



Neutral Citation Number: [2022] EWHC 2159 (Ch)

Case No: BL-2021-001951

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**BUSINESS LIST (ChD)**

Rolls Building,  
7 The Rolls Buildings,  
Fetter Lane,  
London EC4A 1NL

Wednesday, 13<sup>th</sup> July 2022

Before:

**DEPUTY MASTER COLLACO MORAES**

Between:

(1) SELECT LIFESTYLES LIMITED

**First Claimant / Part 20 Defendant**

(2) N&C HORTON (A FIRM)

**Second Claimant**

(3) HORTONS MOTORCYCLES LIMITED

**Third Claimant**

- and -

DEAN NORMAN

**Defendant / Part 20 Claimant**

- and -

NICHOLAS JOHN HORTON

**Third Party/Second Part 20 Defendant**

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MR. MATTHEW PARKER QC and MR. JAMES GARDNER (instructed by  
Peters & Peters Solicitors LLP) appeared on behalf of the Claimants.

MR. NICHOLAS COBILL (instructed by Weightmans LLP) appeared on behalf of the  
Defendants.

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**APPROVED JUDGMENT**

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## THE DEPUTY MASTER :

### JUDGMENT ON PRELIMINARY POINTS

#### Introduction

1. I am asked to deal with two short points. This is an application dated 14th April this year made by the claimants (“the Application”). The Application seeks various relief. I do not propose, as there is limited time to deal with the Application, to set out the background facts when dealing with two short preliminary points that I am asked to deal with.
2. The two points are these: First, whether the Application has been properly framed as a summary judgment application and complies or has failed to comply with the provisions of CPR 24 and the Practice Direction thereto.
3. Secondly, whether Mr. Norman should have permission to rely on his witness statement, in opposition to the Application, dated 5th July 2022, which it is accepted was served a day late.
4. There now seems to be no real opposition one way or other to either of those points. The defendant, Mr. Norman, accepting through his counsel, that the Application was treated by him as a summary judgment application and he has prepared for it on the basis that it is a summary judgment application, even though it does not comply with the Practice Direction.
5. As far as the claimants are concerned, while they oppose permission to extend time for the filing of Mr. Norman's witness statement dated 5th July, there is no serious opposition, save that they leave it to the court to decide that issue, in circumstances where the claimant has filed two subsequent witness statements.
6. As far as the Application is concerned, in so far as it is defective for non-compliance with the CPR, I exercise my case management powers, including the power under CPR 3.10 and I direct that the Application should proceed on the basis that it is a summary judgment application for an account.
7. As far as the substantive defect is concerned, that there is no statement in the Application and/or in the evidence that there is no real prospect of defending the claim for an account and the claimants know of no other reason why that issue should go to trial, leaving aside whether or not that was a real issue, that defect, insofar as it existed, has been rectified by the fourth witness statement of Mr. Tickner.
8. As far as prejudice is concerned, there is no real prejudice to the defendant, save for costs. He prepared for this hearing on the basis that the Application was for summary judgment, which is made clear at paragraph 15 of his witness statement. Further, no prejudice is suffered, by reason of the acceptance that, in any event, the Application includes an application for an interim order to account, which poses a lower hurdle for the claimants.
9. In my judgment, any substantive defect has been cured and the Application is to proceed on the basis that it is a summary judgment application. However, in respect of costs,

I would be minded to say, provisionally, that the claimants should not have their costs of the fourth witness statement of Mr. Tickner.

10. As far as the late witness statement of Mr. Norman is concerned, the one dated the 5th July, it is one day late and the Application did not contain the relevant mandatory requirements set out in paragraph 2(5) the Practice Direction to Part 24. However, the correspondence shows that the requirements in the rules were brought to the defendant's attention. This is a witness statement that was one day late, but on any basis the application would be regarded as an out of time application and no explanation is provided for the delay. However, as I have indicated, the claimants have been able to respond to the witness statement, although the late service might have led to unnecessary expense. Insofar as *Denton* applies, I find there was a breach and there is no good reason provided for the breach, but I will exercise my discretion to admit the evidence subject to any orders on costs, to reflect the failure to comply with the overriding objective. Of course the failure is one of those matters that I am entitled to take into account when exercising my discretion in respect of ordering the account, although it might not be one of those factors that weighs heavily in the balance one way or the other.

## MAIN JUDGMENT

### Introduction

11. This is an application by the claimants dated 14th April 2022 (“the Application”). I dealt with preliminary points earlier on in the day concerning whether this application was a summary judgment application or not. I dealt with that in an earlier judgment and reference should be made to that for the reasons for my conclusion that this application, amongst other things, is properly a summary judgment application.

### Factual Background

12. As far as the factual background is concerned, it is now 4.30pm on the 13th July and I note there is an agreed case summary in the hearing bundle and there will be no advantage in repeating that summary in this judgment. Reference must be made to that case summary for the purposes of the factual background to the Application.
13. There is also a separate summary concerning a claim brought by the father of the defendant, namely Ivan Norman, in claim number BL202100664 (“the Ivan proceedings”). That case summary, which I have read, gives the background to that claim.
14. As far as additional facts are concerned, the only other dates and events that are of particular relevance and of importance to this judgment are as follows. On 10th February 2021 Peters & Peters Solicitors LLP (“Peters & Peters”), instructed by the claimants, wrote a letter requesting an account from the defendant, Mr. Norman. I shall refer to him as Mr. Norman and I will adopt the terms and definitions in this judgment that are set out in the case summary.
15. Pursuant to that request, on 1st April a report was prepared by forensic accountants instructed by Mr. Norman, FAR Consultants, and they produced a report dated 1st April 2021 which I will refer to as “the FAR report”. On 17th May 2021 Peters & Peters

wrote to Mr. Norman's then solicitors, Tenet Compliance & Litigation Limited ("Tenet"), setting out their concerns as to the adequacy of the FAR report and highlighted various discrepancies.

16. On 17th June 2020 Tenet made requests for various documents.
17. This claim was issued on 28th October 2021 and after issue, on the 19th November 2021, the Ivan proceedings were served.
18. On 10th January 2022, the defendant filed a defence to counterclaim and on 10th February 2022 there was a reply and defence to the counterclaim. The Application was made on 14th April 2022. There has in the interim, prior to this hearing, been a cost and case management conference on the 25th May 2022 ("the CCMC"). In around June of this year the pleadings were amended pursuant to permission granted at that hearing and this hearing came on today, having been listed prior to the CCMC.
19. The essence of the complaint of the claimants, as far as it is relevant to the Application, is that they are facing a number of creditor's claims from associates of Mr. Norman in respect of transactions that were entered into at a time when he was managing the financial affairs of the claimants. When I refer to managing the affairs of the claimants, sight must not be lost of the fact that he was managing the affairs of the separate entities, separately, i.e. each of the claimants, first, second and third claimants.
20. The difficulty the claimants have faced can be summarised as follows. The transactions all concerned loans but there are a number of transactions. The transactions concern payments into and out of the bank accounts of the claimants, where the lender and the payer of the sums are not necessarily the same. Similarly, the borrower and the recipient of the funds are not necessarily the same.
21. It is accepted by Mr. Norman in respect of the loans, that there might be a circuitous route between the supposed lender and the borrower in terms of how money was transferred to and from the actual lender and the actual borrower.

### The Application

22. As far as the substance of the Application is concerned, it seeks an account on a summary basis, or alternatively an interim account. There is a reference in the claimants' skeleton argument to the fact that if either of those routes to relief are refused then the claimants invite the court to direct a preliminary issue or give directions for a preliminary issue.
23. As far as the evidence is concerned, I have evidence in three witness statements from Mr. Tickner, the claimants' solicitor, and one witness statement from Mr. Horton in support of the Application and a witness statement from Mr. Norman dated 5th July 2022 in opposition.
24. I have also had the benefit of skeleton arguments and oral submissions on behalf of the claimants from Mr. Parker QC, leading Mr. Gardner, and from Mr. Cobill for the defendant.

### The Law

25. As far as the Application is concerned, the first issue is; “what is ‘an account’ for the purposes of the Application? That is, what is the nature of the account that is sought? In respect of that, it is not a financial set of accounts that for example have to be filed at Companies House. What is required is a narrative account by the trustee of his dealings with the assets under his or her control. That was explained by the then Chief Master Marsh in the case of *Ball v Ball* [2020] EWHC 120 Chancery, at chronologically re-numbered paragraphs 26-29, and in particular paragraph 27 of that judgment, where he refers to paragraph 11 the judgment of the Permanent Chancery Master Matthews, as he then was, in the case of *RNL v Headley* [2016] EWHC 1948 (Ch), where Master Matthews observed:

“There is some danger of misunderstanding here. When the books and cases talk about beneficiaries' “entitlement to accounts” or to trustees being “ready with their accounts” they are not generally referring to annual financial statements such as limited companies and others carrying on business (and indeed some large trusts) commonly produce in the form of balance sheets and profit and loss accounts, usually through accountants, and – in the case of limited companies – file at Companies House. Instead they are referring to the very notion of accounting itself. Trustees must be ready to account to their beneficiaries for what they have done with the trust assets. This may be done with formal financial statements, or with less formal documents, or indeed none at all. It is no answer for trustees to say that formal financial statements have not yet been produced by the trustees' accountants.”

26. In terms of whether that account should be ordered, I have to consider two issues: (i) is there a duty to account, and (ii) if there is such a duty to account whether an account should be ordered? That second limb is an exercise of discretion but the burden of that exercise of discretion is reversed, the court having to decide if there are good reasons why an account should not be ordered.
27. The factors to be taken into account in exercising that discretion are: (i) has an account been provided, (ii), if it has been provided is it an adequate account and (iii), the overarching factors that have to be taken into account when exercising a discretion to order an account.
28. Those overarching factors to be taken into account include:
- (i) the information in the fiduciary's possession, and to the extent to which that information has already been provided to the beneficiaries;
  - (ii) whether further information is required for the purposes of providing an account. By that I mean does the accounting fiduciary require further information before he provides a further or better account.
  - (iii) whether the account will serve a useful purpose; i.e. what are the reasons why it is being sought?

That analysis of the second limb was confirmed in *Al-Dowaisan v Al-Salam* [2019] EWHC 301 at paragraph 151:

"The court should have regard to the degree of accounting information that has already been provided, and the likely utility of any further accounting information. The court should also have regard to the reasons why an account is being sought and was being sought at the time the proceedings for an account were issued and it should therefore consider the motivation underlying the claim for an account. ...."

29. Turning then to the summary judgment part of the Application. The law in respect of this is not disputed. The test is as set out in the well-known judgment of Lewison J, as he then was, in *Easyair v Opal Telecoms* [2009] EWHC 39 at paragraph 15. In the context of an account the test is to be applied in the context of the law as confirmed by the then Chief Master Marsh in *Ball v Ball*, and in particular:

(i) at paragraph 31, where he sets out that a claim for an account against a fiduciary is usually dealt with on a summary basis and there is a low threshold;

(ii) in paragraph 23 he sets out what a beneficiary has to show, referring to his earlier decision in *Henchley v Thompson* at paragraph 62:

"I have earlier in this judgment made some observations about the nature of trusts and accounts. They are different to trading accounts for a business entity. In the case of the latter, the accounts, in accordance with accounting conventions, provide a balance sheet which gives a snap shot as to the asset position on a date and a trading report covering a period. Trust accounts, particularly where there are beneficiaries with interests which have not vested, must be able to show from period to period (the frequency of accounts is not fixed) how the trust assets have been dealt with, including what distributions and disposals have taken place. A beneficiary reading trust accounts must be in a position to assess whether the trust assets conform with the trust instrument, that the class of assets held is appropriate for the trust. The style of the accounts, and the level of detail provided will necessarily vary. The accounts produced for 1990 and 1991 may have been suitable for submission to the Inland Revenue, as it then was, for the purposes of assessing tax liability and providing a general summary of the trusts position. However, they were not suitable to provide a beneficiary with an adequate understanding of how the trustees had managed the trust assets in the relevant periods. If, as seems very likely, the accounts for the preceding periods were prepared in a similar form, I do not consider it can be said that at any time adequate trust accounts have been prepared. Nevertheless, the accounts went some way to providing the beneficiaries with relevant information and the 1990 and 1991 accounts certainly gave rise to questions which could have been asked. Indeed, it may well be that questions were asked because there is reference to the beneficiaries of The Childrens' Trust being unhappy at the time."

and;

(iii) Chief Master Marsh set out in paragraphs 23-25 how the discretion is to be exercised, stating that there might be other factors that need to be taken into account.

### Discussion and Decision

30. Turning then to the two limbs, dealing first with the duty to account.

31. The account that is sought is in respect of certain transactions, payment in or payment out of the claimants' bank accounts as set out in schedules 1 and 2 of Peters & Peters' letter of 10th February 2021 ("the 10th February 2021 letter"). Criticism was made of the fact that the transactions were not identified, either in the amended particulars of claim or in the Application itself, so as to be clearly obvious. That is a criticism that does not go very far for the following reasons;:

(i) the response to the request for an account was dealt with in the FAR report, which referred back to those two schedules; and

(ii) paragraph 18 of the particulars of claim and then the amended particulars of claim, refer back to the 10th February 2021 letter and refer to it as 'the particulars' of the request for a full account that was made.

There seems to be no misunderstanding that the request was made by 10th February 2021 letter, for the defence and the evidence in opposition to the Application both deal with the transactions as detailed in the 10th February 2021 letter. Further, the Application whilst not making an express reference to the 10th February 2021 letter, makes a reference to the FAR report, which as I indicated, deals with the request on the basis of the transactions in those two schedules.

### *Duty to account*

32. As far as the duty to account is concerned, there is no dispute that the duty is owed. Mr. Norman was a director of Select between 1st June 2016 to 17th August 2022. He admits that in paragraphs 8A-D and 12 of the amended defence. He was a director of Hortons Motorcycles from 1st March 2014 through to 1st December 2014 and then from 10th December 2016 to 29th June 2019. However, he also admits in paragraph 16.5 of his defence that he was a *de facto* director of Hortons Motorcycles at all relevant times and had control of the bank accounts from 2016.

33. In paragraph 16.1 of the defence Mr. Norman accepts that he had access to, and control of, the bank accounts of the property partnership. As I indicated during submissions, he held a fiduciary role in respect of the management of the finances of the three claimants separately and, to be fair, Mr. Norman through his counsel, Mr. Cobill, accepts that there is that duty to account.

### *Burden the beneficiaries have to discharge*

34. What does the beneficiary have to establish for the purposes of enforcing the duty to account? What the beneficiary has to establish is simply that there is a duty to account because he is a beneficiary; for as a beneficiary he is entitled as a right to have an account. The beneficiary does not have to establish a breach of trust, save to the extent it might involve a failure to account. That is made clear in paragraph 22 of the judgment

in *Ball v Ball* which I already have referred to. But the position is made perfectly clear in the earlier judgment I referred to in this judgment of Chief Master Marsh in *Henchley v Thompson* where he said at paragraph 61:

"The duty to account must also be seen alongside an obligation to keep and to retain records. Although it is perfectly acceptable for trustees, amongst themselves, to divide responsibilities such that one of the trustees is designated to be the record keeper, that does not absolve the trustees collectively from their duties to the beneficiaries. It is not an answer in this case, therefore, for the Defendant" -- in that case the defendant was a fiduciary -- "to say that he left record keeping to Doris Watson and he can, therefore, be absolved from providing an account because no documents have been retained."

35. It follows from that in my judgment that the fact that a beneficiary might have some knowledge of the transactions does not absolve the fiduciary from providing an account.

(i) The account is not to establish liability in respect of any misfeasance but it is to provide a narrative account of the fiduciary's dealings with assets so that the beneficiary can understand his rights and claims and liabilities or obligations.

(ii) The issue of liability and any compensation, to be clear, is not going to be decided by me and nothing I say in this judgment should be construed as making any findings on liability. Accordingly, for the purposes of an account sought in the Application, it is not necessary to decide whether or not Mr. and Mrs. Norton or the other directors of the first claimant, or the third claimant, were aware of a number of the transactions or the majority of the transactions.

(iii) Mr. Norman complains in his evidence that if an account is ordered, he is required to "show his hand" and provide disclosure prior to the claimants' giving disclosure and showing their hand. The simple answer to that is that, whilst that might be true, all he has been required to do is provide an account, which is part of his absolute obligation which he assumed when assuming the role of the fiduciary, regardless of fault or innocence on his part.

36. It follows in my judgment that there is no real dispute that stands a chance of success that there is a duty to account that is imposed on Mr. Norman.

*The exercise of the discretion*

37. The context of that exercise of my discretion is the nature of the account sought. It is an account in respect of the transactions detailed in the 10th February 2021 letter. In considering whether to exercise my discretion I have to look at whether an account has been provided.

*Has an account been provided*

38. Mr. Norman asserts that he has provided an account insofar as it is necessary and he relies on the FAR report for that. The claimants say that that is not a proper or adequate account as it fails to provide the information required by the claimants as beneficiaries



for them to be able to understand their liabilities and obligations as a result of Mr. Norman's dealings with their financial affairs and financial transactions.

39. In my judgment the FAR report is not an adequate account as required or required to be provided by a fiduciary. I come to that conclusion for the following reasons:

(i) the payments to be explained were identified in the 10th February 2021 letter and the requests for information with supportive documentation, or in old fashioned terms, vouchers to be provided, were set out in that letter. There were nine requests for information concerning the transactions by reference to the loans, the payees, the payers and the source and destination of monies. That letter was referred to and incorporated into the particulars of claim.

(ii) The report was a report by a forensic accountant. It was not an account by Mr. Norman. I accept however that if Mr. Norman verified that account then it could amount to an account provided to him. However, the difficulty with the report is evidenced by the scope and nature of the report as defined in the report itself.

40. That scope and nature is set out in numbered paragraph 3 of the FAR report that says that the author of the report had been instructed to provide:

"Assistance to Mr. Norman in respect of issues regarding loans and debts owing which relate to the above parties."

- The above parties are alleged loans from Stephen Crump, Dean Norman and APL Midlands Limited to Select Lifestyles Limited, so only one of the three claimants –

"In particular I have been asked to assist in responding to the request of further information made by Peters & Peters in their letter of 10th February 2021."

41. However, of concern is the extent of the exercise that was conducted by FAR Consultants. That is set out in paragraph 10 of the report under the heading "work undertaken". The sub-heading is: "Reconciliation of P&P schedules, to the bank statements provided" and it states:

"As an initial exercise I have sought to reconcile the transactions reflected in the P&P Schedules to the bank statement subsequently provided to me. I have identified a number of errors and inconsistencies described below."

42. That appears to be the main import of the FAR report. That is reflected in the report when it deals with various issues which are headed by sub-heading E to I. Many of those sub-headings simply are prefaced by the following phrase: "Based on the narrative provided by P&P schedules the transactions appear to be" and then sets out what the transactions appear to be. That is not an account that a fiduciary should be providing. The account that a fiduciary should be providing is a narrative account of his dealings pursuant to the fairly simple nine requests made in the 10th February 2021 letter.

43. The fact that the FAR report does not provide a proper and adequate account of the transaction is made clear by the analysis of one of the loans referred to in the body of the report; a loan to Black Country Pressing Limited (“BCP”). It is evident from paragraphs 36 through to 42 of the FAR report that there is an inconsistency and a failure to explain; (i) the differences between the true lender and the true borrower, (ii) the source of the funds that were channelled to the borrower said to be funds that should be attributed to the lender, and (iii) a failure to explain why various circuitous routes were used to channel the money from what is said to be the lender to the borrower.
44. Quite apart from that, those paragraphs; (i) fail to explain why it is said that a loan, which is said to be from BCP, should somehow be set-off against a loan that in fact was owed to APL Midlands Limited, and (ii) why there should be equal and opposite adjustments made in respect of what is referred to in the FAR report as ‘the APL loan’, justified on the basis that there was no net impact on the aggregate amount owed by what is said to be the borrower, Select. That analysis shows that there has been a failure to appreciate that each claimant was owed a duty to account. Each claimant was entitled to have the transactions explained by the fiduciary, Mr. Norman, so that it could identify to whom it is said it owed money rather than the global amount of what is said to be owing.
45. In respect of the BCP loan, it is of note that although it is said to be a loan to BCP, in Mr. Norman's amended defence, he at paragraph 31B asserts that this loan was in fact a loan from his father Ivan Norman and it appears to have founded the claim made by Ivan Norman in the Ivan proceedings.
46. In respect of that transaction, it is said that funds were channelled through the company called HFRUK Ltd, (“HFR”), a company that appears to have been dormant at the time. No explanation is given in the FAR report as to the involvement of HFR, and more importantly no documents supporting that transaction have been provided in the FAR report.
47. It follows that it is clear that the FAR report is defective in providing sufficient information, and given the evidence now contained in the witness statement of Mr. Norman dated 5th July this year, it is clear that he has not provided the documentation to support the narrative that is set out in the FAR report and which he was required to do. In his witness statement, he confirms that he has access to and possession of various statements of bank accounts in respect of entities that sourced the funds that are said to form the loans that were made to the claimants. Those statements have not been provided so as to verify the payments in and out of the bank accounts or to show the source of payments in and out.
48. As I indicated earlier, on the 17th May 2021, Peters & Peters expressed concerns about the adequacies of the FAR report and expressed other concerns. Rather than dealing with those concerns, Mr. Norman by his solicitors Tenet, sought instead to request further documents for the purposes of providing an account pursuant to the request that was made on 10th February 2021.
49. There are various other instances that show that the information contained in the FAR report is simply not adequate. Those are set out in the letter from Peters & Peters of 17th May 2021 and in subsequent correspondence. It would not assist this judgment to set out all of those discrepancies. What is of note however is when those discrepancies

were raised, no effective response was received from the defendant's solicitors to deal with those legitimate concerns.

*Absence of information*

50. Is the defendant, the fiduciary, hindered from preparing an adequate account because he suffers from an information deficit in the sense that he does not have the necessary documents?
51. Whilst various requests have been made for documents, those requests have now been narrowed to five categories:
- (i) the bank statements of the claimants and in particular the HSBC statements in respect of the bank accounts for the property partnership account number 81398156 and Horton Motorcycles account number 51873601;
  - (ii) the bank statements of Mr. and Mrs. Horton's personal bank accounts;
  - (iii) e-mails in Mr. Norman's Select e-mail account;
  - (iv) the e-mails in Mr. Norman's e-mail account; dean@dnsa.co.uk; and
  - (v) the e-mails in Mr. Horton's Select e-mail account.

I will take each of those categories in turn.

52. As far as the bank statements of the claimants are concerned, the claimants say they provided all the documents that have been sought insofar as the bank accounts of the claimants are concerned. In respect of the HSBC statements that are now sought, while the issue was raised in paragraph 9 of the FAR report, no request was made for those documents as evidenced by the correspondence, including the letter from Tenet dated 26th May 2021. The response to Tenet's letter dated 26th May 2021 from Peters & Peters dated 14th June 2021, amongst other matters, asked whether there was any other documentation that was needed, indicating that the claimants were prepared to provide documents, providing justification was provided for any request. The response was a letter of the 17th June 2021 from Tenet. Again there was no such request in that lengthy letter from Tenet which made various requests for other documents.
53. The defendant's position, as set out in that letter of 17th June 2021, for all the bank statements simply says:
- "... your clients will know full well why all the documentation/information has been requested. The reason being that this will evidence that not only were your clients aware of, but they authorised all loan agreements and also had visibility as to why the financial transactions in question were undertaken ..."
54. In my judgment, that explanation does not go to the issue. The issue is not whether the loans were authorised or not, but whether the documents are necessary for providing the account. Absent any targeted request for other bank statements other than those provided, in my judgment, there is no hindrance to Mr. Norman providing an account,

without further bank statements, save for the HSBC statements in respect of the two accounts identified. I direct that insofar as those statements are available, then they should be disclosed to Mr. Norman. If they are not available, reasons should be provided as to why they are not available.

55. In my judgment, however, the failure to provide those HSBC bank statements did not prevent Mr. Norman from providing an account, as at no stage did he request those documents until referring to them in his witness statement of 5th July 2022.

56. The next category are the personal bank statements of Mr. and Mrs. Horton. On 26th and 31st March 2021, by way of e-mails, Peters & Peters provided redacted copies of the bank statements of the personal accounts of Mr. and Mrs. Horton in respect of four specific transactions, as had been requested. What is now sought is a wholesale disclosure of the bank statements of Mr. and Mrs. Horton without any targeted request. In my judgment such a wide ranging disclosure of bank statements was not necessary for Mr. Norman to produce his account.

57. The next category is the e-mails from Mr. Norman's Select e-mail account. This is a request for all his e-mails in that account. The claimants' position is that that would require disclosure of commercially confidential and sensitive material and that is evidenced by the wide ranging nature of the request. They made it clear in correspondence that if there was a targeted and justified request, then the request would be considered. In the letter dated 17th June 2021, Tenet on behalf of Mr. Norman said that disclosure of those e-mails were required 'to show conversations with your clients', (by that they meant the individuals behind Peter & Peter's clients), and various other internal/external stakeholders specifically in relation to the loans and also requests for him to perform various financial duties. It was summarised succinctly by Mr. Cobill, on behalf of Mr. Norman to say what was being sought were documents that showed the instructions given to Mr. Norman.

58. In my judgment, disclosure of those e-mails is not necessary for Mr. Norman to provide an account for;

(i) the justification given for such disclosure goes to the issues of liability for any misfeasance, not the obligation to account. In other words whether there was authorisation for the steps taken or the transactions entered into by Mr Norman on behalf of the claimants; and

(ii) it is a wide ranging request which is far too wide and, absent a specified or targeted request and reasons for justifying properly why those e-mails are required.

The absence of those e-mails will not hinder Mr. Norman from providing that account.

59. There is then a request for e-mails to Mr. Norman's account at dean @dnsa.co.uk. This fourth category, is a request for the e-mails from nine accounts to that address. This is an odd request because it concerns e-mails that Mr. Norman has received. There is no justification for this request, which is obviously wide ranging, other than to say on his behalf. orally during submissions, that Mr. Norman may not have access to that e-mail account. That is an odd statement to have been made so late in the day, particularly as the issue of the request for disclosure of those e-mails to that particular e-mail address has been dealt with in correspondence in a whole series of letters since the 17th June

2021, and not once has it been suggested that Mr. Norman does not have access to that account or that his inability to access that account prevents him from providing the account. In my judgment, quite apart from the reasons I gave in respect of category 3 documents, those documents are not necessary for Mr. Norman to prepare his account.

60. The fifth category of documents are e-mails from Mr. Horton's Select e-mail address. That request was raised for the first time in the defence and counterclaim, after the FAR report had been produced. It was not thought that those emails were necessary to produce the account at an earlier stage. That defence and counterclaim was served on or around 10th January 2022, some considerable time after the FAR report. In any event, absent a targeted and specified request with reasons justifying why specific e-mails are required, there will be no purpose served in terms of proportionality or otherwise for those e-mails to be provided for the purposes of Mr. Norman providing his account.
61. For those reasons, it is my judgment that the documents requested by Mr. Norman did not hinder him producing an adequate account as required pursuant to his duty to account as a threefold fiduciary. Whilst I have concluded that limited HSBC bank statements should be provided, the absence of those statement did not, prior to Mr Norman's witness statement, appear to be something that hindered the production of the FAR report. However, those bank statements should be provided so as to facilitate, at this stage, any account that is provided.

*Utility of the account*

62. The major factor I have to take into account in respect whether I should exercise my discretion, is the utility of the account. In my judgment, it is perfectly clear that to enable the claimants to ascertain their liability and obligations and/or their rights, it is necessary for there to be an account and consequently there is a real utility for an account.

*Other factors*

63. Finally, in terms of my discretion, are there any other factors that I should take into account. I do take into account the following factors: First, the recent service of the evidence of Mr. Norman in respect of this application. This application was issued on 14th April this year. There was a case management conference in the interim on 25th May. On 17th June this year Peters & Peters sent a letter asking Mr. Norman to justify any request for further documents. There has been no response to that letter either in Mr. Norman's witness statement nor in the skeleton argument served on his behalf on Monday this week. That in my judgment shows a failure to engage in the accounts process.
64. Secondly, in terms of proportionality, significant costs have been incurred. Significant costs would also be incurred in any subsequent litigation between the claimants and potential creditors if an account is not provided. Those costs will multiply because if an account is not provided, the claimants, I suspect, will be forced in respect of each such claim to join Mr. Norman as a Part 20 defendant. The account in my judgment will save significant amount of those costs and court time.

65. Thirdly, I take into account the fact that Mr. Norman failed to answer requests for information that would have required no documentary evidence and, in particular, I refer to the requests set out in the letter from Peters & Peters dated 14th July 2021. They were some belated answers in Mr. Norman's witness statement of 5th July this year but with no explanation as to why those answers could not have been provided earlier, either as part of the accounts process when producing the FAR report or subsequently when the deficiencies of that report were pointed out in Peters & Peters letter of 17th May 2021.

#### Conclusion

66. For those reasons, I come to the conclusion that there is no reasonable prospect of Mr. Norman resisting or the court not exercising its discretion to order an account and there is no other reason why the provision of an account in the form sought should not be ordered.

#### *Order*

67. As far as the order is concerned, during the course of submissions, I indicated that the account which is to be verified by an affidavit could include a provision in the order that the transactions required to be accounted for are those referenced in the two schedules of the 10th February 2021 letter, or if necessary an updated schedule. There should be an express reference to that, though I accept there is a reference to the 10th February 2021 letter by reason of the reference to the FAR report.
68. The only other matter I propose to deal with in this judgment is the fact that the claimants seek to attach a penal notice to the order. On this occasion, it is my provisional judgment, and I am happy to hear further argument on this if necessary, that as the account is to be verified by an affidavit, there is no need for there to be a penal notice attached to the order.

#### Interim order

69. I deal very briefly with the alternative application for an interim order. I should say before I deal with that aspect, that while summary judgment is sought in respect of one aspect of the claim, and a very narrow aspect of the claim, no issue has been taken that this court should not entertain a summary judgment application in respect of a specific issue, as opposed to summary judgment on the whole claim. It seems to me that no issue was taken on that potential issue for good reason, for dealing with this narrow issue is proportionate and in accordance with the overriding objective. Although there are recent judgments that suggest that the court should be cautious when dealing with summary judgments on particular issues, in this particular case I am satisfied that it was appropriate for the application to be made and is appropriate for summary judgment to be granted, on the narrow issue.
70. Turning then to the interim order application. If I had not granted summary judgment, I would have made an order for an interim account in similar terms. For the purposes of an interim order, while it would have been preferable for the claimants to expressly refer to the relevant sub-paragraph of CPR 25.1, the absence of such express reference would not have prevented the court from exercising its case management powers and if

necessary I would have granted permission to amend the application now and dispense with service to include express reference to the relevant sub-paragraph.

71. Finally, if I had refused both of those aspects of the relief sought by the claimants, I have to consider whether I would have given directions for a preliminary issue. It is not part of the Application, but in any event if I had come to the conclusion that summary judgment and/or an interim order was not appropriate, I cannot see any good reasons why I would have ordered in those circumstances a preliminary issue. Although the claim is not brought by way of a part 8 claim in respect of this account, for the obvious reason that it sought relief in addition to the provision of an account which would have necessitated in any event a part 7 claim, it is clear from the authorities that an account by a fiduciary should be dealt with on a summary basis.

### **JUDGMENT ON PENAL NOTICE**

72. I had indicated provisionally in my judgment that I was not minded to attach a penal notice to the order that I made. I have heard submissions from Mr. Parker QC, who seeks to argue that a penal notice should be attached to the order on the basis that Mr. Norman has failed to provide an account for well over a year, despite the deficiencies of the FAR report, which he said had being pointed out to in correspondence, in this application and the evidence in support.
73. In my judgment the attachment of a penal notice is not necessary at this stage.
74. Mr. Norman will have the benefit of my judgment. I have indicated clearly that in my judgment the FAR report is not a proper account. He is a fiduciary who knows his obligations, which have been admitted openly both in his witness statement and via his counsel. He knows his obligations to provide an account.
75. What I do say is, if there is a default in complying with the order for providing the account, as opposed to what might be considered to be failing to provide a further adequate report, then I give permission for an application to be made, if so advised, to be considered without a hearing, for a penal notice to be attached to the order, without prejudging any view that another judge might take as to the attachment of the penal notice and/or whether it should be dealt with without a hearing or requires a hearing.

### **JUDGMENT ON COSTS**

76. I have inevitably to deal with the issue of costs. As far as the principle of costs is concerned, it is said on behalf of the claimants that they are entitled to their costs on the basis that they won the Application. The defendant says that the costs of the Application should be reserved because in due course it may turn out that his version of what the claimants, by their individual agents, knew may turn out to be correct.
77. As far as the principle of costs are concerned, there are two aspects of costs which should be differentiated. The costs of and occasioned by the Application and the costs of the provision of the account, i.e. the production of the account itself. I am not dealing with the costs of the provision of the account. That will no doubt form the basis of any costs in the claim itself and will be for another judge to deal with.

78. In this case, in simple terms, the claimants have won their application, there has been a requirement that they provide information, not as Mr. Cobill says for information if the HSBC accounts exist, but if the bank statements are currently available, then there will be a provision in the order for the claimants to provide those documents in a certain number of days.
79. In my judgment the incidence of costs should follow the event of the disposal of the Application and there is no good reason why the costs should not follow the event. So as a matter of principle the claimants are entitled to their costs of and occasioned by the Application, save for one matter which I referred to earlier.

#### JUDGMENT ON INDEMNITY COSTS

80. The claimants make an application for costs on an indemnity basis rather than on the usual standard basis. The test is well known, the issue is a matter for the court's discretion, exercised on the basis that the conduct of the litigation has been 'out of the norm'.
81. The claimants make effectively three points, and the third point has various sub-points. (i) The first point is that despite saying that he was going to provide an account, the fiduciary defendant has failed to provide an account and continued to oppose providing a further account, even seeking a dismissal of the Application. (ii) Secondly, he continued to rely on the FAR report, despite the obvious criticisms set out in correspondence from the claimants' solicitors pointing out the inadequacies of that report, and that the defendant failed to engage. That failure to deal with the issues raised in respect of that account shows that his conduct has been unreasonable; (iii) Thirdly, and I simply summarise the submissions made on behalf of the claimants on this point; that the purported need for documents before providing an account was not made in good faith, and in any event the conduct has been unreasonable evidenced by four categories of conduct:
- (i) That Mr Norman has changed from time to time the requests he made and makes requests and then abandons them, and has introduced new requests;
  - (ii) he made requests for documents on grounds that were clearly unsustainable;
  - (iii) that he failed to engage reasonably and proportionately with the claimants to justify the requests for documents and provide targeted requests and by that conduct he was unreasonable taking his conduct out of the norm; and
  - (iv) that over a year after the request was made for certain documents he then asks for e-mails to his own account on the basis that he might not have access to his account.
- Those, it is said, were not legitimate responses to the invitation provided in the correspondence by the claimants to provide reasons why he needed those documents.
82. In my judgment, the stance taken by the defendant, as I have found, was not a proportionate or reasonable response to the position of the claimants as explained in correspondence from the claimants and/or in the Application and the evidence in support.



83. However, I do not find that the actions he took were taken in bad faith. These were hard fought proceedings which have involved substantial expenditure of money and time. That has resulted, in my judgment, from a misplaced view the defendant took of his position as fiduciary. I do not find that the position he took was a position taken in bad faith. Equally, while his actions have been disproportionate and not reasonable in the context of being a fiduciary, I do not find his conduct was such that it was 'outside of the norm'. Although I do accept that he came pretty close to over stepping the mark, his conduct was not such that takes him over the line, requiring an order for indemnity costs.
84. By coming to that conclusion I acknowledge that an imposition of an indemnity costs order is not a mark of punishment but is supposed to reflect the conduct.
85. I conclude that the appropriate order is that the costs should be assessed on a standard basis. I propose to make an order that there should be a detailed assessment and that there should be a payment on account.
86. I also order insofar as the costs of the recent witness statement, the fourth witness statement of Mr. Tickner, is concerned, the claimants are not to have the costs of that witness statement.

#### **JUDGMENT ON PAYMENT ON ACCOUNT**

87. I am asked to deal with a payment on account. As is consistent with this litigation that has resulted in argument. The schedule of costs, with a statement of truth, ask for £86,000-odd. Whilst I have regard to the hourly rates, that is matter for detailed assessment, but I do take into account the guideline rates.
88. This was clearly a case where the claimants have been involved in a great deal of effort in producing the evidence for the purposes of this hearing and have necessarily incurred substantial costs. The claimants ask for £66,000-odd on account. The defendant says it should be something in the region of £40,000-odd - less than 50% of the sum claimed.
89. In my judgment, the appropriate order is £65,000. That is a figure I had in mind. I see no reason not to make that order. That is an order in respect of the costs of the claimants' jointly. There is no suggestion that it should be divvied up between the claimants. They are joint and severally liable to repay that sum if there is an overpayment.
90. The second defendant is a partnership with individuals partners . I really see no force in the argument that they will not be able to repay any overpayment.
91. A point was made, and caused me to raise my eyebrows, insofar as anyone can see my eyes being raised on a remote hearing, that while the claimants are not paying the loans that have been made, there should not be a payment on account. The whole purpose of the Application, is to allow the Claimants to establish the extent of their liabilities on the said loans. I come to the firm judgment that the sum should be £65,000 payable on account.
92. In my judgment, on the evidence I have seen and the information provided to me, I see no real risk that the claimants will not be able to repay that sum in the event that on a detailed assessment, it is found that a smaller sum is due under the costs order.

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**This judgment has been approved by the Deputy Master.**