjudicate on falsification and surcharge.[73] Books of account, maintained in respect of the fund or entity, which will be separate to the formal account that the accounting party files, often become part of the evidence. Whether such books and records are to form part of the evidence can be dealt with in the order for the taking of the account.[74]

In cases where a party has an obligation to provide accounts, such as an executor or trustee, the liability to account may be able to be disposed of simply by the court directing that the party prepare accounts and provide them to the beneficiary.[75] An accounting party must file their account, verified by affidavit unless the court otherwise orders.[76] In the absence of some reason to criticise the honesty of the party accounting, this may be sufficient to satisfy the plaintiff. However, in most cases where the plaintiff goes to the extent of bringing proceedings in order to enforce their rights to an account, the plaintiff will want to test the position.[77] The most obvious aspect of the court's procedures that can be called in aid of this process is cross-examination of the accounting party on the basis of their verified accounts.[78]

Another device through which the party seeking the account can challenge the accounts put forward is to surcharge and falsify.[79] A surcharge, called a charge in the Rules, shows an omission for which credit ought to have been given, while a falsification (or error), shows a charge that has been wrongly inserted.[80] The Court Rules require that notice be given of any challenge to the accounts with particulars of

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[73] UCPR r 46.6.

[74] Rule 46.6(b), although financial records would generally be admissible in any event under s 69 of the *Evidence Act 1995* (NSW).

[75] Any person interested in the trust or other fund may enforce an existing obligation on a fiduciary to account: s 102 of the *Trustee Act 1925* (NSW).

[76] *Uniform Civil Procedure Rules 2005* (NSW), r 46.6 (UCPR) and *Federal Court Rules* (Cth), O 39 r 5.

[77] In *Ogden v Battams* (1855) I Jur NS 791, a book of accounts maintained by a trustee were simply admitted into evidence, with liberty to surcharge and falsify.

[78] Or, more accurately, on the affidavit verifying the accounts. As to the right to have an accounting party cross examined, see *Arons v McInerney* (No2) (1899) 25 VLR 148. Historically, cross-examination could even take place before vouching: *Meacham v Cooper* (1873) 16 LR Eq 102. However, in current practice, this would only be allowed in exceptional circumstances.

[79] See UCPR r 46.7, and note the different nomenclature.

[80] *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6 at [38] (overturned on appeal without criticism of his Honour's summary of the law: *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22).

the surcharge and the grounds for the falsification.[81] Falsification includes amounts that were either not paid by the accounting party or were paid improperly.[82]

The taking of accounts in the procedural sense involves a separate hearing, which is usually heard by an associate judge or registrar. First, it is necessary to obtain an order that the account be taken, and that the issue be referred to the associate judge or registrar. It is important to remember that the account does not amount to a judgment for any sum of money. In the main proceedings, it is necessary to seek an order that the accounting party pay the amount that is found to be owing.[83] The court has the power to order that the account be taken at any stage of the proceedings. However, there may be questions that need to be determined before the account is undertaken, such as whether a basis for the ordering of accounts exists (for example, was a partnership formed) and the basis on which the account is to be taken (for example, wilful default or other procedural questions as to how the account is to be conducted).

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[81] UCPR r 46.7.

[82] *Glazier Holdings v Australian Men's Health (No 2)* [2001] NSWSC 6 at [38].

[83] Referred to as the "amount certified": UCPR r 46.2(1)(b); *Federal Court Rules* (Cth), O 39 r 1(b). This order can be made before or after the account is taken, but it is usually more appropriate that it be done after: *Meehan v Glazier Holdings Pty Ltd* (2002) 54 NSWLR 146; [2002] NSWCA 22 at [31]-[32].