**THE HIGH COURT**

**[2016 No. 2326 S]**

**BETWEEN**

**MARGARET BEST AND CARMEL BEST (AS JOINT COMMITTEE OF THE PERSON AND THE ESTATE OF KENNETH BEST, A WARD)**
**PLAINTIFFS**

**AND**

**PRAMIT GHOSE, NIALL JOSEPH TINNEY, PATRICK THOMAS FINNEGAN, PETER ALPHONSUS COSTIGAN, PATRICK DEMPSEY, RAYMOND DEASY, TADHG FRANCIS GUNNELL, ANGUS MCDONNELL, DAVID HARLOWE, MARTIN HARTE, AIDAN SHEERIN, ARTHUR QUINLAN, JOHN MARTIN MAGUIRE, ANNE BARRETT AND LEGACY INVESTMENT HOLDINGS LIMITED, TOGETHER FORMERLY TRADING AS BLOXHAM STOCKBROKERS PARTNERSHIP,**

**BLOXHAM STOCKBROKERS PARTNERSHIP (IN LIQUIDATION)**

**AND**

**NORTHERN TRUST (IRELAND) LIMITED**

**DEFENDANTS**

**Judgment of Ms. Justice Baker delivered on the 27th day of June, 2018**

1. Kenneth Best is a Ward of Court and this action was commenced by his mother and sister, the joint Committee of his Person and Estate ("the Committee"), for an account from the defendants in regard to the dealings in the fund invested on behalf of Mr. Best, which I will for convenience refer to as "the Fund".

2. The first to fifteenth defendants were, at the relevant times, partners in the firm of Bloxham Stockbrokers Partnership which was wound up by order of Cross J. made on 31 May 2012. Kieran Wallace was appointed provisional liquidator of the limited partnership on that day and subsequently appointed liquidator by order of Laffoy J. made on 25 June 2012.

3. The action commenced by way of summary summons on 1 December 2016 was authorised by order of the President of the High Court given on 7 November 2016. Further consideration of the mode of action will appear later in this judgment.

4. The matter came on for hearing before me on foot of a notice of motion issued on 1 March 2017 in which the following relief was sought:

> (a) an order that the first to tenth and twelfth to sixteenth defendants account to the plaintiffs for their dealing with the Fund and provide the plaintiffs with all supporting documentation for the account;
>
> (b) an order directing an inquiry as against the first to tenth and twelfth to sixteenth defendants as to the dealings of those defendants with the Fund.

5. An inquiry is not sought at this time, and the sole relief sought is an order for the taking of an account.

6. A letter from the summons server outlines the unsuccessful attempts to effect service on the eleventh defendant, Aidan Sheridan. No orders are sought against him in this application.

7. No order is sought against the seventeenth defendant, Northern Trust (Ireland) Limited, and the plaintiffs accept that all documentation and information it had has been delivered to them.

8. An appearance has been entered by some, but not all of the defendants. Some of them did not take any active role in the hearing of the application and some have indicated through themselves or their solicitors that they have no objection to the making of the order.

9. The motion was grounded on an affidavit of Margaret Best, the first plaintiff and mother of Kenneth Best ("Mrs. Best"), sworn on 1 March 2017.

10. Affidavits were sworn in reply by the first defendant on 23 May 2017 and on 27 October 2017.

11. Affidavits were also sworn by the third defendant on 3 April 2017, by the eighth defendant on 29 November 2017, by the ninth defendant on 15 February 2017, by the tenth defendant on 12 May 2017, by the twelfth defendant on 28 April 2017, by the thirteenth defendant on 15 February 2017, by the fourteen defendant on 29 November 2017, by fifteenth defendant on 12 April 2017, by Mr. Wallace, liquidator of Bloxham, on 7 July 2017, and by Michael O'Sullivan on behalf of Northern Trust, on 11 January 2017.

12. A supplemental affidavit was sworn on 21 September 2017 by Mrs. Best.

13. An affidavit in support of the application was sworn on 14 September 2017 by David Croft, a financial expert.

14. The first defendant, Pramit Ghose, was cross-examined on his affidavit on foot of a notice to cross-examine dated 26 June 2017. A notice to cross-examine Mr. Wallace was served, but the application to cross-examine him was not pursued at the hearing of the application.

15. The matter was then heard on affidavit and the cross-examination of Mr. Ghose, and on written and oral legal submissions.

**The mode of action**

16. The plaintiffs seek an order that the defendants should give an account of the dealings in the Fund. The claim is one for an account *simpliciter*, and not by way of an order ancillary to any other form of action against the defendants.

17. This action is not grounded on an allegation that the defendants acted in any wrongful way with regard to the management of the Fund, not for relief "ancillary to the prosecution by a plaintiff of a substantive cause of action", the language used by Clarke J. in his first judgment in A*forge Finance SAS and others v. HSBC Institutional Trust Services (Ireland) Ltd.* [2009] IEHC 565, [2010] 2 IR 688, at para. 14, paraphrasing the words of Delany and McGrath in *Civil Procedure in the Superior Courts* (2nd ed., Round Hall, 2005) at para. 23-07. The order for the taking of an account as an ancillary order is "part of the process of determining the legal rights and obligations of parties to litigation rather than an entitlement in itself."

18. The action being one for the substantive relief of an account is governed by O. 2, r. 1(3) of the Rules of the Superior Courts ("RSC") which provides for the commencement by way of summary summons of an action "in which the plaintiff in the first instance desires to have an account taken". Clarke J. considered the mode of action in his second judgment in *Aforge Finance SAS and others v. HSBC Institutional Trust Services (Ireland) Ltd.* [2010] IEHC 6 and commented that the rules are silent as to how the process is to be conducted thereafter, and that the court is "at large" as to "the manner in which any preliminary question validly raised by a defendant is to be determined", at para. 12. In that case, he directed the trial of certain preliminary issues.

19. In the present case, I am satisfied that the claim of the plaintiffs to an account is properly brought by summary summons. The affidavit evidence is sufficient to deal with the preliminary question, namely whether the plaintiffs have an entitlement to an account, and as will appear later in this judgment, to deal with some but not all of the questions otherwise arising. There is some difference between the parties regarding the nature of the documentation and information already given to the plaintiffs, and the difficulties arising therefrom will be dealt with later in this judgment.

**Material facts**

20. Mr. Best was made a Ward of Court by order of the President of the High Court on 14 June 1993. Proceedings were commenced on his behalf in 1978 against the manufacturer of a vaccine he had received as a baby which left him brain damaged, and the sum of IR£2.7 million was paid into court following the approval by the High Court of a settlement of the proceedings. IR£500,000 of the award of IR£2.7 million were paid out to discharge past expenses and the balance of IR£2.25 million became the Fund.

21. Mr. Best is now 49 years of age and lives with his mother who was appointed Committee by the order of 14 June 1993. His sister, the second plaintiff, was appointed joint committee with Mrs. Best by order of 9 December 2005.

22. In the early years, the Fund was administered through the Office of the Wards of Court by Allied Irish Bank Investment Managers, but the administration changed in 2001 and the nature of the new arrangements in broad terms is to be found in the correspondence.

**The investment mandate changes**

23. Correspondence on 13 July 2001 between Joy Callender of Bloxham and the Office of the Wards of Court shows that at that time it was proposed that the Fund would be transferred to Bank of Ireland Security Services to be held in a "segregated account in the name of the Accountant of the Courts of Justice". Assets within that account were then to be designated to the appropriate Ward, Mr. Best, and to be managed by Bloxham.

24. The investment basis of the Fund was set out in the letter of 13 July 2001, *viz*. the Fund would be managed by Bloxham in an "investment portfolio on a discretionary basis." Under the heading "Valuation", Ms. Callender said that Bloxham would "provide the Office of the Wards of Court with a full valuation of all assets under our management on a quarterly basis".

25. The transfer of the portfolios from Allied Irish Bank Investment Managers was authorised by the President of the High Court on 25 July 2001, but apart from the contents of a letter dated 29 January 2002 from the Office of the Wards of Court to Messrs. Ernst J. Cantillon, solicitors for the Committee, no further evidence or information regarding the transfer is available. At that point, the Fund was valued at approximately IR£3,100,000.

26. In a letter dated 19 February 2002 to Ms. Callender from John Mahon, Assistant Registrar for the Office of the Wards of Court, regarding a "revised investment proposal", it was agreed that that the Fund would be managed in a "highly interactive portfolio management style", in line with the proposal made in January 2002. Mr. Mallon instructed Bloxham as follows:

> "Assuming that the Court will not have to consider any alternative investment proposals from Mr. Kenneally it is appropriate that you would proceed to implement the revised investment proposal at your discretion. I would hope that the Custodian agreement would be finalised in the coming weeks and this will further facilitate the implementation of your proposal".

27. Bank of Ireland Security Services was appointed custodian of the Fund on 11 September 2002.

28. Bloxham in turn contracted with Pershing Securities International Limited ("Pershing"), a wholly owned subsidiarity of Bank of New York, to manage all the back office functions, but that sub-contractual arrangement is not relevant to the questions before me.

29. By August 2003, it was considered that the existing asset mix was not sufficient to deal with anticipated future cash requirements and the investment approach was revised to increase the equity weighting. Correspondence in regard to this proposed new management approach was more by way of information than consultation. Mrs. Best says she did receive valuation reports but not transaction reports during the years.

30. Mr. Ghose says in evidence he does not know what happened to the Bloxham computerised data after the liquidation. He also said in his oral evidence that valuation reports "may have been sent" in the Office of the Wards of Court but he does not know if they were sent on a regular or consistent manner. The Office of the Wards of Court says no reports were received.

31. It is in that context that the present action was commenced.

32. In 2011, Northern Trust (Ireland) Limited, the seventeenth defendant, purchased the assets of Bank of Ireland Security Services and became thereafter custodian of the Fund.

33. Bloxham managed the Fund until May 2012, when it was directed to cease trading by the Central Bank. Bloxham was subsequently wound up by order of the court, and Mr. Wallace appointed liquidator.

34. Bloxham's accounts were then moved to J&E Davey Stockbrokers following the sale of its private client business on 5 June 2012, between the date when Mr. Wallace was appointed provisional liquidator and his appointment as official liquidator on 25 June 2012.

35. At all material times, Bloxham carried on transactions on behalf of the Fund and acted as advisors and managers of the Fund, but was not a custodian.

**The obligation to account**
36. The account sought is more than what in everyday language would generally be called "an account" or "a statement" such as one furnished by a banker in the normal course of a banking transaction. What is sought is an account as long understood by the courts of equity, the giving of a narrative or an explanation in respect of transactions or events in the operation of the Fund.

37. In the second edition of his *Equity and the Law of Trusts in the Republic of Ireland*, (Bloomsbury, 2011) at p. 387, Keane usefully explains how the action for an account fell into disuse at common law in the mid-19th century, as it was "so cumbersome and laden with technicalities". In that context, the application for the taking of an account in equity to the chancery courts developed, and not merely in cases where an applicant for such account was asserting an equitable right in that court. Thus, the application for account could be made *inter alia* in what the learned author described as a "fiduciary or *quasi*-fiduciary relationship". Keane noted by way of example the general right of a principal to an account as against his agent or "the similar right of any person who has reposed confidence in another person to such an account."

38. This obligation to account falls upon certain categories of persons, the precise limitations whereof are the first issue to be addressed in this judgment, and I first turn to consider the basis of the plaintiffs' claim to be entitled to an account.

**The entitlement as of right**
39. Because the claim is one brought for the taking of an account and not as part of another substantive cause of action, the plaintiffs must establish an entitlement to an account as of right and not by way of ancillary relief or in support of an already claimed allegation of wrongdoing.

40. In his first judgment in *Aforge Finance v. HSBC Institutional Trust*, at para. 15, Clarke J. considered that the "most obvious example" of the circumstances giving rise to an entitlement to an account as of right is where a defendant owes a fiduciary duty to the plaintiff and is obliged to account by virtue of the fiduciary relationship. He quoted from the judgment of Chatterton V.C. in Moore v. McGlynn [1894] 1 IR 74, also quoted with approval by Kenny J. in Chaine-Nickson v. Bank of Ireland [1976] IR 393, that the relationship of trustee and beneficiary imports such a right. Moore v. McGlynn is an authority for the general and established principle that a cestui que trust is entitled to have an account of the trust property as of right, the right deriving from the nature of the relationship between trustee and beneficiary and not being dependent upon any allegation of wrongdoing on the part of the trustee.

41. In his second judgment in *Aforge Finance v. HSBC Institutional Trust*, having considered the statutory and contractual regime in which the investments were made and which governed the operation of the investment fund, Clarke J. held that there is no reason at the level of principle why a fiduciary relationship could not arise by implication in a trust relationship which was statutory in origin.

42. Clarke J. did not consider it necessary to determine in his second judgment in *Aforge Finance v. HSBC Institutional Trust* the matter by reference to the question of whether the relationship of trustee and beneficiary existed, as the trust relationship was clear. His judgment, therefore, is of limited assistance as it did not answer the question whether an obligation to account could exist other than when there exists an express trust relationship. An obligation to account is implicit in a fiduciary relationship, but it is not always easy to ascertain if a relationship imports fiduciary obligations.

43. I find of particular benefit the statement of principle contained in McGhee, *Snell's Equity* (33rd ed., Sweet & Maxwell, 2015), where the obligation to account is explained as one which arises out of the receipt by a person of property "in an accountable capacity", at para. 20-015, and although that description might appear to be tautological, it is useful as it identifies the key component. The accountable capacity is one that arises in any circumstance where it can be shown that a person has control of property which belongs to another. As Snell says, the central case is that of an express trustee but the principles apply to various categories of relationships, including "agents who control property belonging to the principals", at para. 20-012.

44. Snell also suggests that "[t]he claimant bears the onus of proving that the defendant has received property into their control in circumstances sufficient to import an equitable obligation to handle the property for the benefit of another", at para. 20-015.

**The fiduciary relationship**
45. Assistance is found in the judgment of Feeney J. in *Clements v. Meagher* [2008] IEHC 258 where he said the following:

> "It is not possible to provide a complete definition of the categories of persons who occupy fiduciary positions. The categories of fiduciary relationships are not closed and it is well recognised that fiduciary duties may be owed notwithstanding the fact that the relationship in question does not fall within one of the settled categories of fiduciary relationships. That is so, provided the circumstances justify the imposition of fiduciary duties. A fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary. It follows that a fiduciary is a person who owes fiduciary duties. A fiduciary relationship, therefore, is a relationship between two or more persons in which at least one of them is a fiduciary who owes fiduciary duties to the other or others. (see paragraph 7 - 04 of the 31st Edition of Snell's Equity)", at para. 3.1.

46. The observations of Feeney J. were quoted with approval by Dunne J., giving the judgment of the Supreme Court in *Fermoy Fish Ltd. v. Canestar Ltd*. [2015] IESC 93. Dunne J. considered that duties of a fiduciary type arose because of the agreement by which Canestar undertook to sell, package, and distribute fish on behalf of Fermoy Fish to its former customers with the aim that monies agreed to be owed by Canestar to Fermoy Fish would be recouped:

> "By virtue of the agreements entered into between the parties, Canestar […] undertook to manage the customer accounts of Fermoy Fish for a period of twenty-four months in consideration of a sum of money. Fermoy Fish was entitled to payments made by customers to Canestar on behalf of Fermoy Fish. Clearly, in circumstances where Canestar received a sum of €484,895 on behalf of Fermoy Fish it was under an obligation to pay that sum to Fermoy Fish. It could hardly be thought otherwise than that Canestar had a relationship of trust and good faith towards Fermoy Fish. Despite that, Canestar received money belonging to Fermoy Fish from its customers and, instead of paying it over to Fermoy Fish as it was obliged to do, used the money to discharge its creditors".

47. Therefore, Dunne J. held that the trial judge had been mistaken in his view that no fiduciary obligation arose. The basis of the finding that a fiduciary obligation existed was the undertaking "to manage the customer accounts", but the contract also gave Canestar the right as custodian of the monies collected. The second element is not present in the contract by which Bloxham managed the Fund.

48. The approach adopted by Millett L.J. in *Bristol and West Building Society v. Mothew* [1998] Ch 1 to describe a fiduciary relationship was quoted with approval by Feeney J. in *Clements v. Meagher* and by Fennelly J. in *McMullen v. Clancy (No. 2)* [2005] IESC 10, [2005] 2 IR 445, at p. 470. The characteristics of the fiduciary relationship were described by Millet L.J. as follows:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary", at p. 18.

49. I too adopt that statement of principle.

50. Hogan J. in *Irish Life and Permanent Plc v. FSO* [2012] IEHC 367, at para. 45, referred to "super-added duties of utmost good faith and complete disclosure" which could not, in his view, have been imposed upon the parties in the commercial context in which they operated.

51. Mason J., giving his judgment for the High Court of Australia in *Hospital Products Ltd. v. United States Surgical Corporation* (1984) 156 CLR 41, held as follows:

> "The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense", at para. 68.

52. The attempt to define the fiduciary duty has given rise to much juridical and academic comment but certain features of the fiduciary relationship are well established. A fiduciary relationship is one where it can be said that a person agrees to act for, or on behalf of, or in the interests of, another.

53. Professor Delany Biehler, in her *Equity and The Law of Trusts in Ireland* (6th ed., Round Hall 2016), at p. 234, quoting from Smith's 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on Behalf of Another' (2014) 130 Law Quarterly Review 608, at p. 609, suggests that the requirement of loyalty must be present in all fiduciary relationships.

**Relationships where fiduciary elements are not present**

54. The normal relationship of banker/customer is not a relationship which imports fiduciary obligations, and this is established in a number of recent judgments, including that of Finlay Geoghegan J. in *IBRC Ltd. v. Morrissey* [2013] IEHC 208.

55. Finlay Geoghegan J. considered that the relationship did not go beyond the contractual relationship, notwithstanding a close commercial and business relationship between the parties. She found that Mr. Morrissey had not sought advice from the bank, the bank had not proffered advice in relation to his investment business, and there was none of the *indicia* of a "venture capital" agreement or of a joint venture. She held that the financing terms "were confined to the bank obtaining a return by way of arrangement fees and interest payments", at para 136. Finlay Geoghegan J. found the bank had not taken upon itself an obligation to act with the interest of Mr. Morrissey in mind, nor undertaken to act for or on behalf of Mr. Morrissey in the lending transactions.

56. This decision, well rooted in the authorities, would suggest that the normal banking relationship does not import an obligation of trust giving rise to a fiduciary type duty.

57. The position is different in the case of a stockbroker, as considered by Laffoy J. in *In re Money Markets International Ltd*. [2000] 3 IR 437, at pp. 447 to 448, where she held that the effect of s. 52(5)(a) of the Stock Exchange Act 1995, as substituted by s. 78 of the Investor Compensation Act 1998, was to ring-fence the funds deposited with a stockbroker in the client bank account and preserve them for the client creditors who had provided the funds. The funds so held in the client account were clients' funds and were held by the firm in a fiduciary capacity as trustee. It was the statutory ring-fencing of the funds in a client bank account that constituted the fund as a trust fund in which the client had a beneficial interest irrespective of how the evolution of the final balance had occurred. Laffoy J. did not consider that the fact the investment was made in the course of business did not mean that a trust was not constituted by the statutory provisions.

58. The ordinary relationship of banker/customer involves the bank agreeing to hold money on behalf of a customer, to act on instructions with regard to payments into and from the account, and a bank in general does not actively take decisions which can result in a gain or loss of monies so held.

59. Bloxham had control and responsibility in regard to the Fund in that it did have control over movements in the Fund and was not constrained by the need to consult before directing the purchase or sale of assets, and could direct movements in the asset base within its mandate.

60. But it was not the custodian of the Fund in the way a stockbroker would be.

61. I turn now to analyse the indices of the relationship as it does not readily fit within the categories dealt with in these recent Irish authorities.

**The factual matrix is central**

62. The question of whether an account is required to be given must be answered from the nature of the relationship and the duties that are express or arise therefrom by necessary implication.

63. Finlay Geoghegan J. in *IBRC v. Morrissey*, accepted the agreed proposition that the question of whether a fiduciary relationship existed was primarily a question of fact, and her conclusion on the facts was that the bank had not proffered nor had Mr. Morrissey sought advices that took the relationship outside the "normal commercial relationship of a lending bank and borrower by an experienced entrepreneur or business person", at p. 139. The feature of the relationship that lead to the conclusion that it was not fiduciary was that each party was entitled to further their respective commercial interests in their business relationship with one another, and each was entitled to take such steps and secure arrangements "which each perceived to be to their commercial advantage".

64. In her *Equity and the Law of Trusts in Ireland*, Professor Delany Biehler quotes from Edelman, *When Do Fiduciary Duties Arise?* (2010) 126 Law Quarterly Review 302 , that "the label 'fiduciary' duty is a conclusion which is reached only once it is determined the particular duties are owed", at p. 234.

65. The case law would also suggest that the concept is sufficiently fluid so that certain classes of relationships import certain classes of obligations which could be called "fiduciary" and Woolf M.R. in *Attorney General v. Blake* [1998] Ch. 439, at p. 454, noted that:

> "[t]here is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation."

66. It is, therefore, necessary to ascertain whether those elements of loyalty, an obligation to act in the interests of another, and an obligation not to make a secret profit and to act in good faith are present to a sufficient degree before the characteristics of fiduciary relationship can be found.

**Application to the facts: are there fiduciary elements?**
67. For present purposes, I consider that the essential material characteristic of a fiduciary relationship arises where a person has both the power to act on behalf of another or to act in a way that impacts on the interests of another, and a responsibility to do so in the interests of that other person. The relevant elements include duties of loyalty, responsibility and control over matters that can impact on the interest of another, and a duty not to make a secret profit.

68. If the relationship carries with it an obligation and duties equivalent to a duty of loyalty, or what is sometimes called a "duty of trust", then, that relationship is, for the purposes of the calling for an account, a relationship of a fiduciary nature or sufficiently equivalent to import a degree of obligation which may be of a higher order than that express in a contract. The elements may import a duty to account but not always other duties or rights present in a trust in a true sense.

**Conclusions on the fiduciary relationship**
69. I am of the view that Bloxham undertook the management of the Fund in circumstances which imported a duty to act with loyalty, and whilst Bloxham was entitled to be paid commission and other management charges on the agreed basis, it could not act in its own commercial interests. The management contract contained sufficient elements of a fiduciary nature to import a duty to account.

70. The obligations that Bloxham undertook in regard to the management and operation of the Fund were obligations which, in my view, did import obligations of loyalty, an obligation to achieve a return in the investment for the benefit of Mr. Best, with a corresponding duty to do so in the interests of the Fund and not in the commercial interests of Bloxham. There also exists, in the relationship, an obligation of good faith and also an obligation derived precisely from the fact which Finlay Geoghegan J. regarded as being missing in *IBRC Ltd. v. Morrissey* to act in the commercial interests of the Fund and not in the separate, or potentially separate, interests of Bloxham. Bloxham was paid a management fee for that reason and the fee was one agreed with the Office of the Wards of Court, and not by way of a calculation of commission. It is not so much that Bloxham were proffering advice regarding the investments in the Fund, but that Bloxham directed those investments or made those investments with a particular interest in mind. The relationship did, in my view, import a sufficient element of the indices of a fiduciary relationship to impose a duty in Bloxham to account to the person who, to borrow the language of Keane, had "reposed confidence" in Bloxham to manage the Fund.

71. The relationship is different in a number of respects from the relationship of banker and customer because Bloxham, in a very real and practical sense, had the power to direct the investments and the responsibility to do so with the investment objective identified from time to time. It was constrained by the investment objectives to exercise such powers, but the power to choose the investments to achieve that end was vested in Bloxham, subject to the restrictions imposed by law that limit investment to securities suitable for trust investments.

72. It is argued by counsel for Mr. Ghose that the fact of managing an account does not give rise to a fiduciary relationship between the manager and the beneficiary. Reliance is placed on the judgment of Hogan J. in *Irish Life and Permanent Plc. v. FSO*, where he noted the reluctance on the part of the court to extend the boundaries of fiduciary relationships and thereby to import duties of utmost good faith and disclosure into the "ordinary workings of the commercial world", at para. 45. Counsel for Mr. Ghose also argues that the relationship between Mr. Best through his Committee, and Bloxham was the commercial relationship of the management of a fund.

73. I am not persuaded that my conclusion offends the approach of Hogan J as the question I address is not whether the relationship imported all of the duties of a fiduciary, but rather sufficient indices of that relationship to justify the action for an account. I am not required to determine whether the contract imported other duties or rights of a fiduciary type that might give rise to the entitlement to trace or other substantive rights.

74. It seems to me, therefore, not to be necessary to determine whether Bloxham is to be described as a fiduciary in the absolute sense or whether, for the purposes of the present application, the arrangement entered into with Bloxham imported an obligation of confidence and trust importing in turn an obligation to explain or account the exercise of the discretionary power. I am satisfied on the evidence that Bloxham did have an obligation to explain and account for the exercise of its discretionary investment and management powers, and that the contractual relationship does import a sufficient degree of confidence or trust to constitute the management obligation as being fiduciary in nature.

75. The documentation shows that Bloxham was obliged to manage the Fund on behalf of and with the interests of Mr. Best in mind. The role was a commercial role but the interests to be protected were those of Mr. Best, and as a matter of law and contract, it was obliged to act in the interests of and for the benefit of the Fund, and was not entitled to act other than with the interests of Mr. Best in mind.

76. Mr. Croft, the financial expert engaged by the plaintiffs, explains his view from the documents he examined that the role of Bloxham was to "provide a discretionary management service to the Ward" and that Bloxham "took the decisions about the composition of the portfolio and executed the transactions needed to invest and manage a portfolio of securities without the need for instructions or day to day directions from the Ward".

77. While Bloxham did, from time to time, communicate with Mrs. Best, the discretionary element of the arrangement gave it a power which imports an obligation to exercise the discretion faithfully and with the interests of Mr. Best and no other interest in mind.

78. I do not accept the argument of the plaintiffs that the vulnerable personal circumstances of Mr. Best have the effect of constituting Bloxham trustee of his interests. The purpose of appointing the Committee is to interpose those persons appointed in that role between the Ward and any person or body that manages its funds, and to place the direct obligation of trust and protection of the Ward on the Committee, and ultimately, on the Office of the Wards of Court and the President of the High Court.

79. Wardship is a unique and complex structure by which the President of the High Court holds the ultimate protective role and the Committee is answerable to the President in respect of its stewardship. The respective roles assumed by the Committee and the role vested in the President of the High Court is one characterised by profound responsibility and loyalty.

80. I do not consider that the relationship of trust and loyalty arose on account of the fact that Mr. Best is a vulnerable person. The Committee stands in a fiduciary relationship to him on account of his vulnerability. The obligation on Bloxham derives from the nature of the contract by which Bloxham was engaged to administer the Fund with the interests of Mr. Best in mind.

**Standing to bring the action**

81. The Committee had no direct contractual relationship with Bloxham, the contract was with the Office of the Wards of Court, and the Accountant of the Courts of Justice made requests for payment from the account from time to time, in accordance with the needs of the Ward.

82. Bloxham argues that, as its reporting obligation is to the Office of the Accountant of the Courts of Justice ("the Accountant's Office"), it can have no reporting obligation to the Committee.

83. The question arising is whether the action is properly one that may be maintained by the Committee or whether, having regard to the fact that the direct contractual relationship is between the Accountant of the Courts of Justice or the Office of the Wards of Court, on the one hand, and Bloxham on the other, and whether, as argued, it is those Offices that alone have standing to bring this action.

84. The President of the High Court has authorised the bringing of these proceedings in the name of and on behalf of the Ward. The order is clear that the intended proceedings were to seek an account of Bloxham's dealing with the Fund and all documents on which such account is based. The Committee, therefore, in my view, stands in the role of and acts for the purpose of the action on behalf of the relevant Offices of the High Court for the purposes of these proceedings, and has standing derived from the authorisation of the President of the High Court.

**What form of account is to be given?**

85. The plaintiffs seek more than a mere statement of current balances from time to time of the Fund, more than a regular bank statement that might issue to the holder of a bank account and that is capable of being produced electronically.

86. That a court may itself engage in the exercise of taking an account is well established and is a practice not unfamiliar to lawyers. The plaintiffs, however, do not seek that the court would take the account, but rather, that the defendants would give an explanation and furnish documents and a narrative regarding the history of the Fund.

87. Whether that narrative is sufficient is a matter that is open to scrutiny by the court on inquiry, and would involve an examination of the records and whether the records are sufficient and comprehensive, and enable the beneficiary of the Fund to understand the movements on the account from time to time. That relief is not sought at this juncture.

88. The judgment of Chatterton V.C. in *Moore v. McGlynn* gives some guidance on the type of detail and information to be furnished by a trustee. An account was there directed of the profits arising in the administration of the assets entrusted to the trustee, including the management of the trading carried on by the trustees, what Chatterton V.C. described as the "usual accounts of the real and personal estate".

89. Clarke J. considered the form of account in the second judgment in *Aforge Finance v. HSBC Institutional Trust*, and stated the general proposition with which I agree "that the precise accounting obligations of a trustee may, in practice, vary from case to case […]", but that, in the case of an ordinary trustee/beneficiary, the trustee "has an absolute obligation to report on how the duties of the trustee have been carried out and all other matters material to the legitimate interests of the beneficiary", at para. 5.17. In that case, he considered that the obligation was to give a report on a regular basis within the time limit specified in the relevant statutory regime.

90. Kenny J. gave some assistance in his judgment in *Chaine-Nickson v. Bank of Ireland* where, having determined that the relationship of trustee/beneficiary existed and that the plaintiff, a potential beneficiary under a discretionary trust, was entitled to an account, at p. 396 paraphrasing *Underhill's Law Relating to Trusts and Trustees* (11th ed., 1959) described the form of account as follows:

> "When a beneficiary has a vested interest in a trust fund so that he has a right to payment of the income, the trustees must at all reasonable times at his request give him full and accurate information as to the amount and the state of the trust property and permit him, or his solicitor, to inspect the accounts and vouchers and other documents relating to the trust".

91. In board terms, Kenny J. considered that a potential beneficiary "is entitled to copies of the trust accounts and to information as to the investments which represent the trust fund" and that "[t]he obligation of the trustees is not satisfied by giving particulars of the payments made by them", at p. 397. In reliance on the judgment of Chatterton V.C. in *Moore v. McGlenn*, Kenny J. considered that an entitlement was established to information "as to the way in which the trust fund has been invested and of the dealings by the trustees with it", and later referred to "details of the investments representing the trust fund", at pp. 398 to 399.

92. It seems to me that the duty to account must depend on the nature of a fund or property, and as Kenny J. noted in *Chaine-Nickson v. Bank of Ireland*, if a beneficiary is entitled to information regarding the investment representing a trust fund, then, in certain cases such as where an investment is real property, details regarding any expenditure out of the real property, rents and profits received, *etc*. would be part of the information regarding the management or administration of the investment. Thus, in a simple case of a trust fund held entirely in a bank account, the giving of an account might be relevantly straightforward, but when decisions were made regarding the movement of monies, the investing in stock, shares, real property, or other suitable vehicles, the obligation to account might be more onerous.

93. The account is the means by which the trustee is to furnish to the beneficiary sufficient information and documentation to enable

the beneficiary to understand the movements on the account, the nature of the investments, the monies expended and recovered, the income earned, the expenses paid, and how, when, and on what basis investment decisions were made.

94. The complexity of modern commerce would suggest that an obligation to account would not always require a trustee or other person holding monies in a fiduciary capacity to fully narrate the movements on the account in a way that would be intelligible and clear to any reader, and the person receiving the information may himself or herself be in a position to understand complete, coherent, and detailed information, or have available the assistance of legal and financial advisers to assist in fully understanding the information. The plaintiffs in the present case do have financial advisor with such competence.

95. A degree of proportionate and practical commercial sense must be imported into the requirement to account, and this approach derives from the discretionary and flexible nature of the remedy. That is a particular factor in the present case to which I will turn later in this judgment.

**Conclusions on account to be given**
96. It seems to me the defendants are obliged to give an account of the dealings with the capital and income of the Fund, and that the details would, if necessary, be supported by relevant documentation and be sufficiently intelligible and clear to provide an explanation as to the movement on the account.

97. What is required is documentation in hard copy or electronic form sufficient to meet the formula described by Snell to serve "the informative purpose of allowing the beneficiaries to know the status of the fund and what transformations it has undergone" at para. 20.013.

98. Some documentation has already been furnished through the Office of Wards of Court and directly to the solicitor for the Committee. I turn now to examine this.

**What has already been furnished?**
99. The evidence is incomplete and has evolved in the course of the hearing.

100. Bloxham asserts that reports have been prepared "consistently in the form sought" to the Accountant's Office, a statement made in a letter of 19 March 2010 from Messrs. McCann Fitzgerald, on behalf of Bloxham to Cantillons, and that there is no deficit in information.

101. In his affidavit of 27 October 2017, Mr. Ghose states his belief that information and reports concerning the Bloxham management of the Fund had been furnished to the offices of the Wards of Court on the agreed quarterly basis between 2002 and 2012. He says it was "the practice of Bloxham to send such reports to clients", but he is unclear as to where the portfolio reports are now to be found. He considers that they may be either in the possession of Mr. Wallace as liquidator or in J&E Davey's.

102. The request of the solicitor for the Committee to the Office of the Wards of Court (which passed the request to the Accountant's Office) for copies of all documents in the form of reports or other statements from Bloxham since the Fund came to be managed by Bloxham in 2002 has produced some but not a complete record and it is clear that there are significant gaps in the sequence.

103. Mr. Wallace says that account statements were made to the Accountant of the Courts of Justice, but, somewhat alarmingly, the correspondence from the Office of the Wards of Court suggests that regular reports were not received from Bloxham on the management of the account. In particular, a letter of 30 July 2009 from the Assistant Registrar of that Office states the following:

> "I wish to confirm that neither the Office of Wards of Courts nor the Office of the Accountant of the Courts of Justice received any reports from Bloxham on the management of Kenneth's funds."

104. There is a clear difference in the evidence from Mr. Wallace and Mr. Ghose on the one hand, who suggests that statements were furnished to the Accountant of the Courts of Justice, and the letter from the Assistant Registrar.

105. In his affidavit, Mr. Wallace exhibits statements sent to the Accountant of the Courts of Justice, albeit the large bundle of documents exhibited by Mr. Wallace date from 2003/2004, very detailed accounts were furnished and there is also exhibited a document showing a statement of account from 1 October 2004 to 22 July 2009, which contains in total fifteen pages and ends with an entry on 29 April 2009.

106. That exhibited document is one long statement of account for a period of five years, and is not consistent with the stated intention in 2002 that statements would be furnished on a quarterly basis.

107. The Committee engaged a financial expert, David Croft, who furnished a report exhibited in his affidavit of 14 September 2017. Notwithstanding that documentation has come to light since he prepared his report, no updated report from Mr. Croft is available and, without wishing to criticise Mr. Croft, it is clear to me that his report was based on limited information, and cannot be regarded as complete.

108. Mr. Croft describes his report as a "preliminary opinion" and he make the tentative conclusion that the documentation and information furnished do not "amount to a full and proper account", although the documents do contain "transaction level information and cash movements which may or may not be a complete record". The documents are as follows:

> (i) a spreadsheet prepared by Bloxham;
>
> (ii) a book dealing with a Saturn account which relates to a fund in respect of which a separate action has been compromised;
>
> (iii) tax reclaim status report;
>
> (iv) transaction detail by security;
>
> (v) income and expense details;
>
> (vi) cash activity details;

(vii) letter from Bloxham dated 7 August 2012 with enclosures.

109. Mr. Croft is of the view that, for the purpose of understanding the movements in the Fund, he requires to see documentation which shows the "risk parameters and risk and return objectives agreed". Mr. Croft's evidence is that discretionary managers should "[a]s a matter of practice, and law and regulation" provide "regular reports to the trustees" containing the following at a minimum:

> (i) a list and description of each transaction during the period, including purchases, sales, dividends, coupon repayments taxes, or expenses paid;
>
> (ii) a listing of the end of period assets showing the number of units or shares held, their cost, current market value, and, if relevant, current percentage annual yield;
>
> (iii) a summary of the asset composition by type and possibly by sector;
>
> (iv) a summary evaluation of the portfolio and changes since the last report, changes since the start of the year, or the tax year, along with some summary statistics to indicate the return, by way of percentage or otherwise;
>
> (v) often, provide a comparison of the performance for the period with a relevant bench mark index appropriate for the mandate.

110. Mr. Croft is of the view that such a report should be prepared at least annually, if not monthly or quarterly, not least because internal management purposes might require reports to properly manage the portfolio and take informed decisions on a day to day basis.

111. Mr. Croft states that, if it is the case that reports were not produced by Bloxham or if they were produced and are no longer available, it should be possible to "reconstruct them month by month or quarter by quarter from the transaction data."

112. Mr. Croft is not entirely critical of the records already furnished by Bloxham, and he says that the spreadsheet does provide "a complete transaction record" for the period between 2003 and 2011, but that the income and expenses detail is incomplete, and there is a lack of information regarding Irish securities. He is of the view, however, that the data is not complete for the ten-year period in question.

113. Mr. Croft is of the view that the exercise required to be done might be time consuming but "would not be complex". What he says is required is that a series of reports be built up through time from the start of the period, and he accepts that whilst the end reports may not be perfectly accurate or complete, they would be sufficient for a person with his expertise to understand the composition and movement on the account from time to time.

114. However, documentation has become available since Mr. Croft prepared this report.

**What further information has been provided?**

115. Further documents were furnished by the solicitors for the liquidator on 23 October 2017 none of which seems to have been furnished to Mr. Croft. Included is a spreadsheet of transactions from 24 October 2002 to 23 December 2011, almost the entirety of the relevant period. This is a very short document, although not unintelligible.

116. In addition, a document containing 244 pages was obtained from Bank of Ireland Security Services, containing *inter alia* a series of statements for various dates between the 30 September 2002 and the 30 June 2010. I note there are significant gaps in that document, the primary gap being between 15 September 2004 and 1 January 2010.

117. Other documents including statement of accounts from 14 February 2002 to 8 December 2003 and from 26 October 2010 to 29 April 2009 are also furnished.

118. I do not propose reviewing these documents save to note that the type of document furnished is, broadly speaking, in conformity with the type of document referred to by Mr. Croft as compliant with best practice, and also to note that the documentation is not provided for the full period of the investment. I also accept the evidence of Mr. Croft regarding the type of documentation that is to be furnished.

119. For this reason, I reject the suggestion of Mr. Wallace that there is sufficient raw data now available to Mr. Croft and/or the Committee to properly understand the composition and evolution of the Fund. I am unable to take a view as to whether Mr. Croft could, with the new information now available, take a considered view as to the history of the account, but I note that Mr. Croft seemed to be of the view that what was required was not precise and exact figures for every single movement in the account, but sufficient to enable him or another advisor to take a view as to its evolution and management. That approach of Mr. Croft is reasonable and it is an approach with which I am in agreement.

120. Mr. Wallace confirms that he has 504 boxes of documents in his possession and claims that he cannot confirm "definitively" that there is no further information on the files other than that which he has now furnished. He says that "carrying out such an exercise would impose a very significant burden on the liquidation of Bloxhams which ultimately would create a very significant cost which would have to be borne by the creditors." Bloxham is insolvent, and Mr. Wallace expresses a view that the burden that imposed on creditors would be unjustifiable.

121. At para. 58 of his supplemental affidavit, Mr. Wallace says that:

> "[…] I am open to engaging in a process whereby the Committee's advisors can review all of the hard copy records of Bloxham, but I am not in a position to compel former Bloxham partners or employees to assist with any such review."

122. Later, he says he is "prepared to enter into a protocol" as to how a full review of the hard copy records can be carried out, and to deal with confidentiality, data protection, and other issues which might come to light. Mr. Wallace also says that any claim against Bloxham would be an unsecured claim, that no insurance is available to meet the claim, and that although it is likely that preferential creditors will be paid in full, the projected dividend for unsecured creditors is likely to be extremely small or nil.

**Conclusion as to the taking of an account and on the position of the liquidator**

123. Insofar as any obligation to account might exist as a matter of law, the equitable remedy of an account is discretionary. In *Hons*

*v. Hons* [2010] NSWSC 247, at para. 101, the Supreme Court of New South Wales considered the discretionary nature of the remedy and Ward J. explained paraphrasing Young, Croft, and Smith, *On Equity* (Thompson Reuters, 2009), at para. 16.1340, that the court could exercise its discretion not to order an account where it would be "futile or premature", and having examined the case law, he considered that an order for account would be premature and oppressive and would involve a "disproportionate cost to any potential benefit". Ward J. also considered the "delay in seeking an account" to be added as a factor tending against the exercise of discretion, at para. 118.

124. Counsel for the first defendant argues that the making of a final order for the taking of an account at this stage is premature, and I agree with him, primarily because it is unclear to me the extent to which documentation might actually be held in the Office of the Wards of Court or the Accountant of the Courts of Justice, or whether Mr. Croft has been in a position to review further the documentation now available which, to my eyes, is incomplete in its sequence but which may be of the form of documentation which would suffice for his purposes.

125. However, I am at present not prepared to take a view that the furnishing of an account would be onerous or oppressive, but having regard to the decision of Kenny J. in *Chaine-Nickson v. Bank of Ireland*, I consider that the case law does suggest that, as a matter of principle and pending any further order, the cost of making an account is one that is to be met by a beneficiary and not by the person giving the account. Thus, it seems to me that the state of the law would suggest that the Committee should itself and/or through its advisors inspect the boxes of documents held by Mr. Wallace at the cost of the Committee itself.

126. I am concerned that while the commencement of these proceedings was authorised, it may be necessary for the plaintiffs to seek further clarification and directions from the President of the High Court that the Registrar of the Wards of Court Office and/or the Accountant of the Courts of Justice should make further examination of the files of papers held in regard to Mr. Best to ascertain whether in fact, having regard to the evidence of Mr. Ghose, accounts were actually furnished to that office on a consistent basis or at least for some of the period in question.

127. Accordingly, and while this is not a particularly satisfactory result, I am not satisfied to make a final order at this stage in the case.

**Summary**
128. I consider in summary that the following is the position:

> (a) there exits an obligation on the defendants, subject only to what I say below regarding the role to be played by some of the defendants, to furnish a full record of transactions in the form of an account or narrative;
>
> (b) the documents available at the hearing of the application before me are *prima facie* not complete;
>
> (c) the plaintiffs, with their advisors, are to be permitted to inspect the 504 boxes of documents held by Mr. Wallace;
>
> (d) the President of the High Court is to be asked for further directions regarding the documents held by the Registry of the Office of the Wards of Court and/or the Accountant of the Courts of Justice or other relevant office;
>
> (e) Mr. Croft is to further analyse and inspect the documents now available and can then offer further assistance with regard to the adequacy of the records for his purpose.

**The role of the liquidator**
112. Having taken this general view, I must now consider on whom the duty to account is to be imposed. I will first deal with the position of the liquidator.

113. I am satisfied that the liquidator could not be described as having any fiduciary duty or any direct contractual obligation to the plaintiffs or indeed to the Office of the Wards of Court or other court Office. I am satisfied having regard to the decision of Kenny J. in *In re Belfast Theatre of Varieties Ltd.* [1963] 1 IR 41, that the liquidator does not have an obligation to account and whilst he may be a trustee for the company, the older case law would suggest that a liquidator is, at best, an agent who might have special duties imposed by statute or otherwise and may not properly be described as a trustee at all. Kenny J. referred to the decision of Romer J. in *Knowles v. Scott* (1891) 1 Ch 717, at p. 723 as authority for that proposition and he declined to follow the judgment of Overend J. in *In re Uniacke (No. 2)* [1944] 78 ILTR 154 as considered the point not being argued.

114. Finlay Geoghegan J. in *In re DR Developments (Youghal) Ltd. (In Liquidation)* [2011] IEHC 307, [2012] 1 ILRM 374, followed the judgement of Kenny J. in *Belfast Theatre* and also came to the same view in *In re Custom House Capital Ltd. (In Liquidation)* [2012] IEHC 382, [2012] 3 IR 93, where she held that the relationship between the clients of the company in liquidation and the company was contractual and not one of trustee and beneficiary.

115. In his authoritative text *The Law of Companies* (4th ed., 2016), at para. 25.031, Courtney stated the matter in clear terms as follows:

> "As noted by Finlay Geoghegan J. in *DR Developments (Youghal) Ltd* in the discharge of their statutory obligations and duties, liquidators owe fiduciary duties to the company, as opposed to the individual creditors. Liquidators may not make a secret profit as a result of their office and are liable to account to the company where they do so."

116. I am satisfied there is no basis on which I can import any obligation on Mr. Wallace whether it be as agent or trustee or as fiduciary on behalf of the Fund. At best, Mr. Wallace holds certain documents of Bloxham arising from his appointment as liquidator. Furthermore, having regard to the concession made by Mr. Wallace that he is prepared to agree a protocol in permitting an inspection of the books of the boxes that he imposed, I do not need to consider the matter any more fully. I am satisfied Mr. Wallace could not be said to have had any dealings with the Fund, or with the management or operation of the Fund, and the Fund was transferred to J&E Davey almost immediately after his appointment as provisional liquidator.

117. It would be unnecessary, pointless, and oppressive to require Mr. Wallace to give an account in respect of the period of approximately ten days between his appointment as provisional liquidator when he might technically have had some control over the Fund, and the transfer of the Fund to J&E Davey.

**The position of the fifteenth defendant**
118. The fifteenth defendant, Legacy Investment Holdings Ltd., was a limited partner under s. 6(1) of the Limited Partnerships Act 1907 ("the 1907 Act"), and is thereby precluded from taking any part in the management of the partnership business. A limited partner has no part to bind the firm.

119. The evidence from Legacy is that it had, as a matter of fact, no role in the management of Bloxham, and no role in the management of the Kenneth Best's Fund, and, in those circumstances, it has no documents in relation to the Fund.

120. The legal basis on which any application to account might be made against the fifteenth defendant is not established, and I propose making an order refusing the granting of relief against that defendant or removing it from the proceedings.

**The position of the first to fourteenth defendants**
121. Mr. Ghose was managing partner for some of the relevant period of the firm Bloxham Stock Brokers trading as a partnership. His position detailed in his two affidavits and in the oral evidence gave to the court has already been dealt with in this judgment.

122. The second defendant, Niall Joseph Tinney has not entered an appearance. He has by a personal letter indicated that he is not contesting the order sought.

123. The third defendant, Patrick Thomas Finnegan, has sworn an affidavit on 3 April 2017 in which he confirms the contents of the letter sent by him on 18 July 2014 that he has no files or records relating to the Fund. He confirms that he is unable to provide any documentation or other form of assistance. He says he had at no time any personal knowledge of or involvement in the Fund and did not have any access to files or documentation relating to the subject matter of the plaintiffs' claim. He denies that the plaintiffs are entitled to the relief sought.

124. The fourth defendant, Peter Alphonsus Costigan, entered a personal appearance as did the fifth defendant, Patrick Dempsey. The sixth defendant, Raymond Deasy, entered an appearance through solicitors.

125. The seventh defendant, Tadhg Francis Gunnell was adjudicated a bankrupt and has by letter confirmed that he is not contesting to the order.

126. Angus McDonnell, the eight defendant, swore an affidavit on 29 November 2017 saying he has no relevant papers in regard to the Fund. He says he was a managing partner of Bloxham and that he resigned in 2006 and sold his shares in 2008. He therefore avers to not being in a position to assist in the provision of the documents sought.

127. David Harlow, the ninth defendant, in his affidavit sworn on 15 February 2017 says that he retired as a partner at Bloxham on the 30 June 2006 and had no involvement whatsoever during his time as a partner in the firm with the Fund, that he did not hold or manage any files relating to the Fund, and that he did not bring any files with him when he retired. He has no access to any files now and has no assistance to offer.

128. Martin Harte, the tenth defendant, swore an affidavit on the 12 May 2017 and says that he retired as a partner on the 30 May 2006 and that he had no involvement in the partnership after his retirement and that following a long period of illness he has returned to other employment on a limited basis. He says he was never involved in managing the Fund.

129. Arthur Quinlan, the twelfth defendant, swore an affidavit on the 28 April 2017 in which he says he retired as managing partner of Bloxham in May 2006 and that he had no involvement with the management of the Fund at any time and did not and does not now hold any information or supporting documentation relating thereto.

130. John Maguire, the thirteenth defendant, swore an affidavit on the 15 February 2017. He says he retired as a partner of Bloxham on the 30 March 2007, that he had no involvement with the Fund, and did not or does not now hold or manage any files relating thereto.

131. Anne Barrett, the fourteenth defendant, swore an affidavit on the 29 November 2017. She says she retired as a partner in Bloxham on 30 April 2008. She says she never dealt with the Fund and never had any involvement with the private client department of the firm at any time. She says she does not have or ever had any access to any files that might be of assistance.

132. The plaintiffs argue that, notwithstanding some of the defendants had never had any involvement with the management of the files, they can still be held liable to furnish an account. Bloxham traded as a limited partnership and is governed by the Partnership Act 1890 ("the 1890 Act") and the 1907 Act. The plaintiffs rely on s. 5 of the 1907 Act to the effect that every partner is an agent of the firm, s. 6, by which every act or instrument relating to the business of the firm finds the firm and all partners, s. 9, by which every partner is liable jointly and with other partners severally for all debts and obligations the firm incurred while he is a partner.

133. It is argued in those circumstances that the fact that certain defendants have retired from the firm does not relieve them of any obligation that accrued during their currency as partners.

134. Section 17(2) of the 1890 Act provides as follows:

> "A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement."

135. I accept that in principle, as a matter of statute, the retired partners may have a continuing obligation in respect of matters that arose during their partnership. Their retirement does not extinguish that obligation.

136. However, a practical problem presents itself in that some of the retired partners never had any involvement in the Fund and can offer no assistance. They might technically have an obligation in other classes of action, but for the purposes of the present application, which is concerned solely with the question of the giving of an account, I am satisfied only those persons who could arguably have information or access to information and documents, or be in a position to explain other documentation, can be held liable to account.

137. I am further satisfied that, having regard to the discretionary nature of the remedy, the position of the first defendant who was the managing partner at the relevant times must be distinguished from that of partners who retired in the currency of the Bloxham management of the Fund, and also from those persons who continued to be partners but who had no involvement with the Fund.

138. The exercise of discretion to refuse the relief is compelling in the case of retired partners whose evidence is that they have no relevant information and no means of obtaining that relevant information has not been controverted.

139. I accept the argument by counsel on behalf of the eighth defendant that he has nothing to offer and by the solicitor who acts for Ms. Barrett, the fourteenth defendant, that she had no involvement whatsoever with the relevant division in Bloxham.

140. I accept also the argument made by counsel on behalf of the ninth and thirteenth defendants, who are retired, that are not now in a position to explain the documentation furnished, albeit both that ninth and thirteenth defendants could at some point, and depending on the outcome of this stage of the process, be called upon only if necessary to fulfil a gap in an explanation.

141. I accept also the argument by counsel on behalf of the limited partner, the fifteenth defendant, that it could not have any liability to account having regard to its limited statutory powers of management.

142. I adopt for the purpose the formula adopted by Kelly J. in making an order for discovery in the related case of *SMDF v. Bloxham* (High Court, Kelly J., 20 April 2010) of documents in the possession or power of procurement of a defendant "over and above the documents" which were to be discovered by the other defendants.

143. I propose in the circumstances making orders against the first defendant only, and will hear counsel with regard to the correct approach to the other defendants.