



**5 Stone
Buildings**

Webinar – Taking accounts

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Taking accounts-context

- Process of enforcing, by court order, fiduciary's obligation to "account" for his dealings
- Arises in many contexts: trustees; PRs; partners; co-owners; agents; LPAs/deputies
- Claim may be brought by beneficiary; principal (in case of agency) or by subsequent fiduciary
- Venue: typically BPC (ChD) and typically by Master.



What is the obligation to account?

- Explanation of fiduciary's dealings with property or business with which entrusted: **provision of information**
- Making good any financial deficit arising from defects or inadequacies with explanation: **remedy**
- **N.B.** distinction between taking account in common form and account on the footing of wilful default: former requires fiduciary to account on basis of what happened (but disallowing unauthorised expenditure) and the latter requires fiduciary to account on basis of what should have happened but for breach of duty.

Step 1: Getting an order for an account

- CPR PD 40A and Chancery Guide chapter 23
- Order for an account normally made at early stage of proceedings
- Possible Hurdles
 - Fiduciary relationship?
 - Is it too late? Limitation position complex: s.23 of the LA 1980 (same as underlying claim). No time limit for account in common form (*viz* provision of information) but could be laches/estoppel/settled accounts
 - Is there already a sufficient account?
 - Court's discretion

What is a sufficient account/explanation?

- Fiduciary should be “ready with his accounts” (i.e. comprehensive explanation of what he has received and spent; with supporting documents) and if he is not then adverse inferences may be drawn in “taking the account”
- No particular form required: in modern case-law, courts readier to take context into account
- *Ball v Ball*, *Westway* [2020] EWHC 1020 (Ch); *Henchley v Thompson* [2017] EWHC 225 (Ch)

What is a sufficient account/explanation (II)?

- “The beneficiary must show that an account has not been produced or that the account is inadequate. What will comprise an adequate account will depend on the circumstances. It is not necessary...to show...breach of their duties: *Ball* [22]
- “Trust accounts...must be able to show from period to period...how the trust assets have been dealt with, including what distributions and disposals have taken place...whether trust assets conform with the trust instrument, that the class of assets held is appropriate”: *Henchley* [62]
- Level of detail and formality required will vary with size and nature of trust: *Ball* [25]

Discretion?

- “No absolute entitlement to obtain an order for an account... however...the court will, in exercise of its discretion, ordinarily make an order for an account where an account has not been provided...very limited circumstances in which the court will decline to make such an order”: *Henchley* [19]
- “The court may be in a position to consider whether any underlying claims time-barred...relevant factor in the exercise of the court’s discretion...court does not act in vain”: *Al-Dawaisan v Al-Salam* [2019] EWHC 301 (Ch) [146]
- In relation to a conventional trust, provision of account itself will often provide real benefit in itself...provision of information... does not have to be connected with a claim: *Ball* [21]

Verifying the account

- PD 40 A para 2: “subject to any order to the contrary the accounting party must make out his account and verify it by an affidavit or WS to which the account is exhibited.”
- Fiduciary’s obligation to “vouch” (i.e. retain documentary evidence) for his dealings.

Step 2: challenging the account

- Are there aspects of account which claimant wishes to challenge?:-
 - Assets received but not accounted for
 - Assets which should have been received but which have not been
 - Payments/investments made which were not authorized
 - Distributions to beneficiaries not entitled to them
 - “Bad” investments
- N.B. distinction between “falsifying” and “surcharging”
- N.B. distinction between challenges which can be made to an account in common form and account for wilful default

Step 2: “taking” the account: procedure

- Directions for points of objection; points of response
- Directions for evidence
- Obtaining an order that the account be taken on the footing of wilful default
 - Wilful default means breach of duty **NOT** dishonesty or deliberate misconduct
 - Needed if allegation is fiduciary has failed to collect in assets that should have received or failed to invest or realise assets prudently
 - Must show one or more clear instances of breach of duty to get such an order

Step 3: the final reckoning

- Court will determine:–
 - Which of the challenged expenditure is allowed (or conversely disallowed/falsified)
 - What amounts should have been received but were not (surcharged)
 - How much (if anything) the fiduciary is liable to pay to the beneficiary or restore to the fund
 - Costs?



Example

Nureyev is a busy solicitor. He has acted as trustee of the Black Swan trust, which contains substantial funds, for 20 years. The life tenant Margot has just died. Nureyev had a very good relationship with Margot and she was happy with the informal way in which he ran the trust while she was alive.

However, Margot's children, Darcey and Marianela, who are also beneficiaries of the Black Swan Trust, are now taking issue with the way things were run. They say that Nureyev did not keep sufficient records of what was done with the trust funds. It also looks like the trust made various unsecured loans to Margot even though she was not a capital beneficiary, as well as to companies controlled by Margot, and sold off some trust property at an undervalue.

Unfortunately, Margot's estate is insolvent so there is no prospect of the loans being recovered. To add insult to injury, Nureyev has not taken any steps to recover any of the company loans, some of which may now be statute barred.

So...



Darcey and Marianela instruct Covent & Garden LLP to write a pre-action letter to Nureyev. He responds with a very apologetic 18-page letter setting out what he remembers of the administration of the trust over the last 20 years together with some bank statements and email correspondence recording the decision to make some of the loans to Margot. He says that there were formal loan agreements with the companies but he can't find them.

Darcey and Marianela are not satisfied and issue a claim for an account in common form.

What happens next?

- Has Nureyev given a sufficient account?
- If not, is the court likely to order an account?
- What about wilful default?
- Limitation?



A salutary warning

- Paragraph 29.80 of the Chancery Guide (Partnership Claims)
- “The expense of taking an account in court may be disproportionate to the amount at stake. Parties are strongly encouraged to refer disputes on accounts to a jointly instructed accountant for determination as an expert or arbitrator. Partnership claims are often suitable for mediation or alternative dispute resolution by the court (early neutral evaluation or financial dispute resolution)”



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Any questions?

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