Neutral Citation Number: [2023] EWHC 1082 (Ch)

Case No: PT-2021-000402

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 10 May 2023

Before:

DEPUTY MASTER FRANCIS

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Between:

(1) JEMMA ALIZADE
(2) MICHAEL ALIZADE
(3) GEORGE SAADE **Claimants**

- and –

MARTIN KUDLICK **Defendant**

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Owen Curry (instructed by **Preiskel & Co LLP**) for the **Claimants**
Laurie Scher (instructed by **Solomon Taylor & Shaw LLP**) for the **Defendant**

Hearing date: 18 January 2023

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APPROVED JUDGMENT

This judgment will be handed down to the parties in person at 10.30am on 10 May 2023 and by release thereafter to the National Archives

Deputy Master Francis

Introduction

1. This is a claim brought under section 25 of the Administration of Estates Act 1925, and under the court's inherent supervisory jurisdiction over trustees, for orders requiring the defendant, Martin Kudlick:-

   a) to render an account of the administration of the estates of Harold Miller and Ethel Miller to the court; and

   b) to provide proper particulars and accounts of the assets, and his dealings with those assets, of two trusts created under the last wills of Harold Miller and Ethel Miller, and of a trust settled by Harold Miller during his lifetime known as the Marian Miller Settlement.

2. The claim is brought by Jemma Alizade, who is a beneficiary under the three trusts, and, since 1998, a trustee of the Marian Miller Settlement and, since at latest 2015, also a trustee of the two will trusts; it is also brought by Michael Alizade and George Saade, family or associates of Jemma's husband, who with Jemma are the present trustees of all three trusts following their appointments on 31 January 2020 and 21 February 2021 respectively.

3. The defendant, Martin Kudlick, was a chartered accountant and senior partner in the firm of HW Fisher & Co until his retirement from practice in April 1994; he is now 89 years old. He was one of two executors of the estate of Harold Miller, who died on 29 December 1984, and of the estate of Ethel Miller, Harold's wife, who died on 26 December 1987. He was also one of the trustees of two will trusts created under their respective wills, and, from its inception in 1973, of the Marian Miller Settlement, in each case until his retirement on 31 January 2020.

4. I have been ably assisted in the determination of this dispute by counsel on both sides, Mr Owen Curry for the claimants, and Mr Laurie Scher for the defendant.

Background

5. Harold Miller was a solicitor and property investor / developer. He and Ethel lived in Hampstead in North London. They had two daughters, Pauline, born in 1942, and Marian, born in 1946.

6. Pauline had two daughters of her own, Jemma, the first claimant, born in 1974, and Susannah, born in 1977. Following her divorce in 1989, Pauline emigrated with her daughters to New Zealand, and was living in Auckland at the time of her death in 2019. Jemma and Susannah both live in Auckland with families of their own.

7. Harold and Ethel's younger daughter, Marian, has suffered from chronic paranoid schizophrenia since she was 18 years old. She has no children of her own, but lives in London in a home purchased for her with monies from the Marian Miller Settlement, and receives care which is organised for her by Jemma.

8. The Marian Miller Settlement was a protective trust settled by Harold by deed dated 19 January 1973 for the purposes of providing for Marian's needs during her lifetime. The assets of the trust are held for Marian for her life, and, in the events which have happened, on her death will vest in Jemma and Susannah absolutely. Mr Kudlick and Samuel Citron were the original trustees of the settlement, with David Levy, a family friend and senior partner in Lubbock Fine chartered accountants, replacing Mr Citron as trustee in 1983.

9. Under Harold's last will dated 18 May 1983 he appointed Mr Kudlick and Mr Levy as his executors and trustees. He bequeathed to Ethel his half-share in Flat A, 4 Redington Gardens (their home at the date of the will), together with 40% of the 90% shareholding he held in Redington Residential Holdings Ltd ("RRHL"), a company through which he held a number of properties. He bequeathed his shareholding in another property company, Summerdown Estates (Eastbourne) Ltd ("Summerdown"), to David Levy and Gerald Levin to hold on trust for Jemma and Susannah under what was known as the Grandchildren's Settlement, a trust in which Mr Kudlick had no involvement. He then left one half of his residuary estate (referred to as Marian's Share) to Mr Kudlick and Mr Levy as trustees on protective trust for Marian's benefit during her lifetime and on her death on the trusts declared by the Marian Miller Settlement, in other words (as events have happened) for Jemma and Susannah absolutely. The other half of his residuary estate was left, as to one half (25% of the total) to Pauline absolutely, and as to one half (the remaining 25% of the total) on the trusts of the Grandchildren's Settlement.

10. Under Ethel's last will dated 23 June 1987 she appointed Mr Kudlick and Mr Levy as her executors and trustees. She similarly bequeathed her shareholding in Summerdown to Mr Levy and Mr Levin to hold on the trusts of the Grandchildren's Settlement. She left one half of her residuary estate (Marian's share) to Mr Kudlick and Mr Levy on protective trust for Marian's benefit during her lifetime and on her death (in the events which have happened) on the trusts of the Grandchildren's Settlement. The other half of her residuary estate (referred to as Pauline's Family Share) was left, as to one half to Pauline absolutely, and as to the other half on the trusts of the Grandchildren's Settlement.

11. The effect of all this was that Mr Kudlick and Mr Levy were responsible as executors for the administration of Harold and Ethel's estates, and were the trustees of three separate trusts (the property of which comprised one-quarter of Harold's and one quarter of Ethel's residuary estates together with any other property previously settled under the Marian Miller Settlement), under which such property was and continues to be held for Marian's benefit during her lifetime, and to which Jemma and Susannah will become entitled on Marian's death. Mr Kudlick has explained in his evidence, and it is not disputed, that because the beneficiaries of the three trusts are the same, he and Mr Levy dealt with the three trusts as one, preparing annually a single set of trust accounts for the three trusts rather than separate accounts for each.

12. Jemma was appointed as an additional trustee of the Marian Miller Settlement in 1998 when she was 24 years old. She has explained in her evidence that she was asked to become a trustee by Mr Kudlick and Mr Levy to help organise Marian's care needs, as she was living in London at the time and was very close to her aunt, but had little involvement or knowledge in the financial affairs and administration of the trusts which she left to Mr Kudlick and Mr Levy. There is a question as to whether she was appointed as a trustee of the two will trusts at the same time: she believes that she was only formally appointed as trustee of the two will trusts rather later on in 2015, when Mr Levy retired, but if the three

trusts were administered as one it may well be that she was *de facto* trustee of all three even if only formally appointed to the first.

13. Mr Levy retired as trustee of all three trusts in 2015 shortly before his death. Howard Freeman, a solicitor and then senior partner in the firm of Freemans, was appointed in his place. Mr Kudlick ceased to play an active role in the administration of the trusts in 2017, but only formally retired on 31 January 2020, following some disagreement as to who should be appointed to succeed him.

The present dispute

14. By the present claim, Jemma seeks an order requiring Mr Kudlick to provide an account both of his administration of her grandparents' estates and of his administration of the trusts since their inception. On the face of it, she is asking the court to direct Mr Kudlick to provide details of his administration and dealings with the estate and trusts over a period of 49 years.

15. Jemma explains in her first statement her reasons for seeking such relief. It is apparent from this that her concerns relate principally to the question what became of the portfolio of properties which Harold had held prior to his death either in his own name, or through companies of which he was sole or principal shareholder, including in particular RRHL and Redown Management Limited ("Redown"). She says this at paragraph 13:-

> *"The current assets in the three trusts are worth roughly £3.75 million and produce an income of about £80,000 per year. Now that I am aware of the substantial assets that I believe were owned by my grandfather, this is far less than expected. After my mother's death in November 2019, I obtained documents (which included original copies of the Harold Miller and Ethel Miller executors' accounts) showing the assets in the estate at the time that my grandfather died. I was really surprised that he owned so many companies and properties and I wondered why David Levy never told me about them. Prior to this, I only knew about 4 Redington Gardens, 20 Yew Tree Court, 28 Hampstead High Street (which our company Redington Residential Holdings Limited still owns) and 222 – 224 Northfields Avenue (which was sold on the strong recommendation of David Levy and Martin Kudlick in 2013 due to serious issues with the building). I now want to know what happened to all the other properties that they never told me about and understand if there has been any wrongdoing."*

In paragraphs 25 to 37 of her first statement, Jemma goes on to list the various properties and companies in whose names they were held, and to set out what she has discovered about what became of them. She poses a number of questions as why the prices achieved for certain of the properties was substantially less than that achieved on their resale, the reasons underlying the decision to sell the properties, rather than retain them except to the extent necessary to pay outstanding capital transfer tax or inheritance tax. I shall return below to some of the detail of such properties and the questions raised about them.

16. The executors' accounts relating to Harold's and Ethel's estates to which Jemma refers in the passage above are accounts, in the case of Harold's estate, for the period from his death to 5 April 1986 and then for successive years to 1994, when the administration of the estate was completed; and in the case of Ethel's estate for the period from her death to 5 April 1989 and then likewise for successive years to 1994. These are prepared in the usual

format for estate accounts and contain all the information one might usually expect to see in such accounts.

17. It is apparent from Harold's estate accounts that the properties held in Harold's sole name at the date of his death – 9 Cloncurry Street, 15 Alberon Gardens, 20 Yew Tree Court and the freehold reversionary estate to Haven Lodge – were all sold in the course of the administration. Of the property companies in which Harold held shares at the date of his death, the shares in Summerdown were transferred to the Grandchildren's Settlement in accordance with his will, whilst three other companies – Bournside Properties Ltd, The Hamlet (Champion Hill Development) Ltd and Redown - were liquidated in the course of the administration, so that by the conclusion the administration the principal asset remaining in the estate comprised Harold's 50% shareholding in the remaining property company, RRHL. It is also apparent that the Inland Revenue had challenged the probate value initially ascribed to the shares in RRHL, resulting in a mark-up of their value from £50,000 to £283,000, with consequential increase in the amount of capital transfer tax and interest thereon charged to the estate. This appears to have been the reason for the delay in the conclusion of the administration, with the 1994 accounts recording that the executors' liability to capital transfer tax had now been agreed and clearance in respect of the estate obtained on 14 June 1994.

18. A similar picture emerges from Ethel's estate accounts. The only property which is recorded in her accounts as owned by her at her death is Garage No 5 at the rear of Haven Lodge which was sold in the course of the administration. Her shares in Summerdown were transferred to the Grandchildren's Settlement, and the value of her shares in Redown realised on the liquidation of that company, so that at the conclusion of the administration in 1994 the principal asset remaining in the estate comprised Ethel's 50% shareholding in RRHL. The probate value for that shareholding was eventually agreed with the Inland Revenue in the sum of £350,000, an increase from the value initially ascribed to the shares of £250,000. Again, this gave rise to a consequential increase in inheritance tax and interest charged to the estate. The 1994 accounts record that clearance in respect of the estate was obtained on 30 August 1994.

19. The extent of the property held by RRHL is not of course apparent from the estate accounts. It is not disputed however that by the conclusion of the administration of the estates, RRHL retained two investment properties, 28 Hampstead High Street, a freehold building comprising a shop, offices and flats above, and 222 – 224 Northfields Avenue, a freehold building comprising a shop with flats above (the latter property having previously been held in the name of Redown Management Ltd but apparently transferred to RRHL on Redown's liquidation). The retention of these two properties reflected Harold's wishes set out in clause 8 of his will. In contrast, other properties previously held by RRHL and by Redown during Harold's lifetime appear to have been sold following his death in circumstances which Jemma now seeks to question.

20. The estate accounts thus provide some information about what became of the property portfolio to which Jemma refers, but do not provide information concerning the sale of properties held by RRHL or Redown, or any narrative or explanation of the circumstances surrounding the sale of individual properties, or the reasoning behind the decision to sell. In addition, whilst the accounts reveal that there was a dispute with Inland Revenue relating to the probate value of the shares in RRHL which was eventually resolved, they do not

provide any narrative account or explanation thereof, or any costs to the estate which were thereby incurred.

21. Following the completion of the administration of the two estates, the share capital in RRHL was divided between those entitled under Harold and Ethel's wills, so that 50% of the shares were thereafter held by Mr Kudlick and Mr Levy on Marian's will trusts, with the remaining 50% held for or distributed to Pauline and Jemma and Susannah, who have since been shareholders of the company in their own right. Jemma was appointed a director of RRHL in October 1998, shortly before she was appointed trustee of the Marian Miller Settlement in November that year.

22. It is apparent that in the years following completion of the administrations both Pauline and Jemma raised questions of Mr Kudlick and Mr Levy of the conduct of the administrations. Much of the correspondence appears to be missing or lost, but there are snapshots within documents which Jemma has found within her mother's papers, or within paper files held by Mr Kudlick and passed on to the defendants in the course of the present litigation.

23. Among the documents drawn to my attention was a letter dated 31 January 1996 written by Asher Oldschool, the solicitor who acted for Mr Kudlick and Mr Levy in their role as executors and trustees, to solicitors retained by Pauline, providing information relating to the administration of the estates. Only a single page of this letter survives, setting out details of the dates and proceeds of sale of three properties formerly owned by RRHL, including the freehold to 4 Redington Gardens (sold in October 1985), and properties at 22 Charlotte Street, Bristol (sold in July 1985) and 178a Walthamstow Lane (sold in May 1988), together with leasehold estate to Flat A, 4 Redington Gardens (Harold and Ethel's former home) which had passed to Ethel on Harold's death and was said also to have been sold in October 1985, during her lifetime. On the same page, Mr Oldschool also extended an invitation to Pauline's accountant to inspect the paperwork relating to the administration to enable him "*to ascertain the complications encountered in the administration*".

24. Also drawn to my attention was a series of letters stated to be from Jemma to Mr Levy dating from August and September 2002, together with minutes of a contemporaneous RRHL board meeting stated to be held between Mr Kudlick and Jemma, held in Mr Kudlick's papers. Jemma states that she has no recollection of such letters, or of the meeting, and does not recognise the style or language of the letters as her own, or the content of the meeting. In his submissions, however, Mr Curry did not advance any positive case that the documents were fabricated, and in the circumstances I can see no reason not to take them at face value:-

    a) in a first letter dated 27 August 2002, Jemma requested copies of signed accounts for RRHL and Redown showing the proceeds of sale of Flat A, 4 Redington Gardens, the Coach House (forming part of 4 Redington Gardens) and 20 Yew Tree Court, which the letter states were required "*for my own personnel* [sic] *legal peace of mind*";

    b) the minutes of a subsequent RRHL board meeting on 9 September (at which Mr Levy and Jemma's father are also stated to have been in attendance) recorded Jemma as having produced a list of properties for which she wishes to see where the proceeds of sale were reflected in the accounts;

c) in a second letter dated 9 September 2002, Jemma stated to Mr Levy that "*I do think we cleared up the questions I had at the Director's meeting today pertaining to questions I had about the various Estate properties contained in my previous letter*".

25. In the absence of any more comprehensive set of correspondence, it is difficult to draw much from these snapshots other than that the concerns which have led to the present claim are ones which are not new, but were raised previously, whether or not answered to Pauline's or Jemma's satisfaction.

26. In any event, the concerns which had been raised seem thereafter to have gone into abeyance until June 2020, after Mr Levy had retired as trustee of the three trusts in 2015, shortly before his death, and Mr Kudlick had himself retired on 31 January 2020. In the meantime, it appears that there had been something of a breakdown in the relationship between Jemma, Mr Kudlick and Howard Freeman, who had been appointed trustee in Mr Levy's place, concerning the question who should be appointed trustees of the three trusts, and director of RRHL, to replace Mr Kudlick who himself had been seeking to retire since September 2016.

27. On 8 June 2020, Preiskel & Co LLP ("Preiskel") wrote on behalf of Jemma and Michael Alizade to Mr Kudlick requesting a full account of his trusteeship of the three trusts, which they explained should include an explanation of his dealings with the assets of the trusts so that the beneficiaries could understand how the trust assets had been dealt with and an account of the trustees' involvement in the property companies whose shares were held under the trusts. It is unnecessary to recount in detail the correspondence which followed with Solomon Taylor & Shaw LLP ("STS"), solicitors retained by Mr Kudlick, beyond noting that:-

a) in its response dated 8 July 2020, STS took issue with the extent of the requirement being imposed upon Mr Kudlick whilst stating that he would be prepared to answer any "*reasonable and specific questions*" relating to his trusteeship;

b) this led Preiskel in turn to make what it stated was a more limited request on 12 August 2020, without prejudice to the right to a full account, that Mr Kudlick provide an account of the trustees' dealings with the various companies and properties that were owned by the three trusts, including an explanation of the trusts' dealings with the companies and their decision to liquidate such companies, and an explanation as to "*the basis on which your client determined which properties needed to be sold by the trust or company concerned and why they needed to be sold, how they approached the sale of each property, how they found purchasers for each property and what became of the proceeds of sale*";

c) STS stated in response on 17 September 2020 that the request for information relating to the companies and properties owned by the trusts in the 1980s and 1990s was wholly unreasonable; Mr Kudlick no longer had any memory of such matters, nor possession or control of the documents that would be required to provide such an account;

d) Preiskel did not accept this; as they stated in their letter of 24 September 2020, "*it is incumbent on your client at least to provide a narrative of his recollection of the assets of the trusts and his dealings with those assets in the first instance, including his*

recollection of the basis on which he determined that particular trust assets should be sold".

28. The present claim was issued in May 2021. Preiskel continued thereafter to reiterate in correspondence that the basic question of concern for the claimants was what happened to the properties owned by Harold, to which Mr Kudlick had provided no response. On 16 June 2021, Preiskel sent to STS a list of questions for Mr Kudlick to answer relating to the performance of his roles as executor of the two estates, as trustee of the three trusts and as director of the companies in which shares were held by the three trusts. The list amounted to some 11 pages and covered ground rather more extensive than the basic question of concern which they had identified might obviously warrant. Mr Kudlick replied to some of the questions in a document dated 14 July 2021, but stated the majority of the questions to be unreasonable for some or all of the reasons that (a) it sought an unreasonable level of detail concerning events which occurred more than 30 years ago, (b) it was asked of a former trustee who did not have access to the trust's papers and records, (c) it was asked of someone who was 87 years old and in poor health, and (d) it was asked by someone who had herself been a trustee since 1998. The claimants were dissatisfied with these answers, and so have pressed ahead for the grant of relief from the court in the terms sought in the claim form.

29. It is not disputed that Mr Kudlick has suffered poor health over recent years. In 2019 he underwent surgery for bowel cancer, with major complications. In 2020 and 2021 he was hospitalised on three occasions, the last after a fall. In December 2022, shortly before the final hearing, he was again hospitalised with a strangulated hernia, a serious condition, and underwent a kidney scan following discovery of a lump at the bottom of his left kidney. He faces possible further surgery as he approaches his 90s. It is not surprising to be told that this litigation is an unwelcome burden for someone who wishes to focus on his recovery and enjoyment of his remaining years, and has had a deleterious effect on his mental state.

The legal framework

30. Section 25 (b) of the Administration of Estates Act 1925 places on a statutory footing the duty of a personal representative of a deceased person, when required to do so by the court, to render an account of the administration of the estate to the court.

31. It is common ground that such a duty applies whether or not the representative is still in office: see Williams Mortimer & Sunnucks at paragraph 42-22. However, an application to compel the provision of an account may be refused on grounds of laches where it is sought only after a substantial lapse of time. As set out in Williams Mortimer & Sunnucks paragraph 42-23:-

> *There is no prescribed time period within which an application for an inventory and account must be made, and time alone does not preclude such an application. If, however, there has been a great lapse of time since the death, the court may and frequently has refused to require the representative to exhibit an inventory, for reason and justice prescribe some limitation. Thus, an application to compel an administratrix to exhibit an inventory after the lapse of 18 years was rejected, and the applicant had to pay the costs of the application.*

32. There was more controversy between the parties as to the duties of trustees. Whilst Mr Scher on behalf of Mr Kudlick accepted that it was a core duty of a trustee whilst in office to keep clear and distinct accounts of the trust property and to be constantly ready with such accounts, he submitted that on leaving office a retired trustee was subject to different and less onerous duties summarised in Lewin on Trusts at paragraphs 21-119 and 21-121 as follows:-

> *21-119. A new trustee is entitled to require the former trustee to deliver up to him all records, books and other papers belonging to the trust. He is also entitled to inspect and copy other papers (not belonging to the trust) in the hands of the former trustee so far as they contain information relating to the trust. The papers to which he is so entitled include the minutes of meetings of the trustees and the internal memoranda of a corporate trustee, and correspondence files.*
>
> *21-121. The new trustee may need to approach a former trustee for information and explanations not apparent from the trust papers. The former trustee is, to the extent that the request for information or explanation is reasonable in the circumstances, under an obligation to supply the information requested, and he must take reasonable care that any information which he does supply is accurate.*

33. Mr Scher submitted that there was good reason for the distinction between the duties of current and former trustees. The latter were no longer administering the trusts, had been discharged from office and may no longer have access to the books and records of the trust. It was the trustees who remained in office or who replaced those who had retired who retained or succeeded to the burden of providing beneficiaries with access to information and documents relating to and accounts of the administration of the trust property. The former trustees may be called on by the current trustees to provide information and explanations as to their administration of the trusts, where this was reasonably required, but were no longer directly at the beck and call of beneficiaries of the trust.

34. Neither counsel was able to refer me to any authority which directly addressed the question whether there was such a distinction between the duties of current and retired trustees. However Mr Curry relied heavily on the well-known decision of Chief Master Marsh in *Henchley v Thompson* [2017] EWHC 225; [2018] WTLR 1289, a case in which beneficiaries brought a claim requiring a defendant trustee to provide historic accounts and information relating to his administration of two family trusts over a period dating back to the 1970s. There was evidence that the defendant had retired from the first of the trusts, the Henchley Trust, in 1998, and, as the second of the trusts, the Children's Trust, the defendant himself asserted that the trust had been wound up in the early 1990s. In considering the duty to account owed by the defendant, no point was taken by counsel that this was affected by his actual or purported retirement, absent any express release, and there is nothing in the Chief Master's judgment to suggest that this made any difference.

35. Persuasively though the case was put by Mr Scher, I am not convinced that there is such a distinction as he seeks to draw. If there were, it would be surprising indeed that it was not relied upon in *Henchley*. In my judgment, the fact that a trustee has retired does not operate as such to discharge him from the obligation to account, if he has not already done so, although it may be a relevant factor for the court to take into account in the exercise of its discretion whether or not to order an account on the facts of the case.

36. The principal questions with which the Chief Master was concerned in *Henchley* were whether the court had any discretion whether or not to order an account against a trustee who it was accepted was under a duty to account, and if so how that discretion should be exercised on the facts of that case. On the first of these questions, he concluded as follows (at paragraph 25 of his judgment):-

> "*There is no absolute entitlement to obtain an order for an account. It is one thing for the duty to account being part of the irreducible minimum obligations of trustees, but quite another to say that the court must always, without exception, make an order for an account to be provided. The duty and an entitlement to an order from the court are quite different. I can accept, however, that the court will, in the exercise of its discretion, ordinarily make an order for an account where an account has not been provided and furthermore, there may be very limited circumstances in which the court will decline to make such an order. Nevertheless, it is plain to my mind there is a discretion even if it is one which will be applied sparingly. I will discuss later in this judgment how such a discretion may be exercised, but even a lengthy delay in requesting an account may be of limited assistance to the trustee, in the absence of a release, because without an account the beneficiaries do not know what has happened to the trust income and assets. All the more so, where there are succeeding generations of beneficiaries who neither have, nor could have, any direct knowledge of how the trust assets have been managed and distributed."*

37. In paragraph 33 of his judgment, the Chief Master went on to explain how the doctrine of laches interplayed with the court's discretionary power to refuse an account:-

> "*On the basis that the court has a discretion whether to make an order for an account, I am not convinced that consideration of the doctrine of laches adds a great deal bearing in mind delay on its own will not be sufficient to make out laches. It is more likely that the sort of considerations relied upon by the Defendant as grounds for the court refusing to make an order will be persuasive than that the Defendant could establish laches.*"

38. Related to the question of delay in applying for an account was the question whether any such account would serve any purpose where any substantive cause of action which the beneficiaries may wish to pursue once armed with information provided by such accounts may itself be statute-barred. The Chief Master did not consider that this was a relevant factor in determining whether to order accounts on the application of a beneficiary of a trust for reasons which he set out in paragraph 37:-

> "*I am content not to decide this point because, having determined that the court has a discretion whether or not to make an order for an account, the passage of time is plainly a significant issue even if laches does not apply either in respect of the claim for an account or any claim which might arise out of the account. Furthermore, it seems to me that it is wrong in principle to have regard to substantive allegations which have explicitly not been made and which do not form the basis of the application. To my mind the claim stands or falls on the basis upon which it is put forward, namely that the beneficiaries under the trust have an entitlement to know what has happened to the trust assets and income.*"

This point was picked up again by the Chief Master in *Ball v Ball* [2020] EWHC 1020 (Ch); [2020] WTLR 741 in considering the observations of HHJ Hodge QC in *Al-Dowaisan v Al-Salam* [2019] EWHC 301 (Ch) that the question whether any underlying claim would be statute-barred was a relevant consideration in a claim for accounts brought in a commercial context. He said this at paragraph 21:-

> "*In the context of a business dispute, such as* Al-Dowaisan, *the court is not only concerned with whether there has been a failure to account but also whether ordering an account to be taken is likely to be of practical utility. As HH Judge Hodge QC observed, the court is unlikely to order an account if no order for monetary payment is likely to follow. However, in relation to a conventional trust, the provision of an account itself will often provide real benefit in itself because a beneficiary is entitled to know what the assets of the trust comprise and how they have been dealt with. The provision of information in this context does not have to be connected with a claim*."

39. On the second question in *Henchley*, how the discretion should be exercised on the facts of the case before him, having directed himself at paragraph 60 that a court should not lightly decline to make an order where a trustee hold or has held assets for the beneficiaries of a trust, the Chief Master did nevertheless decline to make any order in relation to the Henchley Trust where the principal asset of the trust was a property which had been retained, and where the value of the remaining portfolio assets which had been disposed of many years previously was modest and "*there was no realistic possibility of the defendant providing any information about its disposal or the use to which the proceeds were placed*". In contrast he did order the defendant to provide an account in relation to the Children's Trust spanning the entire period of his trusteeship from the early 1970s, notwithstanding the defendant's protestations that he had already provided all the information available to him and that it would be pointless to make any order against him because he could do no more. Moreover, although the defendant was then 80 years old, the Chief Master found that that was not a reason not to make an order where it was evident that he retained a considerable degree of vigour and was not hampered by ill-health from undertaking such a task.

40. *Ball v Ball* also involved a claim, in that case between siblings, for the provision of accounts relating to a will trust created on the death of their father in 1978, under which the income of his estate was left to his widow for life, with his children thereafter entitled to the residue in equal shares, the principal asset of the estate comprising shares in a family company which carried on a retail business. The claim failed principally on the basis that the defendants had adequately discharged their obligation to account by the provision in 2018 of information in a five page letter summarising the assets forming the father's estate at the date of his death, setting out the income from the trust paid to the mother during her lifetime and enclosing extracts from the company's accounts. The Chief Master rejected the contention that the information provided was inadequate or insufficient, notwithstanding that it had not been presented in the traditional format of accounts, or that the claimants were entitled against the defendants as part of such account to information relating to the conduct as directors of the family company.

41. In paragraphs 22 and 23 of his judgment in *Ball*, the Chief Master referred back to previous dicta of his own in *Henchley* (at paragraph 62) and of HHJ Matthews in *RNLI v Headley* [2016] EWHC 1948 (Ch) (at paragraph 11) as to what the obligation to account entailed,

before then endorsing counsel's summary of the constituent elements in paragraph 24 as follows:-

> "*I accept Mr Lewison's helpful summary of what is required from the trustees in providing an account to the beneficiaries:*
> *i) They must say what the assets were;*
> *ii) They must say what they have done with the assets;*
> *iii) They must say what the assets now are;*
> *iv) They must say what distributions have taken place.*"

42. However trustees are not required in the provision of accounts to beneficiaries to explain why they dealt with trust assets in any particular way, or what factors they took into account in exercising their powers in any particular way. In *Lewis v Tamplin* [2018] EWHC 777; [2018] WTLR 215, HHJ Matthews made this point in the following terms at paragraph 61:-

> "*This jurisdiction is simply about providing to trust beneficiaries information about the trust, its assets and the trustees' stewardship of it and them. It is not about compelling trustees to convict themselves out of their own mouths of breach of trust (cf* Bishopsgate Investment Management Ltd v Maxwell *[1993] Ch 1, CA)"*

and then, further on in the same paragraph

> "*... whilst the beneficiaries may properly ask the trustees to tell them if they did this or that with a trust asset, in general I do not consider that the beneficiaries are entitled to ask why they did or did not do it, or for a general "explanation of their position" on a particular point (although I accept that, if any of this is revealed by a document otherwise produceable, it cannot be withheld on that ground alone)*"

Analysis and conclusions

43. I should note at the outset that the order sought by the claimants in this case is in the widest possible terms, an account of Mr Kudlick's administration of the two estates, and of his dealings with the assets of the three trusts from their inception to the time of his retirement, covering a period of just shy of 50 years. I asked Mr Curry at the outset of the hearing whether he was pursuing such an extensive order and invited him to consider whether he wished to formulate more limited terms of relief. He indicated that it was open to me to make a more limited form of order, for instance relating solely to the period prior to Jemma's appointment as trustee in 1998 but made no concession in this regard and maintained the claimants' entitlement to an account in the wide terms sought.

44. This is somewhat at odds with Jemma's evidence, to which I have referred above, in which she makes quite clear that her concerns relate to the question what happened to the properties which were owned by Harold and Ethel, or Harold's companies before his death. It is also at odds with the tenor of the much of the pre-action correspondence to which I have also made reference above.

45. In paragraph 14 of his statement, Mr Kudlick states as follows:-

> "*After [Harold] died David [Levy] and I ran the Trusts on our own and then, once [Jemma] was appointed, with her. We produced the usual executor accounts and*

annual accounts of the Trusts. After the Trusts merged, we produced only one set of accounts for all three. The accounting records and bookkeeping work remained with Lubbock Fine."

In pre-action correspondence, STS in fact went further, in their letter of 12 October 2020, in stating on Mr Kudlick's behalf that after her appointment as trustee Jemma had signed the trust accounts as they were produced each year. I have not seen any statement on Jemma's behalf, or anything in the correspondence, disputing that such annual accounts of the trusts were produced, or indeed that Jemma signed such accounts following her appointment as trustee.

46. None of the annual accounts for the trusts have been included in the material before me, and it appears that they have not been retained by Mr Kudlick himself but were previously held by Lubbock Fine. However it is not suggested that such accounts were not produced as Mr Kudlick asserts. Moreover, as I have set out, Jemma's concerns as they are set out in her evidence are directed not to any substantial extent at the administration of the trust assets but rather as to what happened to the properties in the course of the administration of Harold and Ethel's estate. In those circumstances, I am not satisfied that there is any proper basis made out for seeking relief in the wide terms sought. I do not find on the evidence before me that there has been any failure on Mr Kudlick's part to provide accounts relating to the administration of the trust assets during his custodianship such as would justify the intervention of the court.

47. Instead, in my judgment, the real question which falls for determination is a more narrow one relating to the provision of information concerning the administration of Harold and Ethel's estate, and what happened to the properties and companies which fell within those estates. Has a sufficient account been provided in relation to those administrations, and if not should an account now be ordered, and in what terms?

48. Mr Scher contends that Mr Kudlick in conjunction with Mr Levy discharged properly their obligation to account in relation to the administration of the two estates in the production of the estate accounts to which I have made extensive reference above. Furthermore, to the extent that the claimants may reasonably have been entitled to ask any specific questions relating to the administrations, Mr Kudlick has answered them as best he can in the responses given to the list of questions prepared on the claimants' behalf by Prieskel.

49. Mr Curry disputes this, contending that the estate accounts do not provide adequate or sufficient information as to what happened to the assets within the estates, or the circumstances in which the Inland Revenue challenged the original probate values ascribed to the RRHL shares and the resulting interest or penalties which arose following the adjustment of those values and consequential increase in the amount of capital transfer and inheritance tax payable in respect of the two estates.

50. In her statement, Jemma has set out the information which she herself has been able to ascertain from public records concerning the various properties which were owned by Harold or Ethel or by one of Harold's property companies and which she contends give grounds for concern. Some of these concerns are, in my judgment, misstated, or are ones to which the answers are evident from the material before the court, and this somewhat detracts from the force of the case that she presents.

51. In particular, Jemma puts at the forefront of her case the fate of 4 Redington Gardens, a substantial dwellinghouse in Hampstead, divided into flats, including Flat A where Harold and Ethel had lived until shortly before his death, and the freehold to which had been owned by RRHL; she explains in paragraph 28 of her statement that Harold had obtained planning permission in his lifetime to develop part of the garden and some garage land which formed part of the property as two dwellinghouses, but then goes on in paragraph 29 to express concerns about the prices achieved on the sale of these development plots in comparison to the amounts achieved subsequently when the plots were resold, at an aggregate value of ten times the previous price. However a cursory examination of the documents provided in support show that there is nothing in this:-

    a) the two plots in question were sold during Harold's lifetime – on 27 April 1984 – for £80,000; this was before Mr Kudlick's appointment as director of RRHL when Harold himself was sole director, and so plainly cannot be something for which Mr Kudlick is accountable, whether as executor, trustee or director;

    b) the onward sales of the two building plots took place in December 1985, and March 1987 after houses had been erected on the two plots, as is evident from the terms of the transfers; thus there is no sensible comparison to be made with the price achieved on the original sale with that achieved for the completed houses.

52. In paragraph 30 of her statement, Jemma expresses further concern about the price achieved on the sale of the freehold of the building itself at 4 Redington Gardens, together with the leasehold of Flat A, in October 1985, in comparison to prices later achieved on the sale of long leaseholds of other flats within the building. This assumes that the other flats within the building were not already subject to long leases at the time of the sale of the freehold, for which there was no evidence before the court. And, as regards Flat A itself, this had passed to Ethel on Harold's death and was sold during her lifetime and so is not something for which Mr Kudlick could be accountable as executor, trustee or director in any event.

53. Jemma expresses concerns in paragraph 31 about why other properties owned by RRHL were sold and whether proper prices were achieved, a theme she picks up again at paragraph 36 of her statement. But she is not entitled to require an explanation from Mr Kudlick why the executors chose to exercise their powers of sale as they did, or, insofar as such properties were sold by them in their capacity as directors of RRHL rather than as executors, to require an account in the terms sought at all. Moreover she includes within her critique questions about properties owned by other companies which are quite clearly not matters for which Mr Kudlick was responsible, such as the freehold estate owned by The Hamlet (Champion Hill Development) Ltd which, on her own case, was sold by Harold before his death, and Summerdown, the shares in which passed to the Grandchildren's Settlement under Harold and Ethel's will.

54. When challenged about some of this, Mr Curry submitted to me that the details of what properties were owned by whom and when they were sold was not a matter for the claimants but rather for Mr Kudlick himself. That is correct in one sense, but does not address the point that, on the face of it, an account of the administration of the estates has been provided by the estate accounts; it is the claimants' contention that such accounts are insufficient or inadequate, which Jemma seeks to demonstrate by the concerns set out in her statement, a number of which appear to me to be misstated or misdirected.

55. In my judgment, Mr Kudlick and Mr Levy properly complied with their statutory duty to account for their administration of the estates in the production of the estate accounts. I accept however that that is not a complete answer to the claim in the sense that the beneficiaries of the estate, including trustees of the trusts of shares of the residue of such estates created under Harold and Ethel's respective wills, might properly request further information relating to the administrations. However that is not the approach which has been adopted by the claimants in this case in the claim as it was issued and as it has been pursued before me.

56. To the extent that there are outstanding questions arising from, or left unanswered by, the estate accounts relating to the administration of the estates which the claimants could properly seek further information from Mr Kudlick, and in respect of which Mr Kudlick may be under a duty to provide a further account, I go on to consider whether Mr Kudlick should now be ordered by the court to provide any such further account. For these purposes, I consider that the approach to the exercise of the court's discretionary power set out by the Chief Master in *Henchley* as regards trustees should apply directly or by analogy to personal representatives; I cannot see any reason for distinguishing between the two, albeit that the duty to account in relation to personal representatives is now on a statutory footing where the trustee's duty remains one subject to the inherent supervisory jurisdiction of the court.

57. My starting point is that the court should ordinarily enforce the duty of a trustee or personal representative to provide a full account of their dealings with trust or estate property. Whilst the court may decline to make an order, it should only do so as an exception to the general rule where the specific facts justify such a departure.

58. I have concluded however that such a departure is justified in this case and that in the exercise of my discretion I should decline to make any order requiring the provision of any further accounts relating to the administration of the two estates. My reasons for this are as follows:-

    a) first, I consider that the delay in seeking any further accounts in relation to the administration of the estates until some 28 years after the administrations were concluded is unjustified and excessive; I do not accept that Jemma can excuse any such delay on the fact that she only came into possession of the estate accounts following Pauline's death and had previously had little knowledge or involvement in the financial affairs of the estates or the trusts which she left to Mr Kudlick and Mr Levy; it is evident from the documents to which I have referred that she herself was previously rather more closely involved in the affairs and administration of the trusts and in asking questions about the properties which may have formed part of her grandparents' estates than she has acknowledged in her statement, and there is no good reason in my judgment why she could and should not have pursued any claim much sooner;

    b) second, even if delay may not be a bar without more to the grant of relief, the effect of such delay is oppressive and unconscionable in this case; I am satisfied that Mr Kudlick is no longer in a position, at his age and with memories now faded by the lapse of time, and many documents relating to the administration of the estates either destroyed or missing, to provide more detailed and comprehensive information and answers to questions raised relating to the administration of the estates; I also consider that the

extent of the information sought is unduly burdensome and the manner in which it has been sought oppressive;

c) third, and allied to this, I take into account Mr Kudlick's state of health; it is clear that he is suffering from on-going serious medical problems and that these have also affected his mental well-being; given his age, it is to be expected that these problems are ones which will continue and may progress; I consider that the added burden of having to undertake the scale of task demanded of him by the claimants would likely be detrimental to his ability to deal with those ailments;

d) fourth, whilst I accept that the court may properly take into account the provision of information relating to the assets of the estate or trust as a benefit in itself to be gained from an order for an account, whether or not any further claim could be pursued, it remains legitimate to ask whether the anticipated benefit to be derived from such an order is proportionate to the burden which compliance with the order would place upon the defendant; it was not suggested by Mr Curry that there was any serious prospect of any substantive claim in devastavit or breach of trust being pursued for which the information sought by the accounts was required, and, on the face of it, it is difficult to see how any claim relating to any alleged failure to collect in or obtain proper value for the assets of the estates, or any default in the declarations made or information provided to the Inland Revenue, would not now be subject to a limitation defence; I cannot see that any benefit which the claimants may derive simply from being provided with further information relating to the administration of the estates, without the realistic prospect of being able to pursue any further claim as result, would be proportionate to the burden imposed on Mr Kudlick in having to comply with such order.

59. For all these reasons, I have concluded, not without some anxious consideration, that the claim should be dismissed. I do so on the footing that trust accounts have historically been prepared and provided, even though not before the court and not in Mr Kudlick's possession, and likewise on the basis that estate accounts, which were before the court, were so prepared. To the extent that there were questions relating to the administration of the estates to which the claimants might properly ask Mr Kudlick to provide further information, I consider nevertheless that I should decline to make any order in the circumstances which I have set out above.