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Claim Number: BL-2020-000633

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

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

Date: 12 October 2022

Before : Caroline Shea KC

B E T W E E N:-

JAMES MARTIN KEKWICK

Claimant

-and-

**(1) DR CHRISTOPHER ALAN KEKWICK
(2) STUART HUTSON**

**(as Trustees of the Settlement dated 29 April 1985 between Joan Amber Kekwick and
James Martin Kekwick)**

Defendants

Paul Clarke (acting by direct access) for the **Claimant**
James McCreath (instructed by Blanchards Bailey) for the **Defendants**

Hearing dates: 7 – 8 July 2022

Background

1. The Claimant (to whom I shall refer to by his first name, James, in order to avoid confusion with the First Defendant who bears the same surname) is the beneficiary under a trust (“the Trust”) settled by his late mother Joan Kekwick (“Joan”) on 29 April 1985 pursuant to a trust deed of that date (“the Trust Deed”). Originally, James and Joan were the trustees of the Trust, and the beneficiaries comprised a wide class of individuals. The only asset of the Trust was the family home (“Braemoor”) located in Witley, Surrey. The Trust was a discretionary trust during Joan’s lifetime, with an absolute trust in favour of James on her death: clause 5 of the Trust Deed.

2. James purported to resign as trustee in 2002. Although I am told that resignation was ineffective, in any event title to Braemoor was transferred back into Joan's sole name on 20 February 2002. In November 2002 James left the family home following a money judgment against him dated 28 November 2002 arising from a dispute with builders who had performed works at Braemoor. It is understood that James never saw Joan again. His subsequent letters to his mother, or at any rate those included in the materials before me, focussed heavily on his need for money.
3. Joan became unwell in 2007 after injuries sustained from a fall. Thereafter her health declined. In James' absence, responsibility for Joan's care fell on Dr Kekwick, her nephew, who lives in Devon. It became necessary to sell Braemoor in order to fund care for Joan, initially at home, and from 7 March 2008 in a nursing home to which she had been admitted. By deed dated 30 June 2008, Dr Kekwick and the Second Defendant ("Mr Hutson") were appointed trustees (together, "the Trustees") of the Trust. Dr Kekwick agreed to take the appointment reluctantly, and only because no one else, including James, was able or willing to assist in the administration of the Trust. At Dr Kekwick's request, Mr Hutson, a long-standing solicitor acquaintance of Dr Kekwick, was appointed as a second trustee. Braemoor was sold on 31 October 2008 for £508,555. Joan died on 29 January 2009, at which point James became the sole beneficiary under the Trust.
4. Between then and now, and for reasons which I will come to explore in more detail, the net proceeds of sale, originally some £497,414.51 ("the Trust Fund"), have not been distributed to James. There have been three broad issues relating to distribution. First, after Joan's death, it was not known to what extent if any inheritance tax would be payable out of the Trust Fund, and the Trustees had been advised not to distribute until that tax liability had been established. It was not until a letter dated 5 March 2015 that Hart Brown was notified by HMRC that no tax was payable on either the Trust or the estate (an earlier letter of 2013 containing this information was seemingly never received by Hart Brown). Secondly, there has been considerable concern on the part of the Trustees to confirm James' identity and address, and that information has never been established to their satisfaction. Thirdly, for a period of time, the Trustees, again on legal advice, were seeking a form of discharge from James relieving them of liability for any breach of trust, an indemnity which James was not willing to give, and which the Trustees now accept he was not obliged to give. The failed attempts by the Trustees and James to reach agreement on the issues between them have meant there has been no distribution of the Trust Fund.

Procedural history

5. On 16 April 2020 James issued a Part 8 Claim Form seeking directions pursuant to CPR 64(2)(a); a payment on account out of the Trust Fund and disclosure of documents relating to the Trust and the Trustees' dealings in relation to the Trust; alternatively a prospective costs order under CPR PD 64A; and permission to apply for further relief following consideration of the documents disclosed in the event that the parties were unable to agree the final sum which should properly be held on account by the Trustees. The original Claim Form included no address for James, in breach of CPR PD 16.2.2 and 16.2.5. James issued an Amended Claim Form on 30 July 2020, providing an address in Latvia.

6. By Acknowledgements of Service dated 13 August 2020, the Trustees each gave notice of intention to contest the claim, and to bring a counterclaim. The Endorsement for Counterclaim sought an account to be taken of the Trust Fund and the amount due to be paid to James to be ascertained; directions on the matters of ascertaining the identity of James and the form of indemnity if any which the Trustees were entitled to require from him; further or other relief; and an order that the Trustees' costs of the counterclaim be paid out of the Trust Fund.
7. On 16 November 2020 a hearing took place before Deputy Master Nurse, in which the Trustees were granted permission to bring a counterclaim in those terms. It was also ordered that an account be taken of the monies due from the Trustees. Further, it was provided that an interim distribution from the Trust Fund in the sum of £50,000 should be made to James on condition that James served on the Trustees a copy of his passport or driving licence; documents proving his address; details of the bank account into which payment should be made; and a declaration that no one else had any claim to the Trust Fund and that he knew of no other pending claims. James has not served those documents and no interim payment has been made.
8. On 27 November 2020, the Trustees filed an account showing a total of £358,293.89 in the Trust Fund. On 14 October 2021, pursuant to the order of Deputy Master Nurse dated 16 November 2020, James gave Notice of Objections to the account ("the Notice of Objections"), objecting to (in summary) (1) alleged excessive legal costs; (2) the fact that the Trustees had failed to invest the Trust Fund; (3) the fact that the Trustees had failed to advance the Trust Fund or any part of it; and (4) the fact that the Trustees had allegedly failed to obtain a proper sale price for Braemoor. That Notice of Objections was said to supersede two earlier documents ("the Written Notices"), one of December 2020 entitled "Written Notice of Objections", the second of January 2021 entitled "Additions to Written Notice".
9. Following a hearing before Master Kaye on 26 October 2021, it was ordered that the following five preliminary issues ("the Issues", and individually "Issue (1)", and so on) be determined.
 - (1) Which, if any, of the objections contained in the Notice of Objections are time-barred by the Limitation Act 1980 ("the 1980 Act").
 - (2) Whether and to what extent James' challenge to the legal costs set out in paragraphs 6 – 8 of the Notice of Objections should be referred for assessment, and what directions should be given for an assessment (it being agreed that in principle the Court may order such an assessment).
 - (3) Whether the letter from James dated 29.05.09 and/or the opinion of David Rowell dated 29.06.11 provide the Trustees with a defence to the allegations in paragraph 9 - 11 of the Notice of Objections.
 - (4) Whether the Trustees were in breach of trust in failing to pay James the Trust Fund or advance sums from it, as alleged in paragraph 12 of the Notice of Objections, and if so, what losses as a matter of law are in principle recoverable in respect of such breach, and whether the Trustees should be granted relief under section 61 of the Trustee Act 1925.
 - (5) Whether the Trustees were in breach of trust in failing to maintain Braemoor and to present it in best condition to maximise the sale price, as alleged in paragraphs 13

and 14 of the Notice, and if so, whether the Trustees should be granted relief under section 61 of the Trustee Act 1925.

10. In accordance with directions, James served his evidence on 27 January 2022. Notwithstanding the Trustees giving notice that they wish to cross-examine James, James has indicated he will not attend for cross examination. James served a further witness statement dated 27 June 2022. No point is taken by the Trustees that no permission has been given for this second statement. Rather they submit that no weight can be given to any of James' evidence because of his refusal to submit to cross-examination. Statements from Dr Kekwick and Mr Hutson were served, and reference was also made to Dr Kekwick's first statement in support of the Trustees' counterclaim for an account. Dr Kekwick was cross-examined at the hearing of the preliminary issues, but no notification was given of any desire to cross examine Mr Hutson, whose evidence accordingly stands unchallenged.
11. James attended the remote hearing (although his camera remained switched off, his identity was confirmed by Mr Clarke, his counsel), but declined to make himself available for cross examination. I have given James' evidence no weight, since it has not been tested, and no reason good or otherwise was given for his refusal to submit to cross examination. Having said that, there were few if any relevant factual disputes, and none which played any significant part in the reasoning or evidence which have led to my determination of the Issues.
12. James has indicated that for the purposes of this hearing he accepts that the allegations relating to Issue (5) are time-barred, and generally that he is prevented from making any claim in respect of breaches dating from before 16 April 2014, being six years before the date of issue of the claim form on 16 April 2020. However, both in his skeleton argument and in submissions made on instructions by Mr Clarke, James purports to "reserve his position on this issue". This is an untenable position for James to attempt to take. Issue (5) was ordered to be determined at this hearing, and it is not possible procedurally or logically for James to accept it for the purposes of this hearing whilst also "reserving his position". Neither has James made any application to adjourn the determination of issue (5). His acceptance that the allegations relating to Issue (5) are time-barred is and will remain binding on him; there can be no question of his being entitled to revisit this at any point in the future. I shall consider the remaining four issues in order.

Issue (1): Which of the objections are time-barred?

13. The scope of the first issue has narrowed following the (as I have held, irrevocable) acceptance by James that breaches of trust occurring more than six years before he brought the present claim (on 16 April 2020) are time-barred. Remaining for determination is the question whether any of the procedural steps taken subsequently have been effective to stop time running in respect of the breach of trust claims. Related to that is the question whether James should be granted permission to re-amend the Amended Claim Form so as to include claims for breach of trust.
14. The position as regards limitation is governed by section 21(3) of the 1980 Act ("section 21(3)") which provides:

"Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not

being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.”

15. It is uncontroversial that the cause of action for breach of trust accrues at the date of the breach of trust: *Thorne v Heard* [1894] 1 Ch 599. Accordingly, James as beneficiary is barred from bringing “an action” in respect of any breach of trust on the part of the Trustees taking place more than six years prior to James bringing the action. “An action” is defined at section 38(1) of the 1980 Act (“section 38(1)”) as including “any proceeding in a court of law ...”.
16. James’ case is that time stopped running pursuant to any one of a number of steps taken in the litigation, each said (in a series of alternatives) to qualify as the bringing of an action by James for the purposes of section 21(3). First in time is the original Claim Form issued on 20 April 2020. Second in time is the Trustees’ counterclaim for an account issued shortly after and pursuant to the order of Deputy Master Nurse on 16 November 2020, on the basis that the claims for breach of trust are “part and parcel of the claim for an account”. Third in time is either 21 December 2020 or January 2021 when James filed the Written Notices and alleged breaches of trust. Fourth and last in time is 14 October 2021, being the date on which James served the Notice of Objections, which stands as a replacement for the Written Notices, and which provided some particulars of the alleged breaches of trust. In the alternative to any of these dates, James submits that if necessary the existing Amended Claim Form can simply be re-amended to include the breach of trust claims. James has accordingly brought an application to re-amend the Amended Claim Form to include such claims, the effect of which, it is submitted, would be that the breach of trust claims would fall to be treated as if made in the original claim form on 20 April 2020; alternatively, at the date such application is granted.
17. The Trustees’ case on this issue is as follows. Time is still running, on the basis that no action has been brought by James in respect of the alleged breaches of trust within the meaning of section 21(3). The Amended Claim Form, whilst qualifying as “an action”, is not an action “in respect of breaches of trust”, because it merely seeks directions and makes no reference to any breaches of trust. Next, the order of Deputy Master Nurse dated 16 November 2020, that an account be taken of the monies due from the Trustees, is not an “action” within the meaning of section 21(3), for two reasons. First, it was an order made as to a counterclaim brought by the Trustees, not by James, and so fails the requirement that the action be an action brought “by a beneficiary”. Second, in any event the account sought by the Trustees is nothing to do with any breach of trust. Indeed, the Trustees deny any breaches. So neither that order, nor the counterclaim itself seeking an account, qualify as an action in respect of any breach of trust by a beneficiary. Finally, the allegations of breach of trust made by James in the Written Notices and the Notice of Objection are not made in “an action” within the meaning of section 21(3). In order to qualify as “an action”, it is said that James must take a further step, namely, the issue of a claim for a payment of the amounts he says are due, including the amount which he says is due by reason breach of trust.
18. I have no hesitation in rejecting the submission that the commencement of the claim on 20 April 2020 satisfied the requirements of section 21(3). Although it is an action brought by James, the relief sought in the claim form makes no reference, nor can one be

implied, to any alleged breach of the trust. Rather what is sought are directions for payments, disclosure, a prospective costs order, and permission to apply for further relief. On no view can this be interpreted as an action in respect of any breach of trust. The highest it could be put is that the relief was sought (partly) in order to equip James to determine whether or not there had been a breach of trust. That is not sufficient.

19. The next step in time relied on by James is the counterclaim brought by the Trustees for an account following the hearing before Deputy Master Nurse on 16 November 2020. There are two reasons in my view why the counterclaim also fails to qualify within the meaning of section 21(3). Firstly, although the counterclaim qualifies as an action, it is not an action brought by the beneficiary. Secondly, the counterclaim itself does not make any claims in respect of any breach of trust. I accept the submission on behalf of James that the taking of an account is capable of opening the door to allegations of breach of trust; and that determining whether there had been any breach has the capacity to become an integral part of the process of taking the account. But it still requires any such claims to be made (“brought”, in the language of section 21(3)), in the absence of which the “action” in question remains merely the taking of an account. It cannot in my view sensibly be said that the counterclaim is brought “in respect of any breach of trust”.
20. Nor is that outcome affected by the order of Deputy Master Nurse requiring James to file and serve a written notice “setting out his objections to the account”. Again, whilst paving the way for any allegations of breach of trust, objections can be made to an account without necessarily involving allegations of breach of trust. The mere order did not operate to commence any action or process brought by James in respect of any breach of trust.
21. The next steps in time relied on by James are the Written Notices, both expressed to be “pursuant to Practice Direction PD 40A, 3.1”. In terms of their content, in the December Written Notice, express reference is made to “further breaches of trust”, following a list of matters of which complaint is made. The listed matters are not expressly identified as breaches of trust, though the express reference that follows makes it clear that that is what is being alleged. The January Written Notice does not make express reference to breaches of trust, but the items listed as complaints (1) clearly qualify as breaches of trust and (2) can be interpreted accordingly following as they do the express reference in the December Written Notice to which the January Written Notice is said to be “additional”. So the Written Notices are generated (“brought”) by James, and they are so brought in respect of alleged breaches of trust. In order to determine whether this brings the Written Notices within section 21(3), so as to stop time running, the remaining question is: do the Written Notices qualify as an “action” for the purposes of section 21(3), the definition of which includes “any proceeding in a court of law”?
22. On the question of the meaning of the words “action” and “proceeding”, I was taken to the decision of the House of Lords in *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, at 1446, where Lord Simon stated:

“The primary sense of “action” as a term of legal art is the invocation of the jurisdiction of the court by writ, “proceeding” the invocation of the jurisdiction of the court by process other than writ”.

Whilst the legislative context is different, in my judgment the approach taken to the meaning of the two terms holds good when considering their meaning in the 1980 Act.

Lord Simon had regard to the fact that the Companies Act 1948 was a statute dealing with technical matters, and that one would expect the words therein to be used in their primary sense as terms of legal art. In my view, the same can be said of the 1980 Act. Those terms of legal art had been considered with some precision by Lord Simon within three years of the enactment of the 1980 Act, and the 1980 Act is also a statute dealing with technical matters. It follows that the terms as used in the 1980 Act are properly interpreted in the same way as they were interpreted by Lord Simon, and I adopt his definition of them.

23. The Written Notices are clearly not an action, in the sense of being an invocation of the court's jurisdiction by writ, and James does not contend otherwise. He must therefore rely on the Written Notices being a proceeding, that is to say, an invocation of the court's jurisdiction by process other than writ. This is the only hook on which James could possibly hang any argument that the Written Notices are a proceeding in the requisite sense of that word. The Written Notices were produced pursuant to Practice Direction PD40A, paragraph 3.1, which provides (to summarise) that any party who wishes to contest the amounts in, or the accuracy of, an account, must give written notice to be a counterparty of his objections. By paragraph 3.2, the complaining party must inter alia "give the grounds on which the contention is made". The grounds relied on by James are that the issues arise by reason of breaches of trust on the part of the Trustees.
24. In my view, the mere fact that the grounds given for the objections are that they arise as a result of breaches of trust is not sufficient to invest the Written Notices with the quality of "a proceeding" in the sense of "the invocation of the jurisdiction of the court by process other than writ". Further, on James' own argument, the ability to raise breaches of trust is inherent in any action for an account; and that action was brought not by James but by the Trustees. The fact that James appears to be looking to claim damages consequential on those alleged breaches is another telling factor; it would be a strange outcome if damages could be awarded to a party without any originating process having been commenced in respect of breaches (or other cause of action) that would justify an award of damages (and as Mr McCreath, counsel for the Trustees pointed out, without any court fee having been paid). Taking all these factors into account, my conclusion is that neither of the Written Notices are properly viewed as the invocation of the court's jurisdiction by a process other than by writ; therefore neither qualifies as a "proceeding" within the meaning of section 38; and neither therefore is an "action" brought by James in respect of the alleged breaches of trust for the purposes of section 21(3).
25. It was submitted on behalf of James that this analysis involves an unjustified standing on procedural niceties, since the claim for an account has already been made, and breaches of trust are to be considered as part and parcel of the account. In his reply, Mr Clarke further relied on a passage in Lewin on Trusts, 50 - 043-044, approved in the case of *Barnett v Creggy* [2014] EWHC 3080 (Ch), concerning the effect of section 23 of the 1980 Act, which distinguishes between an account on the one hand and an order for payment of what is shown to be due on the taking of the account on the other. It is suggested that the effect of these paragraphs is that it is not required to issue a separate claim form for relief once an account has been ordered, since a trustee cannot be deprived of a limitation defence available to him. I do not accept that the passages in Lewin bear the weight sought to be placed on them. I agree with the submission on

behalf the Trustees that, merely because James is entitled to bring an objection based on breach of trust, it does not follow that when the account is finalised the Trustees will be liable to pay any equitable compensation. In order for that to happen there needs to be a claim; James has not yet made one.

26. Neither does it assist James, as was submitted, that the Trustees have been aware that James was contemplating bringing a breach of trust claim, and that he would be likely to identify the breaches in his Notice of Objections. Such knowledge cannot dispense with the statutory requirement that, in order for time to stop running, an action, or proceeding, must be brought by the beneficiary in respect of the alleged breaches of trust. This is a question of the correct interpretation of a highly technical statute, and consequences of that interpretation cannot be jettisoned on the grounds it involves a “procedural nicety” which can be ignored.
27. The same conclusion applies, for the same reasons, to the Notice of Objections which supersedes the Written Notices. It follows that none of the procedural steps taken by James in these proceedings qualify as an action by him in respect of breaches of trust. Accordingly, time has not stopped running, and the Trustees have a limitation defence to any cause of action accruing prior to six years before an action is brought by James in respect of the alleged breaches of trust.

Application to amend

28. In anticipation of this outcome, James has brought an application dated 25 February 2022 for permission to re-amend the Claim Form, to seek relief arising from what are said to be the Trustees’ breaches of trust in: failing to distribute the Trust Fund; failing to invest the Trust Fund; and unreasonably incurring legal costs. James seeks compensation for breach of trust, assessment or moderation of the legal fees incurred by the Trustees, replenishment of the Trust Fund, and further or other relief.
29. The Trustees’ resistance to James’ application is threefold. First, it is said that the effect of the relation back provisions under the 1980 Act would be to deprive the Trustees of an arguable limitation defence, and accordingly no amendment should be allowed. Secondly, it is said that the claims have no reasonable prospect of success. Thirdly, it is said that the new claims are wholly unparticularised: for example, it is alleged by James that numerous requests have been made to distribute the Trust Fund, but no particulars of those requests have been provided.
30. The strongest of these objections is the first, which seems to me wholly right. By section 35(1) of the 1980 Act (“section 35(1)”), any claim is deemed to be a separate action and to have been commenced on the same date as the original action. Where the court considers that a defendant has a reasonably arguable case on limitation, and the limitation question has been decided in the defendant’s favour as a preliminary issue, the application to amend will be refused, and the claimant’s remedy will be to issue separate proceedings in respect of the new claim, at which point the defendant can plead its limitation defence: see the decision of the Court of Appeal in *Chandra v Brooke North* [2013] EWCA.

31. In the light of my conclusion above that the Trustees have a defence based on limitation, since time has not stopped running, the effect of section 35(1) would be to deprive them of that defence if the amendments were allowed. Accordingly, I refuse the application for permission to amend.
32. I do not need therefore to address the second and third reasons advanced on behalf of the Trustees, save to say that it would not have been realistic at this hearing to have determined the question whether there was no reasonable prospect of success, without fuller argument of the claims themselves. As to the third reason, that the claims were insufficiently particularised, in my view if the defences were otherwise clearly arguable, any such deficiency could have been dealt with by the imposition of conditions requiring full particularisation.

Issue (2): Whether and to what extent the Claimant’s challenge to the legal costs set out in paragraphs 6 – 8 of the Notice should be referred for assessment, and what direction should be given for an assessment (it being agreed that in principle the Court may order such an assessment)

33. The Trust Fund has further diminished to £247,606.19, with a roughly similar amount having been spent by the Trustees principally on legal costs. James complains that that expenditure has been excessive, and should be referred for assessment. It is common ground that the court has power to do this: *Tim Martin Interiors Ltd v Akin Gump LLP* [2011] EWCA Civ 1574, at [100].
34. In order to facilitate the hearing of this preliminary issue, Master Kaye by order dated 27 November 2021 gave directions for the Trustees to disclose all narratives or equivalent documents in their control or possession which accompanied or explain the invoices at pages 6 to 43 of the exhibit to Dr Kekwick’s second witness statement dated 27 November 2020; and for James thereafter to serve further particulars of his challenge to those legal costs setting out (a) whether it was his case that the Trustees were not entitled to instruct all or some (and in that case which) of the work covered by each bill; (b) whether James disputes the reasonableness of the sums claimed in each bill and if so what he says a reasonable sum would have been; and (c) in each case a brief explanation of the basis of James’ contentions.
35. It is accepted by James that the Trustees complied with those directions. It is also accepted by James that he himself has not complied with the directions, in that he has failed to identify the disputed items or the reasons for disputing them. James’ explanation is that the information provided by the Trustees lacked sufficient detail to allow him to provide such responses. It was submitted that “from what [James] has been able to ascertain, the majority of the amount paid by the Trustees during the period of the claim, and prior to issue these proceedings, relate to the Trustees’ attempts to hire solicitors and counsel, in order to provide the Trustees with an exemption or indemnity document signed by [James] to which they are not entitled”.
36. The directions clearly envisaged that by the date of this hearing more would be known about James’ case on the costs incurred by the Trustees than was known when the order was made; and that that information would be relevant to the determination of the question whether to refer the account for an assessment. No complaint is made that the Trustees failed to comply with the directions. Notably, James did not prior to this

hearing identify any deficiencies or seek further information that would allow him to comply; nor did he apply to the court for further directions. This suggests at the very least a passivity on the part of James that could be viewed as self-serving: his failure to comply would have saved him both the trouble and the costs of doing so, whilst continuing to argue for an assessment, in spite of not providing the required information, nor taking any steps to improve the situation by requesting further information.

37. I do not accept that James was unable to provide the information directed, at least in relation to a number of the costs incurred by the Trustees. The invoices and accounts attached at exhibit CAK6 to Dr Kekwick's second witness statement dated 27 November 2020 in my view contain sufficient details as to timing and subject matter (for example, invoices for Opinions which have been referred to and relied on by the Trustees) to allow James to identify to what work, and to what element of the dispute, they related. Mr Clarke was able to tell me in submissions that a large amount of costs was incurred relating to the deed of discharge and deed of indemnity sought by the Trustees, which were quite wrong and should never have been required of James. Knowing as James did both when the letters came, and how the disputes unfolded, it would have been possible for James to connect the invoices and accounts with the particular matters in dispute and to provide the required information, or at the very least some of it. His failure to do so was, I regret to say, typical of what the evidence reveals as a repeated refusal to supply any information which might allow the Trustees to perform their remaining duties, to distribute the Trust Fund, and to bring the Trust to an end (as Dr Kekwick gave evidence, which I accept, that he dearly wishes to do).
38. On behalf of the Trustees it was submitted that the likely outcome of any assessment is very limited in scope. In terms of any challenge to the legal costs incurred by the Trustees, it would not be sufficient merely to show that they were liable to assessment down. He would need to show that for them to have been paid in that sum was itself a breach of trust; section 31 of the Trustee Act 2000 provides that there is no breach if those costs were properly incurred. It is accepted that quantum will be potentially relevant to the question of whether costs were properly incurred, but it will never be determinative because other factors would be relevant. An example was given of a trustee paying a bill of £3000 where the reasonable cost was later assessed to be £2950. It would, it was submitted, and I agree, be fanciful to suggest that it could be argued that those expenses were not properly incurred. Equally, if a given piece of work is complained of not because the cost incurred was unreasonable but because it fell outside of the scope of the Trustees' indemnity, then assessment would not assist. Lastly, it was submitted that even if there was a breach of trust, the Trustees could rely on section 61 of the Trustee Act 1925 if it could be shown for example that the Trustees thought the costs were reasonable and that they were expended in an effort to try and avoid yet more costs being incurred.
39. In determining this Issue, I am much exercised at the thought of the further costs that will be incurred in conducting such an assessment, and by the prospect that any assessment will be to no or little avail. I am struck by the fact that, however arguable James' claim that the material provided to him was insufficient to enable him to comply with the direction, that was no fault of the Trustees, who did comply fully. Neither did James, who seeks to persuade the court that an assessment would be a productive process, take any steps either to obtain further information or to seek further directions, to put the court in a better position to evaluate the strength of his argument. I also bear in

mind the likelihood that assessment is going to be tangential at best in terms of determining whether the Trustees were in breach of duty when incurring any particular costs. I am troubled by the inevitability that the remaining monies in the Trust Fund will be further eroded by the very assessment process which James seeks.

40. I do not forget the fact that James is highly suspicious of the Trustees, and is concerned by the extent to which the Trust Fund has been diminished. Whilst it is not for me today to decide many of the issues arising, I note that James' ability to challenge the Trustees' expenditure on the basis of breach of trust will not be significantly, if at all, affected by the decision not to refer to assessment. Such assessment would in my judgment serve no significant purpose in the context of the issues between the parties. I have concluded that it would be costly, disproportionate, and to a significant degree unproductive to order an assessment, and I decline to do so.

Issue (3) Does either the letter dated 29 May 2009 or the opinion of David Rowell dated 29 June 2011 provide the Trustees with a defence to the allegations in paragraphs 9 – 11 of the Notice of Objections?

41. In paragraphs 9 – 11 of the Notice of Objections, James complains of the Trustees' failure to invest the Trust Fund. He points out that Braemoor was sold in 2008, and that clause 2 of the Trust Deed provides that
- “the Trustees shall hold the net proceeds sale on trust that, subject to the powers granted by clauses 4 to 7 hereof, they shall invest the same when received in any investments hereby authorised”. [Clauses 4 – 7 are not relevant.]
42. Accordingly, James says that the Trust Fund should have been invested at the very least in a FTSE tracker, alternatively Braemoor should not have been sold, or the Trust Fund should have been reinvested in real property.
43. For the purposes of Issue (3), and without otherwise admitting any breaches of duty, the Trustees rely on two documents, each of which they say would provide a defence were they to be in breach of the contractual or statutory duty to invest. The first document is a letter dated 29 May 2009 (“the Non-Action Letter”) from James to Hart Brown, in which he said
- “Without prejudice to any actions that may have been taken by either yourselves or the trustees since 29 January 2009 this communication is to clearly state that no agreements, actions or payments are to be made or entered into either by the trustees, yourselves or agents, without my express authority given in writing and forwarded to yourselves by either letter or fax”.
44. The second document is an opinion of David Rowell of counsel dated 29 June 2011, (“the 2011 Opinion”). At that time, the Trustees were seeking advice generally about whether they should bring any application to speed up the process of administering Joan's estate in circumstances where James had not yet obtained probate. This was important because the inheritance tax position could not be determined until James had obtained probate, but until the inheritance tax position was known the Trustees were not in a position to distribute the Trust Fund, in case it itself attracted tax. In the 2011 Opinion, Mr Rowell states that no useful application could be made to the court but on the other hand there was no particular pressure on the Trustees as matters stood then. If

the Trustees simply “sat tight” the pressure would be on James, since he could not have access to Trust Fund until he had delivered the IHT400 and obtained probate. “My advice to the trustees would therefore be to sit tight”. Later, at paragraph 14, Mr Rowell states

“In the meantime [the Trustees] have no authority to invest in investments which could go down in value. Subject only to resolving the tax position they are nominees for James and he has forbidden them to do anything without his approval.”

The last quoted sentence is footnoted with a reference to the Non-Action Letter.

45. Dr Kekwick’s evidence is that the investment decisions were taken by the Trustees on the basis of the Non-Action Letter and/or the 2011 Opinion. Further, reliance is placed on a principle set out in *Pitt v Holt* [2013] 2 AC 108, para [18]:

“... it would be contrary to principle and authority to impose liability on trustees who conscientiously obtain and follow, in making a decision which is within the scope of their powers, apparently competent professional advice which turns out to be wrong.”

The Trustees case is that they had been advised in unequivocal terms by senior Chancery counsel that they should not invest in any investment that could go down in value. Saying that the Trustees should have invested the Trust Fund is tantamount to saying that the Trustees should have ignored that advice. Further, it is not necessary for the Trustees to independently determine whether the advice was correct: see the decision of the Court of Appeal in *Butt v Kelson* [1952] Chancery 197 (although it was brought to my attention that the decision is described by Lewin at 1-028 and 1-039 as “doubtful”).

46. Finally, it is said that the Non-Action Letter amounts to a concurrence in the breach of trust. Reliance is placed on dicta of Wilberforce J (as he then was) in *Re Pauling’s Settlement Trusts* [1962] 1 WLR 86 at 108:

“... the Court has to consider all the circumstances in which the concurrence ... was given with a view to seeing whether it is fair and equitable that, having given his concurrence, [the beneficiary] should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and it is not necessary that he should himself have directly benefited by the breach of trust.”

47. It is submitted on behalf of the Trustees that James did not merely concur in the failure to invest, but emphatically told the Trustees not to do anything with the Trust Fund, and did not countermand that instruction until he claimed that there had been a breach of duty by reason of the very inactivity that he had demanded. This, it is said, is plainly not fair and equitable.

48. On behalf of James it is said that the Non-Action Letter does not say that the Trustees are relieved of their obligation to invest. Rather it states that they should obtain James’ consent before taking any action. Reliance is placed on the Trustees’ statutory and

contractual duty to invest, and on Lewin at paragraph 35-076, which states that the duty to invest should be reviewed regularly. As to the contents of the 2011 Opinion, three points are made. First, it is said that the Trustees cannot hide behind the advice of Counsel. The Trustees were required to make their own decisions and legal advice is not, without more, a passport to relief: Lewin at paragraph 41-154, referring to *Marsden v Regan* [1954] 1 WLR 43, 435, a decision of the Court of Appeal. Next it is said that the Trustees were under a continuing duty to invest and to review the position. Advice given in 2011 cannot possibly justify inactivity on their part for the following 11 years. Finally it is said that the 2011 Opinion does not advise that the Trustees should not invest but rather they should not do anything, including investing, without James' authority.

49. Dealing first with the Non-Action Letter, I am not persuaded that interpreted objectively it can be read as telling the Trustees to do nothing at all in respect of discharging their duties as Trustees in relation to the Trust Fund. What it says is that the Trustees should do nothing without James' express authority. That is a different matter. They were not told not to fulfil their duties as trustees, but rather not to take any step towards doing so without first obtaining approval from James. I find that the defence based on the Non-Action Letter fails for that reason.
50. As for the 2011 Opinion, the advice in paragraph 13 "to sit tight" is advice given in the context of the question whether any application could be made to the court, Mr Rowell having concluded that "no useful application ... can be made to the court.". "Sitting tight" was the recommended approach in relation to the administration of Joan's estate. But sitting tight in that context says nothing in my view about any other ways in which the Trustees might be required to fulfil their duties in the meantime.
51. That leaves the advice at paragraph 14 of the 2011 Opinion which contains two elements. First, it is said that "in the meantime [Trustees] have no authority to invest in investments which could go down in value." Second, and following, "Subject only to resolving the tax position they are nominees for James and he has forbidden them to do anything without his approval." Taking the second of those propositions first, this merely restates the terms of the Non-Action Letter in which, as I have already found, James does not purport to prohibit the Trustees from fulfilling their duties, but merely seeks to prevent them from doing so without James' prior approval. Nothing about its re-formulation in paragraph 14 affects or dilutes that interpretation.
52. As for the first element in paragraph 14, Mr Rowell states that "in the meantime [the Trustees] have no authority to invest in investments which could go down in value.". It seems to me an investment "which could go down in value" would include any investment other than entirely or virtually risk-free investments (such as an interest bearing savings account with a reputable bank). I assume that Mr Rowell's reference to a restriction on potential investments derives from the terms of the Non-Action Letter, since it is not the case in general that trustees are limited to investing in investments which cannot go down in value. It seems likely that he is warning that the Trustees would need to be exceptionally cautious in any investments they did make. But the first sentence seems to be directed to the question of the type of investment the Trustees could safely make, and to say that the Trustees have no authority to make any other type of investment.

53. So the import of paragraph 14 is twofold: first, that the Trustees are not authorised to invest in investments which might go down; secondly, that the Trustees are forbidden to do anything without James's approval. The second is no more than the Non-Action Letter states, and so does not prevent the Trustees for doing anything at all. However, the first is clear advice from Mr Howell not to invest in anything other than virtually risk free investments. Whether this advice was correct is not material: *see Pitt v Holt*. I note that the Trust Fund appears to have been held in an interest bearing account, and the account shows that interest has been accounted for. It seems to me that in "investing" the Trust Fund in this way the Trustees were following the advice of Mr Rowell, advice which was sufficiently clear and unequivocal to allow them to treat the monies in that way, provided they accounted for them properly, which they did.
54. The statement relied on by James in Lewin, paragraph 41-154, to the effect that for trustees to act in accordance with legal advice does not without more justify a given action, is made in the context of relief under section 61 of the Trustee Act. Further, in the same paragraph Lewin also states that

“ ... lay persons, unremunerated, ought to be excused where they take decisions within the limits of their experience and knowledge, listen to reason, and do not act irrationally or obdurately. The same can also be said where the actions of the trustee are the subject of technical legal guidance, when the trustee is unaccustomed to problems of such nature.”

It is Dr Kekwick's evidence, which I accept, that he knew nothing of the technical side of being a trustee, in these or any circumstances. Mr Hutson, although a solicitor, also had no experience of trust administration or trust law. I regard them as in effect lay people in their roles as trustees, and attach no blame to them for following the advice of Mr Rowell to invest in no investments that could go down in value.

55. Accordingly, I find that whilst Mr Rowell in the 2011 Opinion did not relieve the Trustees from their duty to invest, he advised them that they could do nothing without James' approval, and that they could only invest in risk free investments, that is to say they could not invest in investments that "might go down". The Trustees have acted in accordance with this advice, by placing the Trust Fund in an interest bearing account, and accounting for the interest earned. This element of the 2011 Opinion would therefore provide a defence to any claim that they were in breach of trust for failing to invest.
56. As for the concurrence point, the way that is put on behalf of the Trustees is that the concurrence flows from the Non-Action Letter. Given my finding as to the meaning of the Non-Action Letter, namely, that James was not telling the Trustees to take no further actions at all, the point based on concurrence is no longer available to the Trustees. I do not think it could be said (and I do think it was said on behalf the Trustees) that thereafter it was up to James to prompt the Trustees to invest the Trust Fund in accordance with their statutory and contractual duties.
57. In conclusion, in my judgment the advice of Mr Rowell that the Trustees had no authority to invest in any investment which could go down in value does provide a defence to any claim by James that the Trustees were in breach of duty by failing to

invest the Trust Fund in any investment other than an interest bearing account, the interest earned being credited to the Trust Fund.

Issue (4) Were the Trustees in breach of trust in failing to pay James the Trust Fund or advance sums from it, as alleged at paragraph 12 of the Notice of Objections; if so (a) what losses as a matter of law are in principle recoverable in respect of such breach, and (b) should the Trustees be granted relief under section 61 of the Trustee Act 1925?

58. Braemoor was sold in 2008. Joan died in January 2009, at which point James became absolutely entitled to the sums in the Trust Fund. James complains that the Trust Fund should have been distributed to him at that time. James says that the Trustees should have advanced at the very least a large proportion of the Trust Fund, at least £300,000, especially given what are alleged in James' skeleton argument to be repeated and numerous requests from James, and a succession of solicitors representing him.
59. The existence of the duty is not in issue. The Trustees defend the allegation of breach in two principal ways. First, the Trustees were never able to satisfy themselves beyond doubt that they were in a position to distribute to the right person, namely, James; and that in those circumstances they would have risked being in breach of duty if they had distributed. Second, the Trustees were entitled to retain from the Trust Fund an amount sufficient to protect themselves against any prospective or contingent liability. In appropriate cases that can justify retaining the entire fund; moreover, such retention can include the prospective costs of defending a claim for breach of trust.

(1) Identification sought but not given

60. To be able to rely on this defence, the Trustees will have to establish both that they were entitled or obliged to require such satisfaction; and also that the information which they rightfully sought has not been provided. As to the first of those, it seems to me that it lies at the very fundament of trustees' duties to take such steps as are necessary to satisfy themselves that the persons to whom they are distributing the trust assets are bona fide beneficiaries under the trust. Were authority needed, it can be found at *Holdford v Phipps* (1841) 49 ER 170, with commentary at Lewin 24-004, where the duty is described as the trustee's obligation to "satisfy himself beyond doubt who are the parties legally and equitably entitled to it ... he may compel all persons who claim to be beneficiaries to set forth their title ...".
61. Were the Trustees to fail to take sufficient steps in this direction, then a claim would lie against them, since the duty is one of strict liability: Lewin, 24-005. So they cannot be criticised, much less regarded as in breach of duty, for refusing to distribute until identity and address had been established. By letter dated 19 November 2009 Hart Brown had explained to James the need to provide his identity prior to a distribution being made and requested that he provide ordinary proof of his identity. That was never provided. In subsequent correspondence with new solicitors in 2011, Hart Brown offered to repeat what had been said in the earlier correspondence, noting that that would of course increase costs. No response was received before James moved on to a different new solicitor. By letter dated 24 June 2015, Hart Brown once again asked James to sign a receipt in respect of the trust funds due to him, "in the presence of a notary or solicitor, who should add their name, address an occupation". This was not done.

62. Dr Kekwick gave evidence (paragraph 46 of his fourth witness statement) that the Trustees were advised in 2015 that they needed to provide the accounts to James together with a form of discharge for him to sign in the presence of a notary or solicitor who would have had to confirm James' identity for anti-money-laundering purposes. If that person confirmed that such checks had been carried out, then that would provide sufficient comfort as to James' identity and address to allow the Trustees to make the distribution. Similar advice was received by the Trustees in May 2017, a copy of which was sent to James, in which Mr Nigel Meares of Counsel endorsed the approach previously taken in insisting on a valid form of receipt, and in addition goes on to say that the Trustees must also comply with their money-laundering obligations.
63. The obligation is absolute and universal; trustees need not show they had particular concern in that regard in order for the duty to arise. But on behalf of the Trustees a compelling case was advanced, with detailed reference to a mass of evidence, as to why the Trustees did have particular concerns regarding James' identity and address, rooted in the earliest dealings with James as Trustees. James' letters to his mother, whilst she was alive, bore no address. No address has ever been provided notwithstanding the requests of Hart Brown. The concerns were amplified by subsequent difficulties in contacting James and gaps between hearing from him during the administration of Joan's estate, together with the fact that from 2009 James communicated with Hart Brown principally through a service agency fax business which is been identified as a Business College and Staff Agency in Limerick. By letter dated 24 June 2015, following the final administration of Joan's estate, Hart Brown requested James to sign a receipt in respect of the Trust Fund using the same signature as on the passport a copy of which he had provided in 2009, since which time faxes had been received with a different form of signature, such signature to be made in the presence of a notary or solicitor. He did not do so. Since 2016 the emails sent by James to Hart Brown have all (bar one) been either pp-ed or unsigned. On two separate occasions, in 2014 and 2017, Dr Kekwick was contacted by the Missing Persons bureau as a result of James having been reported missing. So there was cause aplenty for the Trustees to be concerned about James' identity, and whereabouts, and to wish to establish those beyond doubt. These concerns were well founded, and went beyond a mere desire to comply with formalities or technicalities.
64. James never got as far as providing proof of identity or address in any form, much less any form sufficient for the Trustees' requirements. On his behalf it is said that he had good reason not to sign the receipt sought in 2015; it required James to agree that he accepted the Trust Fund in "full and final settlement" of his interest in the Trust, thereby barring him from disputing the amounts or taking any further action against the Trustees for breach of trust. It is said this was not a reasonable stance for Hart Brown or the Trustees to take, because discharging the Trustees in that way would involve James waiving any potential claims he might have for breach of trust.
65. That dispute continued to be played out in the correspondence, and by letter dated 4 August 2016 Hart Brown confirmed that following advice from counsel they had amended the required form of discharge, inter alia removing the words "in full and final settlement". Hart Brown continued to ask James to sign that amended form of discharge "in the presence of a solicitor or notary who will, once they have formally identified you in the usual way, add their signature, name, address and identity." James relies on

the continuing dispute about the terms of the discharge as justifying or neutralising the effect of his continuing refusal to provide the identification and address details sought.

66. The contemporaneous documents reveal, as now accepted by the Trustees, that James was being asked to sign the account on a basis that prejudiced his position and would wrongly deprive him of rights to bring any claims. But it seems to me that that does not meet the point: were the Trustees under a duty to distribute the Trust Fund or any part of it in circumstances where they had not been provided with sufficient information about James' identity and address to satisfy themselves that any distribution would be made to James Kekwick? If James, on receipt of the correspondence requiring him to sign the unacceptable discharge, had responded by providing sufficient information about his identity and address, but refusing to sign the relevant discharge, he might now (though I make no ruling) be entitled to assert that the Trustees then became in breach of their duty to distribute the Trust Fund. But I do not see how the Trustees could be in breach of a duty which they were not in a position to perform; *a fortiori* when the reason they were not in a position to perform it was because of James' failure to provide the information sought since 2009. Indeed, as discussed above, the Trustees might well have been in breach of duty in making any distribution had it transpired that the person with whom they were dealing was not in fact James, and that they had not taken sufficient steps to establish his identity.
67. I note that James' refusal to provide relevant information, appropriately confirmed by a solicitor or notary, has continued throughout these proceedings. The first claim form provided no address; then an address in Dublin was provided; finally an address in Latvia. In James' second witness statement dated 3 November 2020, he gave a yet further address in Estonia. Most tellingly, having come to this Court and obtained an order that the Trustees pay an interim distribution of £50,000, James failed to comply with the conditions attached to that order that he provide a copy of his passport or driving licence; and an official document proving his address. Notwithstanding his evidence as to what he says are dire financial circumstances, and a desperate need for funds, he continues to neglect or refuse to supply the information that would achieve that interim distribution. In the circumstances, I am entitled to conclude that, even if the account provided by the Trustees had included a satisfactory discharge, it is highly likely that James would not have provided sufficiently robust evidence of his identity and address so as to put the Trustees in a position where they could safely make a distribution.
68. I should note that the Trustees also relied on the fact that they had been advised that they were entitled not to distribute the Trust Fund until Joan's estate was administered, and any tax liability satisfied. Confirmation of the tax position did not occur until 2015. Between 2009 and 2015, the Trustees say that they were merely following legal advice in making no distribution. James objects that the Trustees could not rely on this advice when it was always clear that significant sums would remain no matter how high the tax liability (realistically) proved to be. A significant part of the Trust Fund was bound to remain and this ought to have been distributed. However, even if the Trustees had been wrong to rely on the legal advice they received (which I do not think they were, on the same reasoning as above at paragraph 54), and even though Dr Kekwick admits he knew that there would be a significant sum remaining after any tax liability had been satisfied, this does not change the fact that James had not, as he had been requested to

do, confirmed his identity and address in an acceptable form, and so no distribution could have been made in any event.

69. Nor is there any assistance from Dr Kekwick's admission in cross examination that at one point in 2011 he would have been content with a lesser form of proof of identity (signatures in the same form as they appeared on James' passport) than was subsequently demanded in 2015 (signatures to be witnessed and certified by solicitor or notary). First, the Trustees' caution understandably intensified as more time passed without James producing any information. Secondly, asking for evidence in the form requested in 2015 was not inherently unreasonable in the circumstances, and so the fact that at an earlier point the Trustees would have been satisfied with lesser evidence is irrelevant. Thirdly, James produced none of the evidence sought, in any form. If in 2015 he had produced evidence in the form sought in 2011, he might have had an argument (I do not say it would necessarily succeed). But he did not.
70. For the reasons I discuss above, without satisfactory evidence the duty to distribute simply does not arise, since it cannot be fulfilled without breaching, or risking breaching, a concurrent duty on the trustee to establish beyond doubt the identity of the person to whom the assets are being distributed. Further, I am entitled to and do conclude that even if the Trustees had repeated the request during this period, the required information would not have been forthcoming. I say that with a high degree of confidence, based on the fact that on every subsequent occasion on which the information has been requested, it has not in fact been provided, even to the point of James failing to provide such information in order to satisfy the conditions imposed on the distribution of the interim sum ordered by the Court. At any stage since 2009 James could have provided sufficient proof of identity and address to trigger the Trustees' duty to distribute. He has never done so, and he cannot rely on his own omissions to claim a breach of duty by the Trustees, who want nothing more than to distribute the Trust Fund in accordance with their duty, allowing them to bring the Trust to an end.
71. To conclude, the Trustees were not in breach of their duty to distribute whether all or part of the Trust Fund. To do so without establishing the identity and address of James would itself have been a breach of duty; the duty to distribute must operate subject to the duty to establish identity. In such circumstances, the Trustees are not in breach of failing to distribute the Trust Fund or any part of it.
72. The second defence relied on by the Trustees was that they were entitled to retain from the Trust Fund sufficient funds to protect themselves against any prospective or contingent liability. In the light of my decision above, I do not need to decide whether this basis of defence is a good one. I do however have considerable sympathy with the contention that the Trustees reasonably believed that they would be faced with allegations of breach of trust, the costs of which, if the Trustees were to successfully defend such a claim, they would be entitled to take out of the Trust Fund. James revealed a hostile attitude right from the beginning when he wrote to Hart Brown about Joan's estate and the Trust. By undated letter, which appears to have been faxed to Hart Brown on 29 September 2009, James refers to "the unwise and rash actions of the newly appointed trustees in selling the house", and stating "you should know that the persons to whom you refer to as the Trustees will be held liable by the beneficiaries for any necessary tax payable other than that mentioned below arising as a result of their unwise actions." This hostility permeates the subsequent correspondence, albeit the

language becomes more muted when James was represented by lawyers. The depletion of the Trust Fund between 2009 and now, caused almost exclusively by the costs of the disputes leading to this litigation, speaks for itself on the question whether the Trustees rightly anticipated legal costs would be incurred in administering the Trust, in particular in taking advice as a result of James' contentions.

73. I note also that the sum ordered by the Court to be paid by way of interim distribution was limited to £50,000, which must be based at least in part on a conclusion that the remainder of the Trust Fund may legitimately be retained by the Trustees pending the outcome of this litigation. It is correct, as Mr Clarke pointed out, that a distribution might not have been limited to that extent prior to the Trust Fund's significant depletion; but even with the Trust Fund at its highest, it would have been reasonable in my view for the Trustees to take a highly cautious approach to the amount of any interim distribution had James ever supplied sufficient proof of identity.
74. On the issue of interim distribution, my reasons above apply to that issue as they apply to the issue of distribution generally. To distribute any sums to the person claiming to be James, but refusing to provide evidence to support that claim, would be in conflict with the duty to establish beyond doubt that the person to whom the distribution is made is in fact the beneficiary. There is no lesser standard merely because the distribution is an interim one of part only of the trust assets.
75. The second and third elements of the Issue (4) do not fall to be determined, given my findings on the first question.

Conclusion

76. In conclusion, my findings on the Issues are as follows.
- (1) Time is still running, since no action has been brought by James in respect of the alleged breaches of trust. All alleged breaches occurring more than 6 years before the date on which James brings a claim in respect of the alleged breaches of trust will be time barred. Permission to re-amend the Amended Claim Form is refused, since such re-amendment would deprive the Trustees of a limitation defence to the claims.
 - (2) The legal costs should not be referred to the Senior Courts Costs Office for an assessment, since to do so would be unproductive, disproportionate, and achieve little if anything of any substance.
 - (3) The Non-Action Letter does not, but paragraph 14 of the 2011 Opinion does, provide a defence to the allegation of failure to invest.
 - (4) The Trustees are not in breach of their duty to distribute, since they are unable to comply with such duty unless and until James provides adequate proof of his identity and address.
77. I invite the parties to agree an order. Any matters which cannot be agreed will be the subject of directions following the handing down of the judgment.

Supplemental matters

78. Since circulation of the draft judgment, counsel on behalf of the parties have made written submissions on the form of order to be made. They are agreed as to the first three matters set out in a draft order with which I have been supplied; I am content to make those three orders in the form agreed between them.

79. There remain two matters on which the parties are not agreed. As to the first, the Defendants seek an order listing a further hearing before Master Kaye on the first available date convenient to counsel after 01.11.22, with a time estimate of half a day, for the purposes (i) of giving further directions and/or (ii) to settle the accounts and determine any application by the Defendants to pay the trust monies into Court, and (iii) to determine any issues relating to the costs of this action, and (without prejudice to paragraph 9 of the Order of Master Kaye dated 26 October 2021) all outstanding costs issues are reserved to that hearing.
80. The Claimant submits that no order should be made for any such hearing, since he intends to appeal the order made following this hearing (I have not been told which element(s) will be challenged), and ordering a further hearing will, he says, lead to further unnecessary costs. The Defendants submit that there plainly need to be directions to progress the case. I agree that a further hearing should be listed. The matters which I have heard were preliminary issues, and it is necessary for the substantive claim to proceed towards determination, bearing in mind that the Claimant has himself been vociferous in complaining about the length of time for which he has been kept out of the sums he says are due to him from the Defendants. If the Claimant wishes to appeal the order made following this hearing (and I note no application has yet been made to me for permission), then he may use the usual procedural routes, including applying for any stays to which he might be entitled.
81. The Claimant made no substantive submissions on the precise terms of the order listing the hearing, or its purposes, and so I will make the order in the form sought by the Defendants, which I consider sensible, proportionate, and necessary in order to bring the claim towards a resolution. I note that it is proposed that all outstanding costs issues are reserved to that hearing and that accordingly the costs of the preliminary issues before me will fall within those reserved costs. Again, the Claimant does not argue otherwise.
82. The second issue between the parties relates to an order sought by the Defendant to the effect that, if the Claimant wishes to argue pursuant to paragraph 9 of the Order of Master Kaye dated 26 October 2021 that the Defendants should be required to reimburse the Trust for any of the costs of this litigation, he shall by a specified date serve a notice providing particulars of (i) the amounts he contends should be reimbursed and (ii) the basis on which he contends they should be reimbursed. The Claimant objects to this suggestion, partly on the basis (as above) that he intends to appeal, and does not wish to incur unnecessary costs; and partly because he considers any issues relating to the quantum of costs will have to be dealt with on an assessment in the normal way and the order proposed is therefore pointless.
83. The reasons I set out above for dismissing the Claimant's objections to the order on the basis of his wish to appeal apply equally to this second issue, and accordingly his desire to being an appeal would not without more prevent me from making the order sought. As to the second submission, whilst there might be overlap, the kind of objections the Claimant might wish to take to costs incurred by the Defendants in this litigation will

not necessarily be the same type of objections made on an assessment of costs, and so the two exercises may well be distinct.

84. Give that the hearing to be listed before Master Kaye includes in its purposes the determination of any issues relating to the costs of this action, then all matters relating to outstanding costs issues will fall to be argued at the hearing. It seems to me to be wholly in the Claimant's interests to identify in advance of that hearing the amounts he contends should be reimbursed and the basis on which he says they should be reimbursed. Equally it is both fair, and liable to reduce the length of the hearing, that the Defendants should have notice of the basis on which any objections are to be made, and the quantum involved, so that they can prepare effectively for that hearing; alternatively, make submissions as to what directions should be made.
85. It is also urged on behalf of the Claimant that he would consider such an order very onerous to him, especially as he has very limited IT facilities. Whilst sympathetic to the demands that the widening use of new technology places on parties, nonetheless the nature of litigation requires parties who are represented to put themselves in a position to communicate with their advisors, whether by email, telephone, correspondence, in person or otherwise. If special consideration or dispensation with the usual procedural rules or time limits is sought, an application, supported by evidence, may be made in the usual way. So I do not consider that the Claimant's technological difficulties (whatever those are) are sufficient at this point to prevent me making the order sought. Accordingly, I will make an order requiring the Claimant to serve the notice sought at paragraph 5 of the draft order submitted to me.
86. In view of the lapse of time in the interim, in relation to the two disputed orders I will extend the dates originally proposed by 4 weeks, to 29 November 2022 and 7 November 2022 respectively.