Neutral Citation Number: [2019] EWHC 1577 (Ch)

Claim No: HC-2016-002060

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

In the estate of Veronica Christina Cadogan deceased

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

Date: 21/06/2019

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

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Between:

KIRSTY AMANDA MARY LOUISE CADOGAN	**Claimant**
- and -	
(1) KEVIN ANDREW CADOGAN **(2) KATHRIN ELIZABETH ANN CADOGAN** **(3) JUSTIN CHUDDIE** **(4) KELLY DAVIES** **(as the representative of Paul Cadogan deceased)** **(5) MILLS & REEVE TRUST CORPORATION LIMITED** **(as the representative of Veronica Christina Cadogan deceased)**	**Defendants**

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Francis Ng (instructed by **Irwin Mitchell LLP**) for the **Claimant**
The First Defendant in person
The Third Defendant in person

Hearing dates: 5-7 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. Veronica Cadogan ("Mrs Cadogan") died, aged 76, on 3 September 2011. She left alive 5 children; the Claimant ("Kirsty"), the First Defendant ("Kevin"), the Second Defendant ("Kathrin"), the Third Defendant ("Justin") and Paul Cadogan, who died on 29 August 2014 ("Paul").[1]

2. Mrs Cadogan died leaving a will dated 27 May 1994. By her will, Mrs Cadogan's residuary estate devolved on her 5 children equally.

3. Mrs Cadogan's net estate was shown on the letters of administration which were obtained in due course as amounting to £297,366. At the time of her death, Mrs Cadogan was the legal owner of 14 properties in England ("the English properties"), which were mortgaged; namely:

    i) 14 Ryefield Road, Upper Norwood (which has since been sold);

    ii) Upper Flat, 20 Fernham Road, Thornton Heath (now held by Kevin on trust for Mrs Cadogan's estate);

    iii) Lower Flat, 20 Fernham Road, Thornton Heath (now held by Kevin on trust for Mrs Cadogan's estate);

    iv) 91 Barrow Road, London, SW16;

    v) 8 Greenock Road, London, SW16 (a property which, for a time, was held by Kevin on trust for Mrs Cadogan's estate but has since been sold);

    vi) 10 Greenock Road, London, SW16 (a property which was occupied by Ebonycare Ltd. ("Ebonycare") but which has since been sold);

    vii) 88 Greyhound Lane, London, SW16 (which has since been sold);

    viii) 98 Greyhound Lane, London, SW16 (a property which has been occupied by Ebonycare);

    ix) 100 Greyhound Lane, London, SW16 (a property which has been occupied by Ebonycare);

    x) 38 Rural Way, London, SW16 (a property which has been occupied by Ebonycare);

    xi) 41 Valley Road, London, SW16 (a property which has been occupied by Ebonycare and is now held by Kevin on trust for Mrs Cadogan's estate);

    xii) 141 Links Road, London, SW17 (a property which, for a time, was held by Kevin on trust for Mrs Cadogan's estate but has since been sold);

    xiii) 46 Mitcham Road, London, SW17 (which has since been sold);

[1] Because most of the parties are siblings with the same surname, I refer to them by their given names, for convenience. No disrespect is intended.

xiv) 105 Milliners House, Eastfields Avenue, London, SW18 (which has since been sold).

Mrs Cadogan was also apparently the legal owner of property in Florida and Guyana. At the time of her death:

i) Mrs Cadogan was involved in the business of Ebonycare. Ebonycare was the wholly-owned subsidiary of Ebonycare Group Ltd. ("Group") of which Mrs Cadogan, Kirsty and Kevin were directors and in which Kirsty and Kevin, but not Mrs Cadogan, were shareholders. In August 2012, Kevin procured the transfer of Group's shareholding in Ebonycare to himself. Thereafter, Group was dissolved;

ii) Mrs Cadogan had previously been the sole shareholder in and the sole director of Evelyn Fostering Agency Ltd. ("Evelyn"). By the time of her death, Mrs Cadogan had transferred her shareholding in Evelyn to Group and Group had disposed of part of that shareholding to a third party. Evelyn was dissolved in 2014;

iii) there were 3 bank accounts in Mrs Cadogan's name; a Barclays Bank plc account numbered 60231991, a Santander UK plc account numbered 44663260 and an HSBC UK Bank plc account numbered 11656392 ("the HSBC account"). The HSBC account bank statements record the account holder as "Mrs V Cadogan trading as Ebonycare" and, on cheques relating to the account, the drawer is described as "Mrs Veronica Cadogan t/a Ebonycare".

4. Because no grant of probate was taken out, Kirsty and Kevin obtained letters of administration with will annexed on 4 April 2013.

5. On 12 July 2016, Kirsty, as Mrs Cadogan's administratrix, began a claim against Kevin, as Mrs Cadogan's administrator, and against Kathrin and Justin, and against Paul's estate, principally for:

i) an account of Kevin's dealings (as administrator) with Mrs Cadogan's estate on the footing of wilful default and for payment of the sum found due on the taking of the account; in particular because Ebonycare has paid no occupation rent for its occupation of the 5 properties I have identified ("the Ebonycare properties");

ii) "an account of the profits [Kevin] has made as a result of Ebonycare Ltd.'s occupation of [the Ebonycare properties]";

iii) payment of an occupation rent by Kevin for Ebonycare's occupation of the Ebonycare properties (which appears to have since been subsumed into the claim for an account on the footing of wilful default; particularly bearing in mind Kirsty's replacement as Mrs Cadogan's administratrix during the course of the claim);

iv) interest under section 35A of the Senior Courts Act 1981.

6. No specific relief was sought against Kathrin, Justin or Paul's estate (and, although Mr Ng, who appeared for Kirsty at trial, suggested in his skeleton argument that it might be appropriate for the court to make determinations against them, on instructions, he confirmed that Kirsty does not seek any determination against them in the present claim).

7. On about 16 August 2016, Kevin filed a Defence and Counterclaim. By it, he:

   i) admitted, without qualification, that Mrs Cadogan's estate includes the English properties;[2]

   ii) accepted that, as Mrs Cadogan's administrator, he was liable to keep accounts and produce them to the court when required;

   iii) denied that he failed to collect rent for Mrs Cadogan's estate for Ebonycare's occupation of the Ebonycare properties, claiming that he had "given credit to the estate for all sums due in respect of the occupation of [the Ebonycare properties] and the sums that [he had] advanced to or paid on behalf of the estate [exceeded] any liability of Ebonycare…in respect of such occupation";

   iv) sought an account of Kirsty's dealings (as administratrix) with Mrs Cadogan's estate on the footing of wilful default and for payment of the sum found due on the taking of the account, together with payment of an occupation rent for those of Mrs Cadogan's properties occupied by Kirsty or her tenants or licensees, and he also sought interest under section 35A of the Senior Courts Act 1981. His counterclaim for an account on the footing of wilful default was based on his allegations that:

      a) Kirsty had failed to collect rent or obtain possession of the properties in Mrs Cadogan's estate;

      b) Kirsty had failed to account for the rents she had received in relation to the English properties;

      c) Kirsty had appropriated for her own use estate funds.

8. In a Reply and Defence to Counterclaim, in response to Kevin's counterclaim for an account from Kirsty on the footing of wilful default because of her alleged failure to collect rent or obtain possession of properties, Kirsty said:

> "since approximately late 2013 [Kevin] has had, at his request, responsibility for receiving rent on all of properties contained in [Mrs Cadogan's] estate with the exception of one property at 91 Barrow Road…where the tenant refused to deal with [Kevin]"

   and, on this basis, denied that she is liable to account on the footing of wilful default for any failure to collect rent. She admitted that she had received sums belonging to

[2] One of the orders made by Chief Master Marsh, at a case management conference on 6 April 2017 at which Kevin was represented, was the disclosure of tenancy agreements in Ebonycare's favour "relating to estate properties". It has not been suggested that this order has ever been controversial.

Mrs Cadogan's estate but, as she had said in the Particulars of Claim, she asserted that she was willing to account for those sums.

9. By an order made on 6 April 2017, Chief Master Marsh substituted the Fifth Defendant as Mrs Cadogan's administrator, in place of Kirsty and Kevin, with effect from 24 April 2017. The Chief Master also added the Fifth Defendant as a party to the claim.

10. On the same occasion, the Chief Master made orders for disclosure by Kevin of documents relating to income he had received and sums he had expended in relation to Mrs Cadogan's estate. The Chief Master also directed that there should be a written report from a single joint expert on the question, amongst others, of the sums received and expended by Kirsty and Kevin in relation to Mrs Cadogan's estate.

11. The expert reported, on 31 October 2018, by way of an updated report (having received a copy of Kevin's "disclosure documentation")[3]. In summary, it is her opinion that:

    i) Kirsty has received rental income in relation to the English properties amounting to £242,625 and has withdrawn £2,353 from Mrs Cadogan's bank accounts;

    ii) Setting off what she believes is legitimate expenditure against sums Kirsty has received, Kirsty is liable to reimburse Mrs Cadogan's estate £142,793;

    iii) Kevin has received rental income in relation to the English properties amounting to £163,401 (of which only about £26,000 related to Ebonycare properties) and has effectively withdrawn from Mrs Cadogan's bank accounts or retained in those accounts under his control about £2.67 million;

    iv) Setting off what she believes is legitimate expenditure against sums from which she believes Kevin has benefited, he is liable to reimburse Mrs Cadogan's estate £1,723,365;

    v) In addition, Mrs Cadogan's estate is entitled to be reimbursed (or otherwise paid) up to about £1.865 million for rent for the English properties (some of which have, Kirsty and Kevin agree, been under their or the other's control from time to time);

    vi) For the period between Mrs Cadogan's death and the date of the updated report, in relation to the Ebonycare properties, Mrs Cadogan's estate was owed up to £951,000;

    vii) Kevin should be credited with mortgage repayments of £977,603, although only £112,817 of this sum could be reconciled against Kevin's and Ebonycare's bank statements.

    The expert also recorded that she had sought a complete set of mortgage statements but no party (including the Fifth Defendant) was able to provide her with the same.

[3] The disclosure documentation included Kevin's and Ebonycare's bank statements, and invoices for expenditure which Kevin claimed he had incurred in relation to Mrs Cadogan's estate.

Her updated report also contains two schedules, derived from bank statements relating to bank accounts in the name of Kirsty, Kevin and Ebonycare, which show that:

i) after September 2013, save (a) in relation to the property at 91 Barrow Road, (b) between February 2014 and January 2015, in relation to the property at 10 Greenock Road and (c) between April and July 2014, in relation to the property at 141 Links Road, Kirsty did not receive rent in relation to the English properties, whereas, prior to October 2013, she had received rent in relation to 7 properties;

ii) in October 2013, Kevin and/or Ebonycare began to receive rent, for example, in relation to the property at 88 Greyhound Lane, in respect of which property Kirsty had previously received rent.

12. On 20 December 2018, Kevin filed a witness statement. What he said in his witness statement is not entirely clear but, on a reasonable reading:

i) he explained in detail his parents' historical (pre-2009) business providing accommodation and care for looked-after children and his parents' (and their business') complicated accounting and tax affairs;

ii) he explained that Ebonycare was incorporated in 2009 without input from the business' accountants who were focused on dealing with the business' past tax affairs;

iii) he said that Mrs Cadogan and Kirsty (who had become involved in the business) wished to take advantage of the limited liability thereby afforded to protect them from the business' complicated tax affairs;

iv) he said that he was concerned that he might have a personal liability if he became more heavily involved in the business (having been involved in it for some time). He said, later, that he was willing to take this risk;

v) he said that the business' accountants advised that "if companies were to be formed to take forward any part of the business, this should be in parallel with the existing unincorporated business";

vi) he said that Ebonycare and Evelyn were incorporated "to take forward parts of the business";

vii) he said that the business' accountants understood that the whole of the business had been or was intended to be taken over by Ebonycare;

viii) he said "at the time of [Mrs Cadogan's] death, there was no clear practical separation between the partnership [(the unincorporated business)] and [Ebonycare]. In other words, on my understanding, the two entities were in a joint venture, together operating a single business";

ix) he said that the HSBC account, in respect of which he was "a signatory", was "one of several bank accounts of the business" (that is, the partnership Kevin contends for and Ebonycare), the others having been opened in his name or in Ebonycare's name;

x) he said that the Ebonycare properties and the property at 88 Greyhound Lane are "Ebonycare properties";

xi) he said that the expert's report "does not take account of all the mortgage and insurance payments and other costs that I have paid on behalf of the estate".

13. The claim, begun almost 3 years ago, has had a difficult procedural history. There have been a number of case management conferences and interim hearings. The clear impression I have formed, from the orders made at those hearings, is that Kevin has not complied with court orders or furthered the overriding objective and that, in large part, the delay in the claim coming on for trial has been attributable to Kevin's conduct.

14. I have already referred to the case management conference before the Chief Master on 6 April 2017. A further case management conference took place before him on 30 August 2017. Unusually, the order made following that hearing bore a penal notice directed only to Kevin, warning him that he was liable to be held in contempt of court if he failed to comply with certain paragraphs of the order; including in relation to his disclosure and the letter of instruction to the single joint expert. A further case management conference took place on 4 October 2017, again before the Chief Master. On that occasion, the order recorded that Kevin had failed to comply with 3 of the 4 paragraphs to which the penal notice to which I have referred was attached. On 3 April 2018, a further case management conference took place before Deputy Master Bartlett. The Deputy Master reinforced the Chief Master's orders relating to expert evidence and (i) extended the time for questions to the expert (as it turns out to a date exactly a year after the date fixed by the Chief Master) and (ii) permitted any party to apply for an order that the expert attend the trial to give oral evidence. (No such application has been made). The Deputy Master also made an order requiring Kevin to file and serve a composite disclosure list (because, it seems, Kevin's disclosure had previously been given over a period of 5 months by 3 disclosure lists). The last date fixed by the Deputy Master for Kevin to comply with his order was 4 May 2018. This was extended, by an order of Deputy Master Lloyd, by consent, on 20 August 2018, to 28 September 2018. By the same consent order, the Deputy Master extended time for questions to the expert, for a second time, by a further 4 months.

15. As I have said, in due course the expert reported. In her updated report, dated 31 October 2018, she recorded that she had asked Kevin some questions, in her letter (with attachments, running to 40 pages) to him, dated 18 May 2018, but that he had not responded substantively. She recorded that, about a month after she had sent the letter, he promised to respond but then did not do so, even though a reminder was sent to him on 26 June 2018. One of the questions she asked, which Kevin did not answer, was whether the HSBC account "related to the business of Ebonycare or to the estate". She also asked Kevin to provide details (i) for entries on his bank statements which appeared to relate to receipts and payments in connection with Mrs Cadogan's estate and (ii) for invoices which Kevin had supplied and which he claimed related to expenditure he had incurred on the estate's behalf. She also asked Kevin to meet or speak with her to discuss her queries.

16. Although the expert's updated report was dated 31 October 2018, her initial (draft) report was dated 8 July 2018. It was circulated to Kirsty and Kevin some time before 9 July 2018. On 10 July 2018, the expert invited Kevin to send her his questions about

her report. On 12 October 2018, Kevin (through his solicitors) asked her 2 questions (in effect, raising two issues with her draft report). In relation to one of the questions (issues), the expert accepted that Kevin owed about £800 less, in her opinion, than she had previously calculated. In relation to the other of the questions, she rejected the contention advanced on Kevin's behalf. In the 12 October 2018 letter from Kevin's solicitors, it was not suggested that the single joint expert had not taken into account evidence of Kevin's expenditure for the benefit of Mrs Cadogan's estate which had been provided to the expert.

17. At trial, as I have noted, Kirsty was represented by Mr Ng. Kathrin, Kelly and the Fifth Defendant did not appear and were not represented.[4] Having made enquiries on the first day of the trial, I was satisfied that they were aware of the trial dates. Justin represented himself at trial. He was present throughout the trial. Because Kirsty did not seek any determinations against him, in fact generally he did not take any active part in the trial. Kevin had previously engaged solicitors in the claim. It is not clear to me that they have ceased to act or have come off the record. He attended, acting in person, on the first morning of the trial, when he applied for an adjournment. For the reasons I gave at the time, I dismissed his application and refused him permission to appeal to the Court of Appeal. He did not attend the first afternoon of the trial, although I had clearly indicated, before the lunch adjournment, that the hearing would resume (albeit probably briefly) in the afternoon. Justin told me that Kevin had indicated to him that he would be present after the lunch adjournment. Following enquires I asked to be made, it appeared that Kevin was not present in the court building. In fact, other than dealing with some housekeeping matters on the first afternoon of the trial, I adjourned it to the following morning for Mr Ng to open Kirsty's case. I also asked Kirsty's solicitor (and Justin, if he was able to) to notify Kevin that the trial would continue the following morning. Kevin did attend the following morning, when Mr Ng opened Kirsty's case. Kevin asked to make an opening statement (which I permitted) and I explained in detail to him the limited ambit of the issues I intended to determine at the trial. It appeared to me that he understood my explanation. Kevin continued to represent himself for the rest of the trial. I hope that the explanations I provided to Justin and to Kevin from time to time helped them to understand the course of the trial and the issues I had to determine.

18. By at least 3 case management orders, the parties were ordered to notify the court if they considered that the 2 day time estimate for the trial was inadequate. No party has apparently done so. I expressed concern to the parties who were present on the first day of the trial that, if they wanted me to determine all the issues in the claim as they appeared by the time of the trial, a 2 day time estimate was substantially too short. This, Mr Ng and Kevin acknowledged. Mr Ng proposed that, to make best use of the 2 days allocated for trial, I should determine some principal issues in dispute between Kirsty and Kevin. Overnight, at my request, he prepared a draft order showing, by different colouring, how Kirsty wishes me to determine those principal issues and how he understood Kevin wants me to determine those principal issues. The draft order also set out the procedural directions Mr Ng intended to invite me to make to ensure the efficient further progress of the claim and counterclaim.

19. Broadly, Mr Ng's draft order shows that:

[4] Although the Fifth Defendant is represented at the handing down of this judgment.

i) Kirsty seeks an account of Kevin's administration of Mrs Cadogan's estate (from 4 April 2013 to 7 April 2017) including:

   a) an account of his administration of the Ebonycare properties (including all income derived from them) on the footing of wilful default, and otherwise in common form;

   b) a separate account of his administration of the HSBC account;

   c) a direction that he not be permitted to claim, as a just allowance on the taking of accounts, any expense not recommended as a just allowance by the expert or (alternatively) not supported by his existing disclosure or witness evidence;

ii) Kirsty seeks an inquiry into what, if any, interest should be paid on the sums that each of she and Kevin are liable to reimburse (or otherwise pay) Mrs Cadogan's estate;

iii) Kirsty accepts that she is liable to account in common form for her administration of Mrs Cadogan's estate between 4 April 2013 and 7 April 2017;

iv) as his Defence and Counterclaim indicates, Kevin seeks an order that Kirsty accounts not in common form but on the footing of wilful default;

v) Kirsty accepts that there should be an inquiry in relation to Evelyn;

vi) Kirsty seeks liberty to apply for further accounts against Kevin on the footing of wilful default.

20. The draft order reflected the principal issues which Mr Ng invited me to determine; namely:

i) whether the Ebonycare properties were properties falling wholly into Mrs Cadogan's estate. Because Kevin had suggested in his witness statement that they were "Ebonycare properties", Mr Ng was concerned that it might be Kevin's case that, effectively, Ebonycare has had an interest in them (or in the income they generated). When I asked Kevin if he contends that the Ebonycare properties were or were not properties falling wholly into Mrs Cadogan's estate, he explained that he was not in a position to answer the question;

ii) whether Kevin should account for the income generated from or capable of being generated from the Ebonycare properties;

iii) whether Ebonycare and/or Kevin have a beneficial interest in the HSBC account;

iv) whether Kevin should be permitted to claim as just allowances expenses not drawn to the expert's attention by him or recommended for approval by her;

v) whether Kirsty should account in common form or on the footing of wilful default;

vi) whether I should give liberty to Kirsty to apply for further accounts against Kevin on the footing of wilful default.

21. It was clear to me that it was not possible to determine any further issues in a 2 day trial. So I indicated to Kirsty, Kevin and Justin that, only to the extent I needed to do so for the purpose of the different contingencies set out in Mr Ng's draft order, I would determine those 6 principal issues. (As it has turns out, I have not needed to determine the beneficial ownership of the HSBC account).

22. Before setting out the reasons for my determination of these issues, I ought to record a number of matters Kevin asked me to take into account in his opening statement; namely:

i) He has been responsible for Ebonycare;

ii) After Mrs Cadogan's death, local authorities who placed looked-after children with the broader "Ebonycare" business, contracted with Ebonycare, because the regulator transferred Mrs Cadogan's licence to provide services to Ebonycare;

iii) Since 2011, he has always operated the HSBC account.

23. I ought also to record that, in the light of Kirsty's Particulars of Claim (and as she accepted at trial, through Mr Ng) and of Kevin's Defence and Counterclaim, there is no issue in this case that Kirsty and Kevin must account in common form for their administration of Mrs Cadogan's estate. Even if there was a dispute about that, it is well established that they do have to account on that basis at least; see, for example, section 25 of the Administration of Estates Act 1925 and Lewin on Trusts (19th ed), at paragraph 39-005:

> "…A claimant to an account in common form need not allege or prove any default in the trustee's dealings. An order for an account of administration in common form requires the trustee to account only for what he has actually received, and his disbursement and distribution of it. Accordingly, such an account enforces the trustee's primary duty to hold the trust property for the beneficiaries, paying out sums only as he is authorised to do under the terms of the trust…"

The issues

24. I am satisfied that the Ebonycare properties fell wholly into Mrs Cadogan's estate on her death.

25. I have noted that Kevin has admitted in the Defence and Counterclaim, without qualification, that Mrs Cadogan's estate includes the English properties. There has been no application before me to amend and so the court must proceed on the basis of Kevin's admission.

26. Even if there had been a successful application by Kevin to make a very late amendment, my determination of the ownership of the Ebonycare properties on Mrs Cadogan's death would have been the same.

27. There is no dispute that the English properties were in the legal ownership of Mrs Cadogan immediately before her death, so that the legal interest in them fell into her estate. It is well established that, as a result, there is a presumption that, immediately before her death, Mrs Cadogan was the sole owner of the properties (see, for example, *Jones v. Kernott* [2012] 1 AC 776; in particular, at [17]). The burden is therefore on Kevin to establish that Mrs Cadogan was not the sole owner of the properties (so that they did not fall wholly into her estate). Kevin did not suggest, in his cross-examination of Kirsty, that Mrs Cadogan might not have been the sole owner of the properties. (In fact, he acknowledged that 100 Greyhound Lane, one of the Ebonycare properties, was an estate property). Nor did he suggest to her that they did not fall wholly into Mrs Cadogan's estate. I was not taken to any evidence which established that the properties did not fall wholly into Mrs Cadogan's estate. To the contrary, evidence to which I was taken indicates that, as between Kirsty and Kevin at least, there has been agreement, hitherto, that the properties did fall wholly into Mrs Cadogan's estate. The entries on the IHT400 form which was completed for the purpose of their application for a grant of letters of administration shows such an agreement. Further, Kirsty and Kevin executed a declaration of trust of 41 Valley Road (one of the Ebonycare properties), on 8 September 2015, which recited that Kevin was then the legal owner of the property following a transfer to him on the same date and that the property previously formed part of Mrs Cadogan's estate. By the declaration of trust, Kevin declared that he holds the property on trust for Mrs Cadogan's estate. Indeed, that the English properties (or at least the 13 referred to in the Particulars of Claim) fell wholly into Mrs Cadogan's estate appeared not to be controversial before the Chief Master on 6 April 2017. Kevin did suggest, during his cross-examination, that the business (including Ebonycare) contributed substantial sums to the purchase and improvement of the Ebonycare properties. I was not taken to any evidence which established that or expressly suggested that. The English properties were bought before (in some cases, many years before) the incorporation of Ebonycare. Mr George Cadogan apparently retired from the business on 31 March 2008 and Kevin and Kirsty were "admitted" to the partnership on 1 May 2008. The family's relations were very informal and there is no suggestion that the business before 31 March 2008 was not an oral partnership at will between Mr and Mrs Cadogan (as Kevin suggested). The effect of Mr Cadogan's retirement it seems to me (not having been taken to contrary evidence) was that the partnership with Mrs Cadogan was dissolved generally. Mr Cadogan died in early 2009. It was not disputed before me that Mrs Cadogan inherited the whole of his net estate. Kevin explained that the accounts for the partnership did not show any of the Ebonycare properties as partnership assets and that Ebonycare's abbreviated accounts do not show that it has any interest in the Ebonycare properties. In these circumstances, I am not satisfied that any partnership or Ebonycare contributed to the purchase or improvement of the Ebonycare properties or that, thereby, they did not fall wholly into Mrs Cadogan's estate.

28. Because the Ebonycare properties fell wholly into Mrs Cadogan's estate and because too Kevin was Mrs Cadogan's administrator and the Ebonycare properties have been under his control, he is liable to account for his administration of them.

29. As I have noted, the expert has concluded that, for the period between Mrs Cadogan's death and the date of the updated report, in relation to the Ebonycare properties Mrs Cadogan's estate is owed up to £951,000 (which has not been received by Kevin or Ebonycare).

30. Kevin did not dispute Kirsty's evidence that he has not "paid" to Mrs Cadogan's estate any sum for the occupation which has taken place (in fact, by looked-after children it appears) in the Ebonycare properties (which is consistent with his defence that the estate expenses he has paid exceed the sums he has actually received or ought to have received for the Ebonycare properties).

31. Williams, Mortimer & Sunnucks: Executors, Administrators and Probate (21st ed) explain, at paragraphs 52-04 - 52-05:

> "A representative must duly administer and distribute the estate of the deceased. For these purposes, he owes duties to preserve the assets, to deal properly with them, and to apply them in the due course of administration for the benefit of those interested according to that course. A representative who breaches any of these duties is guilty of a devastavit and may be personally liable to make good the loss caused to the estate…
>
> …[A] representative may also be ordered to account upon the footing of wilful default, i.e. to account also for assets of the estate which due to his own breach of duty (whether a devastavit or a breach of trust) he had not received or had received but lost…"

They continue, at paragraph 52-14:

> ""[W]ilful default"…seems to require nothing more than that the representative has fallen below the standards to be expected of a reasonably competent representative…"

They add, at paragraphs 58-23 - 58-30:

> "…The practice is to make representatives account only for the money they themselves have received, not for what they might have received but for their own default. To make them account on the latter footing, wilful default must be pleaded. That is to say, the claimant must plead that assets might have been received but for the default of the representatives; to plead this is technically termed "to plead wilful default". The claimant must allege and prove at least one act of wilful default. Where one or more breaches of trust are proved or admitted a general account on the footing of wilful default will be ordered if the past conduct of the trustees is such as to give rise to a reasonable inference that other breaches of trust not yet known to the claimant or the court have occurred.

> …Wilful default in this context means a passive breach of trust, an omission to do something that ought to have been done as distinct from an active breach of trust or waste. Proof only of one or two active breaches of trust does not entitle a plaintiff to the roving commission that would be afforded by an order for an account on the footing of wilful default. Where wilful default has been alleged and a case is made for it, an account on the footing of wilful default can be directed either at the hearing or at trial of the action, or at any subsequent stage…"

32. I am satisfied that a reasonably competent administrator controlling the Ebonycare properties, which are effectively income-generating properties, would have obtaining income (by way of rent or other occupation fee) for the benefit of Mrs Cadogan's estate. I am satisfied that Kevin has failed to do this and so is liable to account to the estate for that failure on the footing of wilful default (and otherwise in common form in relation to his administration of the estate, as he accepts he must and I am satisfied he ought, as I have explained). Considering, in particular, the sums which the Ebonycare properties might have generated for the benefit of Mrs Cadogan's estate according to the expert, Kevin's failure has been significant and would justify an order for a general account on the footing of wilful default. However, Kirsty does not seek a general account now from Kevin on the footing of wilful default. Rather, she seeks such an account in relation to his administration of the Ebonycare properties, which I will order.

33. I turn now to consider Kirsty's claim for an account by Kevin in common form for his administration of the HSBC account.

34. There is no dispute that the HSBC account was in Mrs Cadogan's name and that she was the account holder immediately before her death. When Mrs Cadogan died, the HSBC account had a credit balance of up to £21,393.51. It is notable, perhaps, that, assuming the HSBC account was then a business account, Mrs Cadogan was recorded, as the account holder and on cheques, as a sole trader, and not as a partner with Mr Cadogan, Kevin or Kirsty. It is notable too, perhaps, that Ebonycare has had its own separate bank accounts. It is Kevin's case that he has operated the account since Mrs Cadogan's death, including during the period he was her administrator. All Kirsty seeks in this trial is an order for an account of Kevin's administration of the account. As Underhill & Hayton: Law of Trusts & Trustees (19th ed) explains, at paragraphs 87.3, 87.5:

> "At the core of the trust is the duty of trustees to produce accounts that are available for the beneficiaries to examine. The beneficiaries are entitled to accounts and supporting documents and information without any court order. However they can also obtain an order for an account as a means of enforcing their rights to specific or substitutive performance of the trustees' duties and reparation for harm caused by the trustees' breaches of duty…
>
> An order for an account in common form is the most common, as the name suggests. The trustees are directed to submit a set of accounts which identify the original trust property, what the

> trustees have subsequently received, what investments they have made, what they have distributed to the beneficiaries, what they have disbursed for costs and expenses, and what remains. These accounts can be challenged by the beneficiaries, but the fact that a court has ordered trustees to present accounts in this form need not imply that the trustees have done anything wrong, since orders for common accounts can be made simply in order to clarify matters. Consistently with this, the beneficiaries need not allege any wrongdoing before such an order will be made: they simply need to establish that their trustee is an accounting party…"

35. In the present context, the explanation of the purpose of an account in common form provided Lord Millett NPJ in the Hong Kong Court of Final Appeal, in *Libertarian Investments Ltd. v. Hall* (2013) 16 HKCFAR 681 at [167]–[170], is particularly illuminating:

> "It is often said that the primary remedy for breach of trust or fiduciary duty is an order for an account, but this is an abbreviated and potentially misleading statement of the true position. In the first place an account is not a remedy for wrong. Trustees and most fiduciaries are accounting parties, and their beneficiaries or principals do not have to prove that there has been a breach of trust or fiduciary duty in order to obtain an order for account. Once the trust or fiduciary relationship is established or conceded the beneficiary or principal is entitled to an account as of right. Although like all equitable remedies an order for an account is discretionary, in making the order the court is not granting a remedy for wrong but enforcing performance of an obligation.
>
> In the second place an order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money. Where the defendant is ordered to make good the deficit by the payment of money, the award is sometimes described as the payment of equitable compensation; but it is not compensation for loss but restitutionary or restorative. The amount of the award is measured by the objective value of the property lost determined at the date when the account is taken and with the full benefit of hindsight."

36. Taking into account the facts I have set out immediately above, I am satisfied that the HSBC account was an asset of Mrs Cadogan's estate on her death and (at least so long

as the bank continued to be indebted to Mrs Cadogan's estate) thereby became vested in Kevin and Kirsty on their appointment as Mrs Cadogan's administrators. Put another way, on the evidence to which I was taken, the benefit of the debtor-creditor contractual arrangement between Mrs Cadogan and the bank passed to Kevin and Kirsty when they became Mrs Cadogan's administrators (at least so long as the bank continued to be indebted to Mrs Cadogan's estate). In principle, in such circumstances, Kevin would be liable to account for his admitted management (through his control) of the HSBC account, during the period when he was Mrs Cadogan's administrator.

37. In fact, because I have ordered that Kevin accounts on the footing of wilful default for his administration of the Ebonycare properties and otherwise in common form, and because, on the analysis so far carried out by Kirsty's solicitors, almost all the receipts into the HSBC account relate to Ebonycare's business, I will need to consider further (immediately after this judgment is handed down), whether, I ought to order any separate account of Kevin's administration of the HSBC account (or, whether, it is appropriate, alternatively, to order an inquiry in this respect, for example) even if it might otherwise have been appropriate to do so.

38. In these circumstances, I do not need to make any further determination, at the moment, about the ownership of the HSBC account.

39. The next issue I must consider is whether Kevin should be permitted to claim, as just allowances, expenses not drawn to the expert's attention by him or recommended for approval by her.

40. As I have noted:

    i) the claim began almost 3 years ago;

    ii) on 6 April 2017, the Chief Master, ordered Kevin to disclose, by 1 May 2017, "all bank statements and other evidence of any income from estate properties passing to [Kevin] or any other party connected with him [and] all documents relating to monies expended by or on behalf of [Kevin] in relation to the estate";

    iii) on the same occasion, the Chief Master directed that there should be a written report from a single joint expert on the question, amongst others, of the sums received and expended by Kirsty and Kevin in relation to Mrs Cadogan's estate;

    iv) on 30 August 2017, Kevin was the subject of an order, to which a penal notice was attached, relating to the letter of instruction to the expert;

    v) on 3 April 2018, Deputy Master Bartlett extended the time for questions to the expert and indicated that, if any party, wanted the expert to attend the trial for cross-examination, they had to make an application;

    vi) Kevin has not made such an application;

vii) by a letter, dated 18 May 2018, the expert raised questions of Kevin but he did not responded substantively;

viii) she sent him a reminder on 26 June 2018;

ix) by the expert's 18 May 2018 letter, she asked Kevin for further information about receipts and payments shown on his bank statements which might relate to Mrs Cadogan's estate and for further information about invoices he contended supported his claim for expenditure for the estate;

x) the expert provided her draft report on 8 July 2018 and informed Kevin, on 10 July 2018, that he could ask questions of her;

xi) when she reported, the expert took into account the material of which Kevin permitted inspection in relation to his disclosure, which included his and Ebonycare's bank statements and, as I have noted, invoices which he contended supported his claim for expenditure for Mrs Cadogan's estate;

xii) in her updated report, the expert credited Kevin with £977,603 mortgage repayments relating to the English properties even though the bank statements he relied on did not support this level of expenditure;

xiii) in her updated report, the expert noted that she had sought a full set of mortgage statements but without success;

xiv) on 12 October 2018, Kevin (through his solicitors) asked the expert only 2 questions;

xv) a further 8 months have elapsed before the trial.

41. The court's jurisdiction to supervise the administration of trusts and estates permits it to fix the terms (or footings) on which accounts are to be conducted. Under paragraph 1.1 of CPR Practice Direction 40A:

> "Where the court orders any account to be taken or any inquiry to be made, it may, by the same or a subsequent order, give directions as to the manner in which the account is to be taken and verified or the inquiry is to be conducted."

42. In *Popek v. National Westminster Bank plc* [2002] CPLR 370, in October 1997, the claimant began a claim against the defendant alleging breach of duty. In February 2000, the court permitted expert evidence, by a written report, from a single joint expert, who reported in July 2000. In January 2001, the claimant applied for permission to adduce further expert evidence from his own experts. That application was refused. The trial took place in May 2001. The claimant's second application for permission to adduce the further expert evidence from his own experts was dismissed. The judge struck out the claim during the course of the trial, in part because, in the light of the expert evidence, the claim was bound to fail. In refusing permission to appeal to the Court of Appeal, Dyson LJ (with whom Longmore LJ agreed) said, at [28]-[29]:

"The detailed facts relied on by Miss Blyth in arriving at her conclusion at para.156, to which I have already referred, are set out at paras.101-110 of her report. Mr Walford told us on instructions in the course of argument that some of these facts, particularly those going to Mr Popek's financial and business competence, are disputed. But the difficulty facing Mr Popek is that he never raised these points at any time before 16 May. It seems to me that if he wished to challenge the conclusion at para.156 of the report on the basis that it had no proper grounding in fact, his solicitors should have addressed this point in their written questions. But although they submitted a significant number of written questions to Miss Blyth, none of them was directed to this issue. That was the time when Mr Popek, through his legal advisers, should have explored with Miss Blyth the question of whether her conclusion would have been different on the basis of his version of the facts. As was explained by Lord Woolf CJ in *P v. Mid Kent Area Health Care National Health Service Trust* [2002] 1 WLR 210, [2001] EWCA Civ 1703, para.28, the cross-examination of a single joint expert is not the norm. Lord Woolf said this:

> "The starting point is: unless there is reason for not having a single expert, there should be only a single expert. If there is no reason which justifies more evidence than that from a single expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report. In the normal way, therefore, there should be no need for that report to be amplified or tested by cross-examination. If it needs amplification, or if it should be subject to cross-examination, the court has a discretion to allow that to happen. The court may permit that to happen either prior to the hearing or at the hearing. But the assumption should be that the single joint expert's report is the evidence. Any amplification or any cross-examination should be restricted as far as possible."

It is obviously sensible that if a single joint expert is (unusually) to be subject to cross-examination, then he or she should know in advance what topics are to be covered, and where fresh material is to be adduced for his or her consideration, and that this should be done in advance of the hearing. It would have been most unsatisfactory if Miss Blyth had been required to consider a challenge to para.156 on the basis of a new set of facts of which she had had no prior notice. In my judgment the Recorder was entitled to decide this application on the basis of Miss Blyth's report. He was not in error in depriving Mr Popek of the opportunity of putting his version of the facts to Miss Blyth by way of cross-examination."

The Court of Appeal's decision in *Popek* related to an application for permission to appeal. Nevertheless, it is referred to for the propositions Dyson LJ set out in [28]-[29] of the judgment in the 2019 White Book and, for example, in Hodkinson & James: Expert Evidence: Law and Practice (4th ed). Unusually, the application was determined by a two-judge court.

43. One of the purposes of the Chief Master's disclosure order was to ensure that the court and the parties, and the expert, had available to them, well before the trial, all the evidence in support of the expenditure which Kevin claims to set off against his liability to Mrs Cadogan's estate.

44. One of the purposes of the Chief Master's order in relation to expert evidence was to ensure that, by the time of trial (at the latest), the court would have an expert opinion on whether that expenditure had in fact been incurred and, if incurred, was properly attributable to Kevin's administration of the estate.

45. Kevin has had over 2 years to provide information about expenses; in particular, to the expert. He has delayed her work, at least by delaying her instruction and not providing her with a substantive response to the questions she asked, including in relation to his expenses claim, as he had promised to do. He has had about a year to raise with her his concerns about her conclusions, because her draft report was provided to him in July 2018. In practice, he has had a year to provide her with further evidence and information. He took 3 months to write to her with his questions, having been told by her, shortly after she circulated her draft report, that he could ask questions, and, then, he did not raise the matters about which he now complains (i.e. that there are many more expenses for which he should be given credit, in particular, in relation to insurance premiums and mortgage repayments). He has made no attempt to obtain alternative expert evidence, to apply to court for permission to call his own expert or to apply to court for an order that the expert gives oral evidence.

46. As Mr Ng suggested, if Kevin is now permitted to claim, in the taking of accounts, as just allowances, expenses which he has not informed the expert about and on which she has not expressed an opinion, that would undermine the Chief Master's order for expert evidence, in circumstances where the claim has already been undetermined for about 3 years. In the light of the order, the expectation of the parties was likely to have been that, at trial, the court would make a determination about what expenses should be allowed to Kevin as just allowances. It was reasonable for the parties to expect that the expert evidence would be given at trial in writing, because no party applied for an order that the expert give oral evidence. Apparently unlike Mr Popek, in this case Kevin did say something about just allowances in his witness statement made on 20 December 2018. However, he said little and provided no details in support. All he said, in the final paragraph of his witness statement, was:

> "The expert's report does not take account of all the mortgage and insurance payments and other costs that I have paid on behalf of the estate. For instance, no account has been taken of the insurance premiums paid for the estate properties out of my bank accounts for which statements were provided to the…expert…; and no account has been taken by the expert's report of the very large sums paid by me in mortgage

> instalments from these same bank accounts of mine to the mortgage lenders for properties within the estate."

A fair reading of what Kevin said is that he expected the expert to take into account his (alleged) payment of insurance premiums and mortgages just from bank statements (which the expert apparently had and on which Kevin had considerable time to comment). He does not suggest that he provided any invoices for insurance premiums, any other evidence in support of payments, or any other information from which the expert could deduce that particular entries on bank statements related to particular expenses. He did not raise these matters with the expert in his questions to her. Further, I have not been taken, at trial, to any contemporaneous evidence relating to insurance premiums or mortgage payments. I was taken to nothing at trial which undermined the expert's opinion about Kevin's expenses claim.

47. The expert has considered Kevin's disclosure including invoices he has disclosed and bank statements. She has credited him with almost £1million of mortgage repayments, although his own documents did not support that level of expenditure. It appears unlikely that there will be further documentary evidence corroborating any further mortgage repayments by Kevin.

48. Whether this issue is determined on the basis of the court's jurisdiction to fix the terms on which accounts are conducted, by reference to CPR Practice Direction 40A or, more generally, as a case management issue, the result is the same and requires the court to determine what is the proportionate response to the issue (by the application of the overriding objective).

49. Taking into account all I have said on this issue, in the exceptional circumstances of this case I agree with Mr Ng that the proportionate, and appropriate, response to this issue is not to permit Kevin to claim, as a just allowance, any expense which has not been recommended, by the expert, to be allowed to him in her updated report.

50. I must now consider Kirsty's request that I give her liberty to apply for further accounts from Kevin on the footing of wilful default.

51. As I have said, in this case, the circumstances which have caused me to conclude that I ought to order an account by Kevin on the footing of wilful default would justify an order for a general account by him on the footing of wilful default. However, such an order is not sought by Kirsty at this trial, and such an order can be onerous and the court is not obliged to make one.

52. In *Re Tebbs* [1976] 1 WLR 924, Slade J ordered a limited account on the footing of wilful default and a general account in common form, and concluded that a general account on the footing of wilful default was not made out. However, he said, at page 931:

> "…I am not finally dismissing the plaintiff's claim for an account on the footing of wilful default in respect of the rest of the estate. At any subsequent stage of the proceedings it will be open to the court, upon evidence of further default being produced to it, to direct further accounts and inquiries on that footing. If the plaintiff wishes to have express liberty to apply

> for further accounts and inquiries upon producing such evidence, I shall give her such liberty."

53. Fry J had also taken the view, in *Re Symons* (1882) 21 ChD 757, that, so long as an account on the footing of wilful default has been claimed by the claimant in her statement of case and so long, too, as the claim for such an account has not been dismissed at trial, a claimant can, thereafter, ask the court to order further accounts on the footing of wilful default.

54. Because I have concluded that I ought to order Kevin to account in relation to his administration of the Ebonycare properties on the footing of wilful default, and because I have indicated that sufficient grounds have been made out for a general account on the footing of wilful default, although I will not make such an order now, in the light of *Re Symons* and *Re Tebbs* Kirsty can seek further orders from the court for Kevin to account on the footing of wilful default. In those circumstances, I am prepared to give her liberty to apply, but it will be for a different judge on a different occasion to decide whether it is appropriate to order further accounts on the footing of wilful default. On that occasion, the judge will need to consider, from a case management perspective at least, whether it is appropriate to allow Kirsty to proceed with her claim for further accounts and so I agree with Mr Ng that it is appropriate to direct that, if Kirsty does seek further accounts, she must support her application with evidence explaining why she did not seek an order for further accounts on the footing of wilful default at trial.

55. I must now consider whether Kirsty should account for her administration of Mrs Cadogan's estate in common form or on the footing of wilful default.

56. Kevin contends that there are 3 grounds justifying an order that Kirsty accounts on the footing of wilful default; namely, that:

    i) Kirsty has failed to collect rent or obtain possession of the properties in Mrs Cadogan's estate;

    ii) Kirsty has failed to account for the rents she had received in relation to the English properties;

    iii) Kirsty has appropriated for her own use estate funds.

    The second and third grounds are the same complaint articulated in a different way and that complaint is really one of an active breach of trust; that is, that Kirsty has received rents relating to the English properties and has not accounted for them. It follows, therefore, that Kirsty can only be required to account on the footing of wilful default if, effectively, she has failed to manage the English properties as a reasonably competent administratrix would.

57. In cross-examination, Kevin accepted that:

    i) Kathrin, Justin and Paul should not have to pay any rent (fee) for their occupation of the English properties;

ii) Kathrin and Justin should be allowed to remain in occupation of the English properties;

iii) Kirsty should not be held liable for any failure to recover any rent (fee) for the occupation of any of the English properties under Kevin's control, unless they had previously been under her control and she had left them in an uninhabitable state.

58. It was not established, at trial, that Kirsty has left any of the English properties in an uninhabitable state or in an unsatisfactory state of repair.

59. Taking into account Kevin's case, Kirsty can only be liable to account on the footing of wilful default in relation to the management of those English properties which were under her control for the time they were under her control whilst she was Mrs Cadogan's administratrix. It appears not to be controversial that those properties were:

i) 91 Barrow Road;

ii) 8 Greenock Road;

iii) The ground floor flat at 10 Greenock Road ("the ground floor flat");

iv) 88 Greyhound Lane;

v) 141 Links Road;

vi) 105 Milliners House.

60. As I have indicated, it is Kirsty's pleaded case that she has not been in control of any of the English properties, except 91 Barrow Road, since October 2013. Mr Ng accepted, in his skeleton argument, that Kirsty received rent for the ground floor flat until the end of December 2014 and Kirsty accepted in her witness statement that she was in control of 105 Milliners House until it was sold in January 2014.

61. Kevin disputed, at trial, whether Kirsty gave up control of the English properties except 91 Barrow Road, the ground floor flat and 105 Milliners House, and that, if she did, when that happened.

62. Kirsty's evidence is as follows in relation to the 6 English properties I have identified:

i) 91 Barrow Road: During the period of her administration, the property was occupied by a tenant, Mr Adam, who was liable to pay £2,200 per calendar month, subject to discounts totalling about £1,200 given to Mr Adam for expenditure he incurred in relation to the property. Mr Adam was a "nightmare" tenant who regularly defaulted in rent payments. She decided not to begin legal proceedings against Mr Adam because Mrs Cadogan's estate would have had to fund those proceedings and the proceedings risked creating a rent void whilst the property remained unoccupied. The Fifth Defendant is apparently seeking to recover the rent arrears from Mr Adam;

ii) 8 Greenock Road: Whilst the property was under her control, it was let, under a pre-existing tenancy, to Zetetick Ltd. which housed vulnerable adults at the

property, for £1,500 per calendar month. For April and May 2013, Zetetick Ltd. paid its rent to Aaron & Partners (which had been instructed by Kirsty and Kevin to act in the administration of Mrs Cadogan's estate) (which is supported by Aaron & Partners' ledgers). In June, July, August and September 2013, it paid rent to Kirsty;

iii) The ground floor flat: Ms Costa was a pre-existing tenant of the property who died in October 2014 and whose rent, of £646.16 per month, was paid by the local authority;

iv) 88 Greyhound Lane: The rent due under the lease of the property was £2,100 per calendar month. She discounted the rent, during the relevant period, on one occasion by £150 because of a persistent blocked drain;

v) 141 Links Road: Between April 2013 and September 2013, the rent due from the pre-existing tenants was £1,733.33;

vi) 105 Milliners House: She told the pre-existing tenants that the property was going to be sold in June 2013. The tenants offered to buy the property but Kevin objected to this and they moved out in July 2013.

63. The opinion of the expert is as follows:

i) 91 Barrow Road: During the period of Kirsty's administration of Mrs Cadogan's estate, she received £74,703 in rent. She should have received £105,600 in rent. (The difference equates to about 14 months' rent). £2,200 per calendar month was a market rent for 91 Barrow Road at the time it was under Kirsty's control;

ii) 8 Greenock Road: The contemporaneous documents are consistent with Kirsty's case about who received rents, how much was received and when rent was received. £1,500 per calendar month was a market rent at the time the property was under Kirsty's control;

iii) The ground floor flat: Kirsty received all the rent which was due between April 2013 and December 2014. The monthly rent she received was a market rent for the property whilst it was under Kirsty's control;

iv) 88 Greyhound Lane: Except for 1 month, when Kirsty received only £1,950, between April and September 2013 she received £2,100 per calendar month. £2,100 per calendar month was a market rent for the property at the time it was under Kirsty's control;

v) 141 Links Road: Between April and September 2013, Kirsty received £10,460 in rent equating to £1,743.33 per calendar month. £1,733.33 per calendar month was a market rent for the property at the time it was under Kirsty's control;

vi) 105 Milliners House: Kirsty received £1,975 per calendar month in rent until the end of July 2013, after which she received no rent. £1,975 per calendar

month was a market rent for the property at the time it was under Kirsty's control.

64. The expert's analysis, drawn from the bank statements relating to bank accounts in the name of Kirsty, Kevin and Ebonycare, is consistent with Kirsty's case about giving up control of most of the English properties in October 2013.

65. That Kevin took control of the English properties, except 91 Barrow Road and 105 Milliners Road, in October 2013 is also consistent with his November 2013 emails pressing Kirsty for details of the rental income she had received and for her to step down as Mrs Cadogan's administratrix.

66. In the light of the expert's analysis and Kevin's November 2013 emails, I prefer Kirsty's evidence about her control of the English properties to Kevin's objection to her evidence.

67. Kirsty's evidence about the rent payable under pre-existing leases of the English properties under her control (and her evidence about the discounting of the 88 Greyhound Lane rent) appears to be uncontroversial. Taking into account that evidence, Aaron and Partners' ledgers relating to 8 Greenock Road and the expert's opinion about Kirsty's rent receipts and market rent, Kevin is unable to establish that Kirsty was in wilful default in her management of the English properties during her administration of Mrs Cadogan's estate, in relation to 8 Greenock Road, the ground floor flat, 88 Greyhound Lane and 141 Links Road.

68. Kirsty did not receive rent for 105 Milliners House between August 2013 and December 2013. It is not disputed that the tenants left the property in July 2013. No objection is taken to its sale in January 2014. I am not satisfied that, during that period, a reasonably competent administratrix would have re-let the property.

69. A more difficult question is whether a reasonably competent administratrix would have taken steps, between April 2013 and April 2017, to repossess 91 Barrow Road. A reasonably competent administratrix is unlikely to have made a decision to begin possession proceedings until some months after Mr Adam fell into arrears during this period. If the proceedings had been successful there is likely to have been a number of months of a rent void. It is likely, too, that there would be irrecoverable litigation costs and, because Mr Adam was in rent arrears, there is a possibility that it would have been difficult, at least, to recover litigation costs from him. Looking at the expert's analysis of rent received by Kirsty from Mr Adam, he paid most of the rent due most months during the period with which I am concerned. In these circumstances, I am not satisfied that a reasonably competent administratrix would have begun possession proceedings against Mr Adam. Nor am I satisfied that Kirsty has otherwise been in wilful default in her management of 91 Barrow Road. If she was, because the Fifth Defendant is apparently now taking steps to recover rent arrears from Mr Adams (and there is no evidence that they will find it any more difficult to recover those arrears now than Kirsty might have done at an earlier time), in the exercise of my discretion I would not order an account of Kirsty's administration of 91 Barrow Road on the footing of wilful default in any event.

70. The final substantive matter with which I need to deal in this judgment is the question of interest.

71. Lewin explains, at paragraph 39-059:

> "…equity generally awards interest as a matter of discretion on any compensation that a trustee is ordered to pay for a breach of trust. Even where the breach is an improper payment made bona fide under a mistake of law, the trustee is regarded in equity as still having the money in his own hands and is accordingly liable to pay interest as well as capital…"

72. In the circumstances, it is appropriate to order inquiries as to the interest, if any, payable by Kirsty and Kevin on the sums they are found to owe to Mrs. Cadogan's estate.

Disposal

73. For the reasons I have given:

i) I will order that, save in relation to Kevin's administration of the Ebonycare properties, in respect of which he must account on the footing of wilful default, he must account for his administration of Mrs Cadogan's estate in common form;

ii) I will hear further from the parties about what, if any, order it is appropriate to make in relation to the HSBC account in the light of the conclusions I have already reached;

iii) As to just allowances, I will order that Kevin is not permitted to claim, as a just allowance, any expense which has not been recommended, by the expert in her updated report, to be allowed to him;

iv) I will give liberty to Kirsty to apply for an order that Kevin accounts further on the footing of wilful default but on condition that she supports her application with evidence explaining why she could not have sought an order for further accounts on the footing of wilful default at trial;

v) I will order that Kirsty accounts for her administration of Mrs Cadogan's estate in common form;

vi) I will make an order for the Evelyn inquiry Mr Ng suggested;

vii) I will direct an inquiry as to interest;

viii) I will give procedural directions for the accounts and inquiries.

I will also hear further from the parties about how effect is to be given to this decision and about costs and consequential matters.

74. There is one further point I should mention before hearing further from the parties. Mr Ng's draft order contemplated that accounts would be ordered for the period ending 7 April 2017. In each case, the period of the accounts should end on 23 April 2017 because that was immediately before the Fifth Defendant's appointment as Mrs Cadogan's administrator took effect.