Neutral Citation Number: [2013] EWCA Civ 910

Case No: A3/2012/2944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE MORGAN
[2012] EWHC 81 and 2487 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 July 2013

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE FULFORD

- -

Between:

(1) ROSS RIVER LIMITED **(2) BLUE RIVER LIMITED PARTNERSHIP**	**Claimants** **Appellants**
- and -	
(1) WAVELEY COMMERCIAL LTD	**Defendant**
(2) PETER BARNETT	**Defendant** **and** **Respondent**
(3) PAUL HARNEY **(4) WESTBURY PROPERTIES LTD**	**Defendants**

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- -

David Caplan (instructed by **Mishcon de Reya**) for the **Appellants**
Piers Hill (instructed by way of Direct Access) for the **Respondent**

Hearing dates: 2 and 3 July 2013

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Approved Judgment

Lord Justice Lloyd:

Introduction and summary

1. This judgment is given on an appeal and a cross-appeal against an order of Mr Justice Morgan dated 9 October 2012, following the delivery of two judgments, one on 25 January 2012, [2012] EWHC 81 (Ch), and the other on 6 September 2012, [2012] EWHC 2487 (Ch). I will refer to the latter as the judgment on remedies.

2. The litigation arose from a development project concerning land in Ampthill, Bedfordshire. The project was initiated by Mr Barnett, the Second Defendant and respondent to the appeal, together with Mr Harney, the Third Defendant, who took no active part in the litigation. At first the project was conducted through a company owned by Mr Barnett, Bradcliffe Ltd. Late in 2004, the Claimants were introduced to Mr Barnett and to the project. They were able to assist by providing the finance needed to buy a site (known as the Shell Site) which was required so as to make it possible to satisfy a condition subject to which it was expected that planning permission would be granted, and by contributing that site to the project on agreed terms. At that stage, the First Defendant, Waveley Commercial Ltd (WCL) was incorporated, to be owned by Mr Barnett and Mr Harney, and a joint venture agreement (JVA) was entered into between the Claimants and the First Defendant, to which Mr Barnett and Mr Harney were also parties as guarantors of liabilities of WCL, though only of liabilities which did not in the event arise.

3. I will refer to the Claimants together as Ross River, though Ross River Ltd, the First Claimant, was a party to the JVA as the general partner of the York Development Limited Partnership, which later changed its name to Blue River Limited Partnership, the Second Claimant. The individual who stands behind Ross River is a Mr York.

4. WCL was not specifically restricted to carrying out only one development project, but in fact it did not do anything else. When it was set up Mr Harney was its only director, but Mr Barnett, who became a director in 2008, accepted that he had been a shadow director throughout.

5. I will have to refer to some of the terms of the JVA in detail later. In August 2005 the parties entered into a Side Agreement which, as the judge found, increased Ross River's entitlement to the Net Profits (as defined in the JVA) from one third to £560,000 plus one third, and gave priority to Ross River's entitlement to that amount. Later, another agreement increased Ross River's share from one third to 40%. A further agreement was reached in February 2006 under which Mr Barnett and Mr Harney were to be entitled to be paid management fees of (or up to) £120,000, the payment of which by WCL which would be deductible for the purpose of calculating the Net Profits.

6. The development was completed in 2007, but its realisation took a long time, and the last elements of the scheme were not sold until 2011, during the trial. Ross River became dissatisfied in 2008 with the lack of progress and the lack of information supplied by WCL, and suspicious of some of WCL's dealings. The litigation was commenced in 2009, the immediate occasion being an application for an injunction to restrain what was said to be an improper sale of part of the development. The issues

developed during the litigation, but from the start one of the contentious points was the status and effect, if any, of the Side Agreement.

7. By the time of the trial, which took place over 11 days in July 2011 followed by 6 days in October 2011, the principal issues were what was the amount of the Net Profits, what was the status and effect of the Side Agreement, and whether Mr Barnett owed duties directly to Ross River as well as the duties that he owed to WCL as director and those that WCL owed to Ross River under the JVA and related agreements. Ross River contended that Mr Barnett owed it contractual duties, under terms to be implied into the JVA, but also that both he and WCL owed it fiduciary duties. By then WCL was not able to pay its debts as they fell due, and was being supported by Mr Barnett. Although WCL was clearly indebted to Ross River, subject to the decision as to quantum of Net Profits and as to the effect of the Side Agreement, a judgment against WCL was unlikely to be of any real value to Ross River. So it was important for it to establish a direct remedy against Mr Barnett. WCL and Mr Barnett were represented by a single team of solicitors and Counsel at the trial.

8. The judge decided most of the issues at trial in favour of Ross River, though he rejected the case as to implied contractual duties owed by Mr Barnett. He decided a number of specific issues as to the Net Profits in favour of Ross River, but did not decide the exact figure because the impact of his judgment on consequential calculations would need to be considered, for which he did not have the necessary material. He held that the Side Agreement was enforceable according to its terms, and was not a sham, as Mr Barnett and WCL had alleged, and he resolved in favour of Ross River arguments as to its interpretation. He also held that WCL and Mr Barnett did owe fiduciary duties to Ross River, of good faith and not to do anything as regards the handling of the joint venture revenues which favoured WCL (and Mr Barnett) to the disadvantage of Ross River. He rejected the argument that they also owed a more extensive fiduciary duty.

9. Mr Justice Morgan gave his first judgment on 25 January 2012, and a date in February was fixed for the final details to be sorted out. In the event, that hearing was adjourned, but the judge then made orders for interim payments to Ross River, of £1 million by WCL and £450,000 by Mr Barnett, neither of which was paid. He gave a separate judgment about the interim payment orders: [2012] EWHC 407 (Ch). The adjourned hearing took place in June 2012. In the meantime, WCL had been ordered to be wound up in May 2012. The outcome of the adjourned hearing, explained in the judge's judgment handed down on 6 September 2012, was that the Net Profits were quantified at £1,209,815, and Ross River's entitlement out of that as being £1,043,926, but that Ross River was not held to be entitled to any equitable compensation for breach of fiduciary duty as against Mr Barnett. The judge's eventual order was made after a further hearing on 8 and 9 October 2012; his judgment on that occasion has the reference [2012] EWHC 3006 (Ch). His order included a provision that there be no order for costs as between Ross River and Mr Barnett.

10. Mr Barnett had filed an Appellant's Notice against the holding in the first judgment that he owed fiduciary duties to Ross River. Ross River was given permission to appeal by the judge against his final order and against his rejection of the implied terms and of the more extensive fiduciary duty for which they had contended. Mr

Barnett's earlier appeal did not proceed, but the issues were taken up in a Respondent's Notice to Ross River's appeal, by which Mr Barnett contends first that he owed no fiduciary duty at all to Ross River (and nor did WCL) and in the alternative that the duty was less extensive than the judge had found it to be. Ross River has not pursued on appeal the contention that terms are to be implied into the JVA.

11. During the trial Mr Barnett and WCL were represented by leading and junior Counsel instructed by Geoffrey Leaver LLP, solicitors. By the time of the hearing in June 2012, Mr Barnett was acting in person, but with the benefit of representation by Mr Piers Hill (who had not appeared in the proceedings before) instructed on a direct access basis. For the appeal and cross-appeal Mr Hill represented Mr Barnett again, still on a direct access basis. Ross River was represented on the appeal by Mr David Caplan on instructions from Mishcon de Reya, he having been their junior Counsel at the trial and (on his own) at the hearing in June.

12. The first issue on the Respondent's Notice, as to whether Mr Barnett (and WCL) did owe a fiduciary duty at all, has to be addressed, logically, before any issue as to the scope of the duty or its consequences. Mr Hill therefore opened his cross-appeal first. In the course of his submissions on the cross-appeal Mr Caplan opened up some of the questions as to the scope of the duty, which arose on both the appeal and the cross-appeal. Then we heard argument separately on the appeal as to whether the judge was right to reject the claim for equitable compensation for breach of fiduciary duty.

13. For the reasons which are set out below, my conclusion is that the judge was right to hold that WCL and Mr Barnett were subject to fiduciary duties owed to Ross River, but that he failed to apply the incidents and features of those duties correctly. I would therefore dismiss Mr Barnett's cross-appeal and allow Ross River's appeal, to an extent and in terms that I will set out below.

The Joint Venture Agreement

14. Mr Hill submitted that the JVA set out the entirety of the rights and duties of the several parties, and that the attempt to fasten a fiduciary duty on Mr Barnett and WCL was an illegitimate way of rendering Mr Barnett liable as a guarantor of WCL's obligations which was inconsistent with the JVA. For his part Mr Caplan accepted that it was necessary to focus on the JVA and that it would be wrong to assert a collateral duty of any kind that was inconsistent with the JVA. Of course, he asserted that the fiduciary duties propounded were not incompatible with the JVA, but were complementary to it. On any basis it is necessary to consider some aspects of the JVA in detail. Helpfully the judge set the whole agreement out as an appendix to his first judgment.

15. Clause 2, headed Preliminary, sets out what are in substance several recitals. They show that Ross River had agreed to assist WCL by acquiring the Shell Site which was necessary to the proposed development, and that the parties had agreed "to enter into this agreement as a joint venture". Clause 3 was headed Objectives. It set out initial objectives, which are those relevant to the proceedings, as well as alternative and fallback objectives. Some were concerned with the implementation of the project, and need not be referred to, but two of them, not at all surprising in content, deserve

quotation, together with a third which gives an indication of the joint nature of the enterprise:

> "3.1.1. To maximise the profits arising from the development of the Supermarket Scheme upon the Composite Site
>
> …
>
> 3.1.4 To acquire or bring under the parties control all outstanding freehold and leasehold interests comprised in the Composite Site including in particular the freehold of the current car parks within the Composite Site currently within the ownership of Ampthill Town Council
>
> …
>
> 3.1.7 To share in the profits arising from the development in the manner provided in this agreement at the earliest practicable time"

16. Clause 5 dealt with obtaining planning permission, in relation to which there were specific obligations of co-operation between WCL and Ross River. I need not refer to any of those provisions in detail, nor to other provisions as to the conduct of the development, which was to be the responsibility of WCL.

17. By clause 7.7 WCL (defined as the Promoter) was under the following obligation:

> "The Promoter will be responsible for payment of all fees and expenses incurred in respect of all obligations contained in this clause and will provide [Ross River] with copies of all invoices and accounts. All such fees and expenses will be added to the base costs and will be taken into account in assessing Net Profits."

18. Clause 10 deals with Ross River's entitlement out of the profits. Ross River was to be entitled to receive the Basic Profit (£250,000), as well as the agreed sale price of the Shell Site, but it was also entitled to opt to receive the Development Profit instead of the Basic Profit, and it did take advantage of that option. Clause 10.5 was as follows:

> "the Development Profit will be payable by the Promoter to [Ross River] at such times and in such manner as the parties agree consistent with the Objectives … But Provided Always no party shall receive Development Profits in advance of the other and the Development Profit will be distributed as soon as practicable following receipt"

19. Clause 11 dealt with a fall-back provision which did not in the event arise. It was only if this came to pass that Mr Barnett and Mr Harney were liable as guarantors of WCL's obligation (in that event) to buy the Shell Site from Ross River. The fall-back provision only arose if no satisfactory planning permission was obtained or if WCL did not exercise its option to buy the Shell Site from Ross River. If that happened it could no doubt have been foreseen that WCL's assets might be inadequate to meet its liabilities to Ross River, hence the need for a guarantee.

20. Clause 12 governed what was to happen on completion of the sale of the Shell Site. Most of this does not matter, but reference was made to clause 12.3.5:

> "If [Ross River] has elected to receive the Development Profit the parties will endeavour to agree the method and manner of payment of the Development Profit and the means to secure payment to [Ross River] in the meantime and failing agreement the matter in dispute will be referred to the Expert Surveyor"

21. Clause 15 provided for the determination of disputes by an appropriate expert, who in the case of a dispute concerning financial matters was to be an accountant.

22. The Development Profit, which Ross River elected to take, was defined in the JVA as one third of the Net Profits derived (in the event) from the entire site. Net Profits meant the sum calculated in accordance with principles expressed in Part II of the Schedule to the JVA. The principal operative provision, paragraph 4 of Part II of the Schedule, is simple:

> "Net Profits shall be the difference between all revenues received from the disposal of the Composite Site … and the costs fees and expenses incurred in achieving such revenues calculated in accordance with the forgoing provisions"

23. The previous provisions referred to principles and policies "to be agreed between the parties" and to Accounting Standards and GAAP. They also provided that, in computing Net Profits, regard was to be had to the base costs referred to in the Financial Proposal as revised from time to time, and to various other matters identified in general terms. The original version of the Financial Proposal was annexed to the JVA, and was headed "Schedule of costs and projected costs" of the component parts of the site, with option, legal and planning costs incurred to 1 November 2004. Reference was made in the course of argument before us to two figures: "Costs, option fees, planning and legal etc" put at £217,000 (these being items already incurred) and "Option fees due 31/3/05" put at £40,000.

24. Besides the Side Agreement which I have mentioned, three supplemental agreements were entered into between the parties in 2005 and 2006. The only one which matters for present purposes, and only for the record, is that the third such agreement, in May 2006, varied the Development Profit as a proportion of Net Profits from one third to 40%.

25. In February 2006 a meeting took place between Mr York and another representative of Ross River, Mr Barnett and Mr Harney, at which there was discussion of the subject of management charges. WCL had put forward an appraisal which included an item of £120,000 by way of management fees at £10,000 per month for a maximum of one year. The judge recorded that the meeting was difficult or tense. He held that it was agreed between the parties, at or soon after that meeting, that the management fee to be paid by WCL to Mr Barnett and Mr Harney was not to exceed £120,000. That was, in effect, a further agreement supplemental to the JVA.

The Side Agreement

26. The Side Agreement is dated 15 August 2005. It is expressed as a side agreement to the JVA, and is between the same parties. It stated that nothing in the Side Agreement "will affect the terms as set out in the [JVA] save for introduction of the Capital Introduced and Prior Profit Allocation which are in addition to the those terms". It provided for Ross River to pay WCL a sum of £325,000, which was defined as "Capital Introduced", and for WCL to be liable, in return, to pay Ross River £235,000 as a fixed share of the Net Profits in addition to the other sums to which it was entitled, "by way of a Prior Profit Allocation". It provided that this sum was, in the events which happened, to be grossed up to £352,500. Repayment of the Capital Introduced and of the Prior Profit Allocation was to take place from the Net Profit once the development was fully sold or let. Accompanying the Side Agreement was a letter of guarantee signed by Mr Barnett and Mr Harney and addressed to Ross River, guaranteeing that certain payments would be made by each of them to WCL. The Side Agreement and the letter of guarantee are set out in a second appendix to the judge's first judgment.

27. At trial WCL and Mr Barnett contended that the Side Agreement was not the true agreement between the parties and that it was a sham, with no legal effect, intended to enable Ross River to misrepresent the position to the tax authorities. They said that the true agreement had been that WCL was not liable to pay any sum to Ross River, and that, instead, Mr Harney was liable to pay Ross River £400,000, and Waveley Developments Ltd (WDL), a company belonging to Mr Barnett and Mr Harney which was carrying out a quite separate project, was to be liable to pay Ross River £160,000. I need not go into the detail underlying this contention, because the judge rejected it on the evidence. He held that the relevant agreement reached between the parties was that recorded in the Side Agreement and the letter of guarantee. He recorded that it was not accurate to describe the £325,000 as Capital Introduced, because the money was paid to WCL, not with a view to it being used in the development project, but to it being passed on to Mr Harney and WDL. However, this inaccuracy made no difference to the validity of the agreement.

28. Even so, the Side Agreement gave rise to some difficulties of interpretation. The judge grappled with these issues and reached conclusions which are not challenged on appeal. He held that the sum of £325,000 was payable to Ross River by WCL and was not to be deducted from gross receipts in calculating the Net Profits (paragraph 192) and that the sum of £235,000 was also so payable (paragraphs 195 to 197). He also held that these two sums were not payable until it was clear that the Net Profits would exceed £560,000, but that when that did become clear, then those sums were payable (paragraph 198).

29. Ross River's case had been put on the basis that the Side Agreement gave it priority as regards the first £716,667 of the Net Profits. Mr Caplan told us that he had discovered this to be the result of an arithmetical error and that the true figure was £933,333. I do not need to decide which of these figures is correct. Even the lower figure is sufficient for Mr Caplan's submissions based on the Side Agreement.

Fiduciary duties

30. For Mr Barnett, Mr Hill's main argument on the cross-appeal is simple. The joint venture was set up and conducted on a purely contractual basis, the rights and obligations of the parties being set out in the JVA, the supplemental agreements and the Side Agreement. There was no justification for finding that either WCL or Mr Barnett became subject at any stage to any obligation towards Ross River other than those set out in these agreements. Mr Barnett never came under any obligation under the agreements, because the events in which he would be liable as a guarantor did not occur. WCL was liable in contract to pay Ross River its share of the proceeds, that liability being enforceable against WCL or, now, by proof in its liquidation. The agreement being a commercial one, there was no basis for importing equitable duties into it, which could have been provided for expressly if they had been sought and agreed.

31. He relied on observations such as those of Lord Walker in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, to the effect that as a matter of general principle the court should be very slow to introduce uncertainty into commercial transactions by the over-ready use of equitable concepts such as fiduciary obligations (paragraph 81), and that, although equity has important functions in regulating commercial life, those functions must be kept within proper bounds (paragraph 85). He also said that in the commercial context the claimant is typically a business person with access to legal advice who is expecting to get a contract (paragraph 68). That particular comment was apposite to the case before the House of Lords, in that the parties had been negotiating expressly subject to contract and had never reached the point of entry into a contract. In the present case, of course, the parties did enter into a contract, and the point is different: not that the court should not use equitable principles to make good the absence of a contract, but that it should not use them to make up for what might be seen as deficiencies (in the events which happened) in the agreed contract.

32. In particular, he argued that, although there were cases in which a contract in the nature of a joint venture was found to impose fiduciary duties on one party, or on an individual standing behind one of the parties, there was nothing in the circumstances of the present case which could justify that course.

33. Mr Caplan submitted that the judge was correct to find that both WCL and Mr Barnett were subject to fiduciary duties, though he contended that the judge should have found the duties to be more extensive than he did. Conversely, Mr Hill submitted that, even if a duty was rightly held to exist, it should be less onerous, and he also argued that the difficulties to which any duty gave rise should be seen as arguments against their existence at all. I will consider first the judge's basis for finding that there were fiduciary duties, before turning to the arguments about the content of the duty.

34. Between paragraphs 235 and 255 the judge considered the law as to fiduciary obligations in relation to joint ventures. We were shown some of the cases to which he referred in that part of his judgment. From these it is clear that, although the analogy with a partnership may suggest that fiduciary duties are owed in the context of a joint venture, the phrase "joint venture" is not a term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be

examined on its own facts and terms to see whether it does carry any obligations of a fiduciary nature.

35. Two particular cases were identified as examples of fiduciary duties being owed in a joint venture context. One is *Murad v Al-Saraj* [2004] EWHC 1235 (Ch), a decision of Etherton J. Morgan J summarised that case aptly as follows at paragraph 247:

> "In *Murad v Al Saraj*, the claimants successfully argued that the defendant owed them fiduciary duties in connection with a joint venture to acquire a hotel. The fiduciary duties were held to arise because the parties were in the position of joint venturers, the relationship was one of trust and confidence, the defendant had taken on a number of responsibilities in connection with the joint venture, in some respects acting as the claimants' agent, the claimants had no relevant experience, they had no knowledge of the arrangements made by the defendant with third parties and they entrusted the defendant with extensive discretion to act in relation to venture which affected the claimants' interests. The judge ordered that the defendant should account for the entirety of his profits from the joint venture even though that remedy gave to the claimants significantly more than they would have obtained pursuant to an award for damages for deceit, to which they were also entitled."

36. It is to be noted that the fiduciary obligation was held to be owed by Mr Al-Saraj even though the joint venture was carried out through a jointly-owned company, Danescroft Ltd, and even though Mr Al-Saraj was not a shareholder in Danescroft, shares being held instead by a company wholly owned by him, Westwood Ltd.

37. The second case is *J D Wetherspoon plc v Van de Berg & Co Ltd* [2007] EWHC 104 (Ch), on a striking out application, and [2009] EWHC 639 (Ch) at trial. It was not in dispute in that case that the Defendant, a corporate agent, owed fiduciary duties to the Claimant as principal. The issue was as to whether any of the three directors of the Defendant owed such duties as well. Lewison J declined to strike out the allegation of fiduciary duty as against two of the three directors but, in his judgment given after the trial, Peter Smith J held that whereas one director was subject to a fiduciary duty, the other two were not. That result is a good illustration of the proposition that the existence of a fiduciary duty in such a case is very fact-sensitive.

38. We were also referred to *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, where Etherton LJ referred to his own decision in *Murad* as follows:

> "In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers. It is clear, however, that in special circumstances they can arise: Snell's Equity (32nd ed) at 7-006; *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) at [325]-[341], [2005] EWCA Civ 959."

39. Accordingly, the judge turned to consider the particular facts of the case, in order to see whether the circumstances of this particular joint venture justified the finding that WCL and Mr Barnett were under fiduciary duties in addition to WCL's defined

contractual duty. He did so first as regards WCL and in relation to the most basic suggested duty, namely to act in good faith in relation to the conduct of the joint venture and the payment of money to Ross River. He found that there was such a duty. His reasoning is set out in his paragraph 257 which I will quote in full:

> "Under the JVA, as between Ross River and WCL, the latter had complete control over the operation of the joint venture, at any rate in the later stages following the sale of the supermarket site (which occurred in March 2006). Thus, WCL was to handle the disposals of the interests in the site. WCL was to receive the proceeds of those disposals. WCL was to incur the expenditure necessary for the purposes of the joint venture and it was to pay the sums due in those respects. WCL was to account to Ross River in relation to the Net Profits and to pay to Ross River the Development Profit. Some of the terms of the JVA are of particular relevance in this regard. The agreement was expressed to be "a joint venture". The objectives of the parties were to maximise profits from the development. The parties were to share in the profits from the development at the earliest possible time. WCL was to provide Ross River with all relevant invoices and accounts. Under clause 10.5, Ross River was entitled to receive Development Profit. Development Profit was to be arrived at by deducting relevant expenses from relevant revenues. Clause 10.5 appeared to contemplate that WCL was not entitled to pay itself out of the revenues of the development before it accounted to Ross River for its share of Net Profit. Ross River had no control over most if not all of these matters. Ross River had no nominee director on the board of WCL and had no shares in WCL. Mr Barnett accepted when cross-examined that Ross River "reposed a very high degree of trust in [him] and Mr Harney to run the JV for the benefit of all parties" and that "with that trust came duties which [he] owed, [he] and WCL owed, ... to the Ross River parties". That answer by Mr Barnett partly concerns matters of fact and partly deals with the legal consequences of those facts. Mr Barnett accepted as a fact that Ross River placed a very high degree of trust in him and Mr Harney. He also accepted, seemingly as a legal consequence of that fact, that he and WCL owed duties to Ross River. I am not obliged to find as a matter of law that WCL (and Mr Barnett) did owe a fiduciary obligation of some sort to Ross River just because of that answer. The issue is ultimately one of law and not one of fact. However, the issue of law is very sensitive to the particular facts of the case. If I felt that Mr Barnett had been pressurised into giving this answer, I would pay little attention to it on its own. However, apart from the inevitable pressure of the process of cross-examination, Mr Barnett gave this evidence readily and freely. He did not make any attempt to quarrel with, or even qualify, the proposition that was put to him. I am able to make a finding supported by this evidence that Ross River did have to trust WCL and Mr Barnett as to the operation of the joint venture and as to the necessary accounting process at the end of it. Indeed, that finding is supported by all the evidence in the case. I am also entitled to bear in mind that Mr Barnett freely accepted that he and WCL owed duties to Ross River as a result

> of the fact that Ross River placed trust and confidence in them. Ross River also relied upon an email of 15th December 2004 between the solicitors for the parties at the time of the negotiation of what became the JVA. The email referred to the need for "a high measure of trust and understanding between the parties to reach agreement in relation to outstanding matters". I do not place much weight on this email. It appears to be dealing with the process of negotiation of the JVA agreement itself rather than with the operation of the concluded JVA. However, the email does not in any way detract from the finding I make as to the trust and confidence which necessarily Ross River had to have in WCL (I will consider the position of Mr Barnett separately in a moment)."

40. On that basis he held, in paragraph 258, that WCL did owe Ross River a fiduciary obligation to act in good faith in the relevant respects. This was consistent with clause 10.5 of the JVA and was not undermined by this separate contractual provision.

41. Then at paragraph 259 he considered Ross River's further contention that WCL owed a duty not to allow a conflict between its own interests and its duty to Ross River. On balance, despite the fact that WCL was plainly a party to the JVA in order to make a profit for itself, he held that "WCL did owe to Ross River a fiduciary obligation not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of Ross River". Then in paragraph 260 he said that, at the time when the JVA was entered into, the particular content of that fiduciary duty was "to act in good faith in relation to Ross River's entitlement to receive [its then one third share of Net Profits] and not to do anything in relation to the handling of the joint venture revenues which favoured itself to the disadvantage of Ross River's entitlement to receive that share". At the end of that paragraph he held that, after the Side Agreement had been entered into, the application of the fiduciary duty in question was such that it "extended to both of the sums payable to Ross River under the Side Agreement as they did to the Development Profit payable under the JVA".

42. Then turning to Mr Barnett, and rejecting the argument that it was simply obvious that Mr Barnett owed such a duty, he said at paragraph 261:

> "… normally it will not be right to hold that a director of a company which is dealing with a third party owes personal fiduciary obligations to that third party, even in a case where the company owes fiduciary obligations to the third party. The distinction which is normally to be made between the company and the director is a fundamental one in company law. Nonetheless, the cases show that it is possible in special circumstances to find that a director has taken on such a fiduciary obligation. Are the circumstances here special enough or are they no more than what is normally the case where a company deals with a third party?"

43. In paragraph 262 the judge addressed the issue of a duty of good faith on the part of Mr Barnett. He referred to Mr Barnett's evidence that he had been deeply involved in the proposed development or a similar development for some years and that it was only through his exceptional persistence and skill that the development could take

place at all. Originally he had used his wholly-owned company Bradcliffe, but WCL was formed as a clean company to enter into the JVA and to undertake the development project from then on, owned by Mr Barnett (80%) and Mr Harney (20%). Mr Barnett considered that he and Mr Harney should be paid personally for managing the joint venture project, which led to the agreement that I have mentioned as to WCL paying them up to £120,000 which would come out of the development proceeds as a deduction in the calculation of the Net Profits, so that it would reduce the sum which Ross River's entitlement would produce. This arrangement emphasised to the judge the personal contributions being made by Mr Barnett and Mr Harney in carrying out the joint venture. The judge also referred to Mr Barnett's evidence in cross-examination as follows:

> "he accepted that Ross River "reposed a very high degree of trust in [him] and Mr Harney to run the JV for the benefit of all parties" and that "with that trust came duties which [he] owed, [he] and WCL owed, ... to the Ross River parties". Thus he freely accepted that he personally owed duties to Ross River, based on the trust and confidence which Ross River placed in him personally."

44. The judge concluded from this review that Mr Barnett did owe a fiduciary duty of good faith to Ross River, for much the same reasons as he had held that WCL did, and that he also owed the same fiduciary duty not to allow a conflict of interest and duty to occur. In terms of transactions which favoured Mr Barnett, for this purpose, he included cases where the party favoured was a company controlled by him or in which he had a substantial interest.

45. That, then, is the reasoning which Mr Hill challenged in arguing upon his Respondent's Notice. In addition to the general points to which I have already referred, as to it being inappropriate to invoke equitable principles in relation to the incidents of commercial contracts, he made a number of points on the facts. He pointed out that, unlike in *Wetherspoon*, there was no prior relationship between Ross River and Mr Barnett on the basis of which it could be said that Ross River reposed trust in Mr Barnett. Ross River would have known that whether it was able to be paid at the end of the day would depend on WCL's assets and solvency, but it did not obtain any contractual security for such payment, not even by using the contractual provision in clause 12.3.5, and no such obligation on the part of the company or of its directors, in effect as guarantors, could be implied nor should it be imposed. The fact that Mr Barnett accepted that Ross River reposed trust in him, in the course of his evidence, could not suffice to justify the finding of a fiduciary duty, and all the more without knowing more about the content of the trust of which the witness spoke. Moreover, if Mr Barnett was under a fiduciary duty to Ross River, then this might put him in a position of conflict as regards his other fiduciary duties to, for example, WCL itself as director. So far as the duty to avoid conflicts of interest and duty is concerned, he pointed out that WCL had its own separate interest for its own sake in the joint venture project, and he submitted that the suggested duty owed to Ross River would apparently override that independent interest of WCL itself, which could not be right. He argued that the judge's reference to "joint venture revenues" was mistaken. There were no such revenues. All proceeds of the development belonged exclusively and beneficially to WCL. He suggested that the judge may have had in mind the idea that the proceeds of the development were in some sense held in trust for WCL and

Ross River, in the relevant shares, but that this was not correct, and that the error undermined the judge's reasoning and conclusion.

46. He had a particular point about the application of the duty as found by the judge to the sum due under the Side Agreement. As to this he said that it would clearly put Mr Barnett into the position of a guarantor, because he would be liable to Ross River (as would WCL itself) even if the reason that WCL was not in a position to pay the sums due to Ross River was that WDL and Mr Harney had not paid to WCL that which was due from them. As Mr Caplan pointed out, this argument is not well founded. Under the Side Agreement WCL did undertake a liability to Ross River, as regards payment out of the Net Profits, which is not dependent on WDL or Mr Harney having complied with their separate obligation to make payments to WCL as regards the sums lent to them by WCL out of the £325,000 paid to it by Ross River. In that respect WCL did undertake an obligation that was independent of WDL and Mr Harney performing their obligations, and was only dependent on the amount of the Net Profits.

47. He sought to distinguish *Murad* on the basis that, there, Mr Al-Saraj had been a personal agent for and adviser to the claimants, who were inexperienced in property matters, and lived abroad, far away from London where the joint venture was to be carried out, whereas Ross River was fully experienced in property matters and required no advice from Mr Barnett in the way that the claimants in *Murad* had required from Mr Al-Saraj. He pointed out that in *Wetherspoon* the director of the defendant who was held to be under a fiduciary duty had had a long prior relationship with the claimant company, in the course of which undoubtedly the claimant had reposed trust in him, and the relationship had been of a kind which it was fully appropriate to identify as fiduciary. By contrast, he said, there were no such special factors in the present case.

48. He argued that the payment of management fees made no difference. They were paid by WCL and could not give rise to any duty to any party other than WCL.

49. Further, he submitted, if there was to be any fiduciary duty, it must not be incompatible with the position that it was WCL who had to run the project and to pay the appropriate expenses which it incurred. Thus, for example, WCL required office space, and made an arrangement for that purpose with a company owned by Mr Harney. He argued that no duty should be found to exist which would be breached if payment was made to such a company for that service, being a proper expense of the development. That particular argument lacks persuasiveness, given that the judge considered the amounts claimed for these expenses and disallowed them in his first judgment: see paragraphs 148 and following.

50. More particularly, he submitted that the duty should be such as would not be breached except by the making of a payment in bad faith and with the intention of preventing WCL from discharging its obligations to Ross River. As an alternative formulation, he said it should not be breached by a payment made if Mr Barnett reasonably believed, on advice, that it was due. He gave a particular example in this context, of the reimbursement to Bradcliffe of its acquisition costs, for which the figure of £217,000 was included in the financial appraisal, as I have mentioned. Mr Barnett had contended that the correct figure was higher than £217,000, and that the higher figure had been paid to Bradcliffe in good faith. The judge held that the true figure

was just over £208,000 and that no more than that amount could be allowed. Mr Hill submitted that at the very least the £217,000 had been paid (or at least could have been paid – there was no evidence as to Mr Barnett's state of mind as regards the circumstances in which it had been paid) in good faith, and that in that case there could be no breach of any fiduciary duty.

51. We were shown some interesting passages from a work of which I was not previously aware, Fiduciary Obligations and Joint Ventures, subtitled The Collaborative Fiduciary Relationship, by Gerard M D Bean, Oxford 1995, in particular from chapter 3, Fiduciary Law in a Commercial Context, and chapter 8, The Operator as Manager. A passage in the latter chapter headed the Managerial Fiduciary Duty is of particular interest. The label JOA which the author uses there stands for Joint Operating Agreement, a species of joint venture often used in the world of oil and gas exploration and development. The author suggests that these are representative of the structure of many joint ventures although they may well be more detailed in their express provisions than many joint ventures in other areas of commercial activity. This passage is from pages 165 to 167:

> "It is more common for managerial duties to arise in various business structures outside the trust example, as the trust is not the most common business structure. Moreover, the operator in a JOA is more analogous to an agent or a managing partner than to a trustee. Managerial duties arise where the purpose of the relationship is maximizing returns from a profit-making apparatus for others. The classic examples are company directors, managing partners of partnerships, and managers of unincorporated businesses. The courts in controlling managers' powers to manage (i.e. by requiring those powers to be exercised honestly in the best interest of the enterprise) have created a duty to manage the business honestly in the best interests of the enterprise.
>
> Finn [see P.D. Finn, Fiduciary Obligations, 1977] considers that a duty to act in the best interests of the beneficiary (a prescriptive fiduciary duty) arises in the case of the 'fiduciary office holder'. Such office holders are entrusted with power to act for the benefit of another, but are not under the immediate control and supervision of the beneficiary. In such cases the fiduciary 'is positively required in his decision making to act honestly in what he alone considers to be the best interests of … his beneficiaries'. Finn cites the usual categories of such persons as trustees, company directors, court appointed receivers, personal representatives, and trustees in bankruptcy and notes that the distinguishing feature of these persons is that they do not derive their powers from agreement with the beneficiary. But, this common factor is not the most important: the important fact is that these persons all exercise some form of managerial function.
>
> Finn's rationale is that the fiduciary who has freedom to determine how the interests of the beneficiary are to be served requires the supervision of equity. Indeed, it is the fiduciary's autonomy in decision-making that requires equity's supervision and this is required

> whether or not the autonomy is created under a contract between the parties or is inherent in the office.
>
> The courts have recognized that managerial powers of company directors are subject to a duty to act *bona fide* in the interests of the company. Partners, too, must act in perfect good faith toward their co-partners and, hence, in their exercise of the right to manage must act in the interests of the partnership. Also agents with discretion, either as part of their relationship or because their instructions are capable of more than one construction, are bound to act *bona fide* in their principal's interests. In a JOA the operator acts as manager of the project and, therefore, we may postulate that an operator is under a duty to act honestly in the best interests of the joint venture in the exercise of any managerial powers."

52. Those comments seem to me to be well justified in the light of the authorities to which we were referred and of the relevant practical and commercial considerations.

53. We were also shown *John v James* [1991] FSR 397, mentioned by Bean, and relied on by Mr Justice Morgan in the present case (see paragraph 246). In that case the claimant (Elton John) asserted fiduciary duties against his manager, publisher and associated companies under agreements for the exploitation of compositions, accompanied by the assignment of the copyright in the compositions. Nicholls J held that fiduciary duties did exist, even though the copyrights were assigned outright to the Defendant, and the Defendant had its own interest in the exploitation of the compositions, as did the Claimant. He said this at 432-3:

> "The defendants' own formulation of its obligation regarding exploitation was that, in addition to an implied term to use reasonable diligence to publish, promote and exploit compositions accepted under the publishing agreements, the publisher was obliged to act honestly and not to organise sub-publishing in a way which no reasonable publisher would have done. Those were the limits of its obligations, and those obligations were contractual and not fiduciary.
>
> I am unable to accept this. This formulation would, for instance, leave DJM free to publish abroad itself, or (which is of no relevant commercial difference) through a wholly-owned subsidiary company, and to fix for itself or its subsidiary once and for all or from time to time the rate at which it or its subsidiary should be paid for that work. So long as DJM honestly considered that exploitation on those terms was for the joint benefit and the terms were commonly found in the publishing trade, the writers could not object. That cannot be right. On a natural, fair reading of the documents one would have expected that the writers' entitlement to sums equal to one half of the royalties "received from persons authorised to publish the musical compositions in foreign territories" (clause 9(c) of the 1967 publishing agreement) carried with it the protection for the writers that, in fixing with the overseas "persons" the amount of the royalties to be remitted, DJM would be negotiating with another person an arm's length deal in which the interests of DJM and of the writers would not be in conflict."

54. The judge continued as follows:

> "I am in no doubt that under the publishing agreements DJM occupied a fiduciary position in respect of any exploitation which it carried out. In particular, in addition to being under a duty to exploit the assigned copyrights only in a way it honestly considered was for the joint benefit of the parties, DJM was under a duty not to make for itself any profit not brought into account in computing the writers' royalties. … I consider this to be a natural, indeed an obvious, consequence of the arrangements made by the publishing agreements for the exploitation of the assigned copyrights. The agreements were to endure for the whole life of the copyrights and the copyrights were to comprise all the compositions of the writers for a period of three or six years. The copyrights were to be assigned to the publisher, and to become its property, but with the intention that they would be exploited by the publisher, which would have complete control over the method of exploitation, not for its benefit alone but for the joint benefit. Thus, commercially, the arrangement was in the nature of a joint venture, and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function."

55. It seems to me that Mr Caplan was right in submitting that this shows a clear and instructive example of a transaction in the nature of a joint venture where the relevant assets belong legally and beneficially to one party, whose task it is to exploit them, but they are to be exploited for the common benefit of both parties, and where fiduciary duties arose from the situation despite the fact that the operator had its own personal interest in the exploitation to which it was entitled to have regard.

56. Mr Hill showed us the judgment of Briggs J in earlier litigation between Ross River and another undertaking, Cambridge City Football Club, [2007] EWHC 2115 (Ch), where on the facts the judge held that a fiduciary duty of good faith was owed, but that the terms of the agreement between the parties were such as not to justify finding a specific fiduciary duty of disclosure, because it would be inconsistent with the detailed express contractual duties. Briggs J said this at paragraph 197, which includes a useful quotation from an influential and much-quoted judgment of Mason J in the High Court of Australia:

> "In relationships falling short of partnership, but having in them elements of joint enterprise or joint venture, there is no hard and fast rule as to the existence or otherwise either of a duty of good faith, a fiduciary duty or a duty of disclosure. Each case will turn on its own facts, but if the relationship is regulated by a contract, then the terms of that contract will be of primary importance, and wider duties will not lightly be implied, in particular in commercial contracts negotiated at arms' length between parties with comparable bargaining power, and all the more so where the contract in question sets out in detail the extent, for example, of a party's disclosure obligations: see more generally *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at 97, where Mason J said this:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the effect the contract is intended to have according to its true construction.""

57. In paragraph 198 Briggs J referred to:

> "well known badges or hallmarks of a fiduciary relationship, such as … [if] the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit."

58. At paragraph 234 he said:

> "This is in my judgment a case in which the specific obligations to volunteer information were exhaustively set out in the sale agreements, such that the identification of any wider or more general obligation of disclosure would conflict with those detailed provisions by rendering them unnecessary."

59. Despite Mr Hill's attempts to distinguish cases such as *John v James* and to criticise Morgan J's reasoning in the present case, in my judgment the judge's conclusion that both WCL and Mr Barnett owed fiduciary duties to Ross River is properly reasoned and is sound and correct on the facts of the present case.

60. The absence of any prior relationship between Ross River and Mr Barnett seems to me of no significance as compared to the nature of the structure adopted under the JVA, where WCL owned all the relevant assets and was entirely in control of their exploitation, and Mr Barnett was entirely in control of what WCL did in this respect. I agree with Mr Hill that Mr Barnett's evidence under cross-examination that Ross River reposed trust in him and that he owed them a duty is not by any means decisive. But I do not see that the judge erred in what he said about that evidence. It would not have sufficed by itself but it was consistent with the conclusion reached by the judge from the other material. I am not impressed with Mr Hill's point about conflicting fiduciary duties. I do not regard that as a realistic problem in the present case, even if there might be cases where the possibility of such conflicts would have to be considered. The judge was under no misapprehension from his use of the phrase joint venture revenues. This was just a convenient label, and it was not misleading in the context. Paragraph 265 showed that the judge had it clearly in mind that the assets belonged to WCL and were not held on trust.

61. I have already explained why I reject Mr Hill's argument about the Side Agreement. It follows that I would uphold specifically the judge's conclusion that the fiduciary duty applied in relation to all of Ross River's entitlement out of the Net Profits, including all of that part of this entitlement that was derived from the Side Agreement.

62. So far as analogies with or distinctions from other decided cases are concerned, of course all such cases are factually different in material respects. *Murad*, *Wetherspoon* and *John v James* are relevant as setting out the principles, and as examples of their application. For my part I find *John v James* the most useful and compelling analogy with the present case, for all the differences that can be pointed out as between the position of Ross River in the present case and that of Elton John in that one, vis-à-vis their respective counterparties in negotiation and in the joint venture itself.

63. It is relevant, in my judgment, that Mr Barnett was not only in control of the project but was also, for a time, paid a management fee which was properly deductible in the calculation of Net Profits, so that it affected the interests, as between them, of Ross River and WCL (i.e. himself).

64. I do not accept Mr Hill's alternative formulation which would depend on proof of bad faith. That seems to me entirely inconsistent with the origin and nature of fiduciary duties arising in circumstances such as these. Of course it is not a breach of such a duty for the operator to pay an expense which is properly payable, or which is in any event agreed to be paid, but if a fiduciary duty exists at all, it throws the burden on the party subject to the duty to justify any payment in any case where there is any doubt as to whether it was properly made. Thus, I accept Mr Caplan's submission that the judge was right to find established at least a fiduciary duty of good faith, on the part of both WCL and Mr Barnett. The full extent of the fiduciary duties owed requires further consideration, for which it is necessary to examine also what the judge said in his later judgment as to remedies.

The judge's judgment as to remedies

65. Both on the appeal and on the cross-appeal issues were raised as to the extent of the duty. These were brought into sharp focus by the judge's judgment given in September 2012 as to the remedies to which Ross River was entitled, in which, as I have mentioned, he reached conclusions as to the amount of the Net Profits and as to Ross River's entitlement out of those Net Profits, but he also concluded that although Mr Barnett had acted in breach of his fiduciary duty, he was not liable to pay any equitable compensation for that breach of duty to Ross River. Mr Caplan argued that this could not be right, and that although the judge's decision as to fiduciary duty was correct, he had misapplied it when addressing the issue of compensation. Conversely Mr Hill submitted that the judge's conclusion showed that his initial decision as to fiduciary duty was not correct.

66. I do not need to take time referring to the judge's decision as to the amount of the Net Profits, or as to Ross River's entitlement out of that amount. As I have mentioned, the Net Profit figure was held to be £1,209,815, and Ross River's entitlement was £1,043,926. That meant that WCL was entitled to retain £165,889.

67. I do, however, need to go back to the passage in the first judgment in which the judge discussed the question of breach of fiduciary duty in order to introduce his ultimate decision on the point. This started at paragraph 264. Speaking of the content of the obligation not to make any payment out of the joint venture revenues which favoured WCL or Mr Barnett to the disadvantage of Ross River, he compared hypothetically, on the one hand, a small payment to a connected party at a time when the Net Profits were expected to be £1.5 million and WCL was entitled to two thirds of them, and no sum was yet due to Ross River, and on the other hand a large payment or series of payments to a connected party which might prevent WCL from being in a position to pay all its creditors and to pay £500,000 to Ross River. In the first case he said that because the payment could not disadvantage Ross River it would not be a breach of the fiduciary obligation, whereas in the latter case the payment might be in bad faith and so in breach of duty (see paragraph 264).

68. He found himself assisted less than he wished by the approach of the parties at trial. Ross River had taken a hard line, submitting that any payment at any time by WCL to a connected party which was not for joint venture purposes was a breach of fiduciary duty, and was made in bad faith and dishonestly. Conversely Mr Barnett maintained (at times, though not consistently) in his evidence that no payments were made which were not for joint venture purposes. No attention was given in the course of the evidence to what the state of mind of Mr Barnett and through him WCL was at the time of any given payment. Faced with this position on the evidence, the judge decided, as a starting point for his discussion of the issue, to identify what WCL ought reasonably to have considered from time to time would be the likely outcome of the development, and the resulting sum payable to Ross River and therefore the resulting sum which WCL would be entitled to retain. He concluded that WCL should have had in its mind during the course of the joint venture the figure of £1.5 million "as the possible outcome by way of Net Profits". Then, by reference to the sequence of agreements, he identified an expected entitlement for WCL of £1 million from the JVA until the Side Agreement, of £440,000 once the Side Agreement had been entered into, until the third supplemental agreement, and £340,000 thereafter. On the basis of those figures he said, in paragraph 271, that from May 2006 onwards:

> "WCL and Mr Barnett would know that if WCL paid connected parties sums which were not for joint venture purposes in circumstances where it could not be confident that it would recover those monies from those parties and those monies exceeded £340,000 then it would have jeopardised its ability to pay the full sum which it could expect Ross River would be entitled to."

69. The judge referred in his first judgment to the state and development of the evidence and the rival contentions as to the issue of payments to connected parties and payments otherwise than for legitimate joint venture purposes, but he was unable to come to a clear conclusion on this matters. One of the points identified as potentially contentious was payments in respect of legal fees in defending the claim on the part of WCL.

70. By the time of the adjourned hearing, the payments in respect of legal fees had become a major issue. Geoffrey Leaver had been instructed on behalf of both Mr Barnett and WCL, on the basis that each was jointly and severally liable for the sums due to the solicitors. Mr Barnett paid three sums to WCL, of £50,000, £50,000 and

£200,000 before July 2011. These payments (together with, in one case, a VAT repayment) enabled WCL to pay £48,000, £85,000 and £200,000 to Geoffrey Leaver. The judge recorded that, though later payments were not in evidence, he had been told that Mr Barnett had paid further sums to WCL which WCL had paid on to Geoffrey Leaver, who had by January 2012 received in all just over £596,000, and further sums since then, although these were not quantified in the judge's judgment. He noted Geoffrey Leaver as having said, in January 2012, that their fees overall, inclusive of VAT, came to £1,150,000 of which WCL had paid £596,346, and Mr Barnett had paid £40,696 and had also given security for further fees, the security being worth £300,000. Mr Barnett had asserted that he and WCL had incurred legal costs amounting in all to over £1,160,000, of which WCL had paid £556,000 odd, and he himself had paid £120,000. We were shown a circular by the liquidators of WCL to all known creditors dated 26 June 2013, which shows Geoffrey Leaver as having claimed £556,270 in the liquidation.

71. Ross River contended that, in substance, all of the legal costs were incurred for Mr Barnett's benefit and that WCL had no good reason to incur legal costs in defending the claim at all, so that WCL ought not to have been made liable for the solicitors' costs. This was based on the proposition that, when the claim was commenced, WCL's assets were no more than some £9,000 in the bank and the unsold assets in the development, which were in due course realised for no more than some £350,000, whereas under the Side Agreement alone WCL was liable in any event to pay Ross River more than £700,000. The Claim Form in its original form claimed the payment of either £795,000 under the agreements taken together, or at least £716,666 under the Side Agreement. WCL was therefore insolvent on any basis (assuming, as the judge held, the Side Agreement was valid and effective according to its terms) and it could not improve its position by resisting the proceedings. The only person whose position was at risk in the proceedings (ignoring Mr Harney) was Mr Barnett. Therefore it was for his sake, and not at all for WCL's sake, that the defence was mounted and maintained, and he should have been solely liable for the solicitors' costs. Since the costs incurred in defending the proceedings could not be regarded as joint venture expenditure, it was said that Mr Barnett's conduct in making WCL liable for Geoffrey Leaver's costs was itself a breach of fiduciary duty.

72. Mr Caplan's submission to the judge is summarised in the judge's paragraph 62, which it is convenient to quote:

> "Mr Caplan's basic submission on the facts was that: (1) WCL only ever had one project, the joint venture; (2) WCL should have retained all of the revenues of the joint venture until Ross River was paid its share of Net Profits; (3) if WCL had retained all of the joint venture revenues, it would have been able to pay Ross River in full; (4) WCL is now in insolvent liquidation and Ross River will receive very little, if anything, from WCL; (5) WCL and, now more importantly Mr Barnett, should not have allowed this to happen; (6) WCL and Mr Barnett must have been in breach of fiduciary duty in allowing this state of affairs to come about; (7) the loss suffered by Ross River is exactly equal to the sums not paid to it by WCL."

73. The judge noted that some aspects of this submission repeated points that he had rejected in his first judgment, namely the proposition that WCL and Mr Barnett would

be in breach of their fiduciary duties merely by making an unauthorised payment to a third party, irrespective of the circumstances. He then addressed the question of WCL's incurring liability for, and paying, the legal costs. It had not been pleaded, nor advanced at trial, that WCL was in breach of fiduciary duty in incurring liability for, and paying, legal costs of defending the proceedings.

74. It is clear that WCL was a necessary party to the proceedings, even if Ross River's main target was Mr Barnett. WCL had to be a party to the process of quantification of the Net Profits, and to the issues over the Side Agreement. The judge said at paragraph 67:

> "On the face of it, WCL was entitled to defend itself and to use its own assets to do so, even though the use of those assets might produce the result that it used up all of its available funds and ended up being unable to pay any sum found to be due to Ross River."

75. Shortly thereafter, at paragraph 69, he said this:

> "In my judgment, both WCL and Mr Barnett were real and substantial defendants. Both were entitled to defend the claims brought against them without there being a breach of fiduciary duty owed to Ross River. The fiduciary duties which, in my earlier judgment, I found to exist do not go so far as to restrict either WCL or Mr Barnett from putting forward their chosen stance in litigation brought by Ross River against them. It would be a very onerous fiduciary duty which prevented a party to adversarial litigation from defending itself."

76. He also rejected an argument from Mr Caplan that, even if this were so in general, it could not justify WCL and Mr Barnett in incurring expense in defending the claim in the way in which they had done so, putting forward a dishonest defence, involving the fabrication of documents and the telling of lies.

77. As to Mr Caplan's point that it could not be right that WCL could use its assets, which were the net proceeds of the joint venture, to resist Ross River's claims under the JVA and the related agreements - in substance, he said, WCL was defending Ross River's claim using the very money which was due to Ross River - the judge said, at paragraph 70:

> "Unfortunately, Ross River's problem is not an unusual one. It is not uncommon for a potential claimant to have to consider whether a defendant is worth suing. Even if the potential defendant is worth suing at the outset, the potential defendant may use up much of, or even all of, its funds in defending the litigation so that it becomes worthless during, or by the end of, the litigation. Even where the court considers that a defendant is likely to attempt to dissipate its assets to make itself judgment proof, the court still allows such a defendant to use its assets to defend the litigation brought against it."

78. Those comments on the judge's part are well made, in general. A corporate defendant to an ordinary money claim may have the wherewithal to pay the claim or to defend the proceedings but not both, but neither it nor any of its directors is ordinarily in

breach of any duty owed to the claimant by resisting the proceedings. However, it seems to me that there is force in Mr Caplan's point that the judge's comments do not take account of the features of this claim, unlike many, namely that, first, WCL had no real interest of its own in defending the claim and, secondly, Mr Barnett did have a real interest in doing so, so that WCL ought to have adopted a neutral position, and Mr Barnett ought to have been the person, and the only one, who incurred cost in defending the litigation.

79. The judge referred to an incidental dispute, namely the basis on which, given that both WCL and Mr Barnett were liable to the solicitors, the liability should be apportioned as between them. Each side argued for an 80/20 split, but in opposite directions. The judge held that the right proportions should be 50/50 (paragraph 73).

80. The judge also rejected the contention that it was a breach of Mr Barnett's fiduciary duty not to cause WCL to go into liquidation early in 2009.

81. He held that, on the basis of the overall estimate of legal fees mentioned above, WCL being liable for half, or about £575,000, the payment already made by WCL, whether of £596,000 or of £546,000, "did not involve any substantial payment by WCL which was not for the benefit of WCL but was for the benefit of Mr Barnett or for the benefit of connected persons", and accordingly that it was not a breach of fiduciary duty for Mr Barnett to arrange that these payments were made (paragraph 76). He also pointed out that, given that WCL carried out only the one project, and was only entitled to retain £166,000 of the Net Profit for itself, the burden of legal fees would have driven WCL into insolvent liquidation even if it had kept all the joint venture revenues in a separate account which could be used only for paying joint venture expenses and legal fees. Moreover he held that it was not a breach of fiduciary duty for Mr Barnett to cause WCL to pay its full share of the legal costs before he had paid the full amount of his own share.

82. Earlier in his judgment the judge had referred to the calculation of the net balance as between WCL and connected parties in respect of payments which were not authorised under the joint venture. Leaving aside the debate about payments for legal fees, the aggregate balance, in favour of WCL, was £775,868 as at the date of the trial in July 2011. That is the deficit for which Ross River contended that, as at that date, WCL and Mr Barnett were liable to make good to Ross River by reason of the breaches of fiduciary duty in making payments to Mr Barnett and connected parties of sums which were nothing to do with the joint venture and which were not otherwise authorised by Ross River.

83. However, the effect of the judge's decision about WCL's liability for legal fees altered that figure radically. First of all, the judge treated Mr Barnett's payments made to WCL, of sums which it then used to pay the solicitors, as being the return of funds by Mr Barnett, thereby reducing the deficit, and secondly he treated the payments made by WCL to the solicitors as properly made, and therefore not increasing the deficit. The combined effect of these two factors reduced the deficit to £179,452.68 (paragraph 40).

84. Then the judge turned to the question whether, on the footing of that lower deficit figure, Mr Barnett had been in breach of his fiduciary duty. Referring back to the approach he had outlined in his first judgment (in passages summarised and partly

quoted at paragraph [68] above) he said that, if at a given time WCL could reasonably have expected its share of the Net Profits to be £340,000, then paying £179,000 to connected parties would arguably not have been a breach of fiduciary duty, even though there was a risk that the Net Profits would be lower (as they turned out to be) and therefore WCL's share, even at that time, would itself be lower. That was in his paragraph 78, and I do not think it is part of the final basis for his decision, rather than an observation on the way, but it does indicate the lines on which he was proceeding, which were consistent with the reasoning in his first judgment.

85. He proceeded, however, by saying that what mattered was not the amount of the deficit at the date when the litigation started but, at any rate as regards causation of loss, its amount when WCL went into liquidation. He observed that there was no evidence at trial as to what amount WCL and Mr Barnett were entitled to expect that the Net Profits would be in the end, at any given time during the development process. Given the lack of any examination of that aspect of the matter at trial, the judge said, at paragraph 80, that he was not able to make a finding that payments in excess of any specific figure should have been appreciated by Mr Barnett as placing on Ross River an unacceptable risk of it not being paid in full. He concluded on this topic as follows:

> "81. Mr Barnett may have been in breach of his fiduciary duty to Ross River at an earlier point in time when the deficit was much greater than it later became. However, Mr Barnett has taken steps which, correctly analysed, resulted in the deficit being a lower figure and, in particular, at a level where I am no longer able to hold that the existence of the deficit is attributable to a breach of fiduciary duty by Mr Barnett.
>
> 82. My conclusion on the evidence at the trial is that Ross River has not shown that Mr Barnett was in breach of his fiduciary duty in relation to a deficit of £179,452.68."

86. Thus, despite the judge's finding that Mr Barnett was in breach of fiduciary duty, that there had been a deficit of £775,000 as regards payments to connected parties when the litigation began, and that WCL was entitled to no more than £165,889 out of the Net Profits, the net result of the claim was, as the judge said at paragraph 88, that he made no order as to the payment of equitable compensation by Mr Barnett.

Issues in relation to the judgment on remedies: general

87. Both Counsel contended before us that the reasoning and the outcome of the judge's judgment as to remedies showed that the judge had gone wrong in the first judgment. Mr Hill argued that it showed that the judge should not have held that WCL or Mr Barnett was under a fiduciary duty at all, or at any rate no more than a duty of good faith. He contended that the difficulty which the judge encountered in applying the more extensive duty, not to deal with joint venture receipts in such a way as to favour WCL to the disadvantage of Ross River, showed that it was an unrealistic and unreasonable duty to have found to exist in the circumstances. Conversely, Mr Caplan submitted, not only that the judge was in any event wrong as regards the legal fees, but that his approach to the formulation of the fiduciary duty as set out in his first judgment was incorrect.

88. It does not seem to me that anything that the judge said in his judgment on remedies casts doubt on the analysis or reasoning on the basis of which he held, in the first judgment, that WCL and Mr Barnett were under fiduciary duties of the kinds which he identified. The control which WCL had over all aspects of the management of the joint venture project, and over the disposal of the funds arising from it and of the assets comprised in it, and the control which Mr Barnett was able to exercise over WCL and what it did in these and all other respects, seem to me amply to justify the judge's conclusion, for the reasons set out in paragraphs 257 to 263 of the first judgment, that both company and director were under the identified fiduciary duties.

89. My difficulty with the judge's reasoning in the judgment on remedies, and in the corresponding part of the first judgment, is that it does not seem to me that he carried through in a fully logical way the consequences of the fiduciary duties that he had held to exist.

90. The duty which the judge found existed, in addition to the duty of good faith, was an application to the particular circumstances of the duty not to allow WCL's interests to conflict with its duty to Ross River, and not to profit from its position as a fiduciary. Since as a joint venturer it did have its own interests to which it was entitled to pay regard, and it was to profit from the joint venture, the application of the basic duties without any adaptation to the circumstances would have been inappropriate. Accordingly the judge found established the particular version of these duties which he set out in paragraph 259 of the first judgment (see paragraph [41] above). In this he was fortified by clause 10.5 of the JVA, which prohibited WCL from paying itself on account of the Net Profits before it paid Ross River. However, the approach which he then promulgated in paragraph 264 of the first judgment is not consistent with clause 10.5 of the JVA because it treated it as permissible for WCL to make a payment to itself or for its own benefit, or to a connected party, not being the payment of a proper joint venture expense, so long as the amount was such that, on the figures known or reasonably anticipated at the time, to make that payment would not put Ross River at a disadvantage, that is to say, it would not reasonably be expected to jeopardise WCL's ability to pay Ross River the amount to which it was entitled out of Net Profits in due course. Necessarily, to make such a payment would involve WCL drawing, so to speak, on its own prospective entitlement to Net Profits, and anticipating its entitlement. It follows that to make the payment would be a breach of clause 10.5 of the JVA. It would be such a breach however confident, or even certain, WCL could reasonably be that the amount of the payment would be within its own prospective entitlement.

91. I agree with the judge's comment in paragraph 258 of the first judgment that clause 10.5 supports the conclusion that a fiduciary duty was owed, the clause being consistent with the fiduciary obligation identified. Correspondingly the fiduciary obligation ought to be consistent with the express contractual obligation. In paragraph 259 the judge observed that Ross River had not relied on clause 10.5 in its pleaded case and had not claimed relief in reliance on it. He considered that this was a weakness in Ross River's pleaded case, though it did not, in the end, persuade him not to find that the fiduciary obligation was owed.

92. With respect to the judge, I do not see why it should count against Ross River in any way that it did not seek relief on the basis of clause 10.5. In contractual terms, WCL's breach of that clause was to pay itself its share of Net Profits before paying

the corresponding share to Ross River. It is not clear what additional contractual relief Ross River could have obtained in reliance on that breach (which undoubtedly occurred). Moreover, the main part of Ross River's case, certainly if measured in financial terms, was not that WCL had paid itself its own share too early, but that it had also paid itself a substantial part of Ross River's share, which was a breach of a more fundamental obligation than that of clause 10.5.

93. As it seems to me, the judge, having rightly identified that the circumstances of the JVA gave rise to a fiduciary obligation owed both by WCL and in turn by Mr Barnett, should have been guided both by the normal principles of fiduciary obligations and by clause 10.5, so as to find that WCL was prohibited from paying itself, or using for its own benefit, any part of the proceeds of the development (any joint venture assets, as the judge described them) otherwise than (a) in payment of proper expenses of the development or (b) as agreed with Ross River, whether generally or on an ad hoc basis. I therefore consider that the judge was wrong to allow to WCL the freedom to make payments to itself or for its own benefit, outside these two permitted categories, if it was able to make a reasonable judgment, in good faith, that to make the payment would not jeopardise its ability in the end to pay to Ross River that to which it was entitled out of the Net Profits. The judge's approach enabled WCL and Mr Barnett to impose on Ross River the risk that the development would not work out as well as expected. It also permitted WCL and Mr Barnett to contend that whether a payment was justified depended on reasonable foresight as to the eventual outcome at the date of the payment, thereby putting Ross River at the risk of the conclusion to which the judge came, that because the evidence at trial had not included any investigation of what outcome could reasonably have been foreseen at any relevant dates, therefore Ross River was not entitled to any compensation, not having proved a breach by WCL or Mr Barnett of the fiduciary obligation.

94. In general, where a person is subject to a fiduciary obligation as regards his or its dealings with assets, then it is up to that person to establish the justification for his or its dealings, if there is any contest, rather than it being for the beneficiary (i.e. the person to whom the obligation is owed) to prove that the payment was not justified. The judge's approach does not seem to me to reflect that principle. Moreover, quite apart from the question of the burden of proof, the judge's approach does allow WCL to pay itself on account of its share of Net Profits, before any sum was paid, or even payable, to Ross River on account of its share. Further, once the Side Agreement had been entered into, Ross River was (as the judge found) entitled to the first £560,000 – and in fact rather more – that became payable by way of Net Profits, and was entitled to be paid that sum when (but not before) the composite site was fully sold or let. Even after the rights of the parties had been changed by the Side Agreement with that effect, the duty as expressed by the judge entitled WCL to make payments for its own benefit which cast upon Ross River the risk that the outcome of the development would not permit the payment in full (or possibly at all) to Ross River of that sum, to which Ross River was contractually entitled to priority.

95. For these reasons, it seems to me that, while the duty formulated by the judge as the second aspect of the fiduciary obligation owed by WCL and Mr Barnett was sound, the way in which he interpreted it, or applied it, was inconsistent with the essential nature of a fiduciary duty, by not placing on the fiduciary the burden of justifying any payment or dealing which was contested, and also by subjecting the beneficiary to the

risk of the payment for the fiduciary's own benefit not turning out in the end to be justified. I also consider that it was inconsistent with the contractual agreement between the parties, above all clause 10.5 of the JVA and the Side Agreement in turn, each of which is incompatible with WCL making a payment for its own benefit out of anticipated Net Profit.

96. On the footing that, for those reasons, the correct analysis of the fiduciary duty which the judge found to be owed by WCL and Mr Barnett to Ross River is that WCL was not entitled to pay sums to itself, for its own benefit or to connected persons (not being proper development expenses), the justification for payment of which depended on WCL's share of Net Profits being sufficient in the end, that would make a major difference to the outcome of the case. The burden would have been on WCL and Mr Barnett to justify the 215 payments identified at trial made by WCL to connected parties. It would not have been relevant for this purpose to enquire what could reasonably have been foreseen, at the time of any of these payments, as to the outcome of the development and the eventual amount of the Net Profits at the end of the day. In practice, the only issue would have been whether any given payment was or was not a proper payment by way of development expenses, or whether Ross River had agreed to the payment being made even if it was not a development expense.

97. On that basis, I revert to the issue between Mr Hill and Mr Caplan as to the scope of the duty. What I have said so far on this aspect is consistent with Mr Caplan's submission that the judge should have found a more extensive duty than he did. That is so even though I criticise not the judge's general formulation of the duty but his application of it in detail. However, Mr Hill's argument was that, if the duty were of this kind, and therefore significantly more onerous on WCL and through it on Mr Barnett, then it would not be right to find that such a duty was owed at all. That submission was consistent with his argument that at most WCL should be under a duty such that it would not be a breach of duty for it to make a payment, even if not in the end justifiable as made by way of development expenses, so long as it was made in good faith on the footing that the payment was reasonably regarded (maybe with the benefit of advice) as due and payable by way of development expenses.

98. That would not be a duty of a kind that I would recognise as being one such as the law imposes on a person in a fiduciary position. Accordingly, it seems to me that Mr Hill's argument in this respect really comes back to his basic position, namely that no fiduciary obligation should be found to exist in this situation at all. I reject that submission for the reasons given earlier in this judgment. It seems to me that the judge was right to find that both WCL and Mr Barnett owed fiduciary duties to Ross River, of the kind identified by the judge, for the reasons which he set out and which I have reviewed above. Moreover, it seems to me that it follows logically that the content of the fiduciary duty is more onerous than the judge found it to be. On this aspect of the case, therefore, I would reject Mr Hill's arguments on the Respondent's Notice that either no fiduciary duty, or one more restricted than that identified by the judge, should be found to exist. Correspondingly I would allow the appeal and hold that the second aspect of the fiduciary duty which the judge held was owed, first, did not permit WCL to make any payment out of the joint venture revenues (in advance of any payment to Ross River of its entitlement out of the Net Profits) other than proper payments of development expenses and payments which Ross River had

agreed could be made, and secondly, required WCL (and Mr Barnett) to justify any payment made, in the event of any dispute.

99. During the oral argument on the appeal Mr Caplan mentioned a claim for Ross River to be entitled to an account of secret profits made by WCL, Mr Barnett or any connected party. It did not seem that any such claim had been advanced in the Particulars of Claim. In any event, on instructions Mr Caplan said that, if Ross River was held, as a result of the appeal, to be entitled to equitable compensation for Mr Barnett's breach of fiduciary duty, it would not in addition seek any remedy as regards secret profits. Accordingly I need not do more than mention that point.

Legal costs of defending the proceedings

100. That finding would itself alter the outcome of the case in favour of Ross River, but I need now to deal with the separate dispute about the legal costs incurred by WCL in defending the proceedings brought by Ross River. The judge held that WCL was entitled to defend itself in the proceedings, and that it was entitled to spend money out of the joint venture revenues for that purpose. I have set out above, or referred to, the relevant passages from the judge's judgment as to remedies.

101. At first sight it would be a striking proposition to say that a company against which a claim is brought seeking orders for payment of substantial sums, under an agreement such as the JVA, and such as the Side Agreement in respect of which there were substantial disputes, and moreover asserting fiduciary duties, should not be entitled, as against the claimant, to spend its own money on defending the claim. Often there would be no basis for such a contention. In the present case, however, it seems to me that Mr Caplan made some good points in favour of this proposition in the given circumstances.

102. That WCL was a proper and indeed a necessary party does not itself justify the incurring of substantial expenditure. Often a company is a necessary defendant but the proceedings are really between others, in particular shareholders in the company, and it is not proper for the company to do anything substantial in the proceedings, leaving it to the real protagonists to fight it out at their own expense.

103. In the case of some joint ventures that might be a direct analogy, if the joint venture is carried out through a company of which both or all parties are (directly or indirectly) shareholders (as was the case in *Murad*). This is not such a case, since WCL was owned and controlled by one side only, but it was the vehicle for carrying out the joint venture project, and it was therefore in and by that company that the joint venture assets were held. They were held legally and beneficially by WCL, but they were nevertheless the subject of contractual and fiduciary duties owed to Ross River as to what was done with them.

104. Mr Caplan submitted that, in commercial and economic terms, by the time the proceedings began, the real contest was between Ross River and Mr Barnett. WCL still held some modest assets, including the remaining development assets. Apart from those it had no more than some £9,000, held in a bank account. Those assets could not justify incurring substantial expense. If the case was to be fought the person who really stood to gain or lose was Mr Barnett. It was indeed he who provided virtually all of the money which WCL used to pay its solicitors – there was no other

available source. On the basis on which the judge proceeded, WCL was defending the proceedings, in substance, at Ross River's expense. Even if the payment of legal expenses had not been (as the judge held) a legitimate outlay, the fact that they were incurred by WCL meant that they further depleted what little might be available to meet Ross River's claim at the end of the day. On the basis that they were a legitimate expense, then the process of resisting Ross River's claim, even though unsuccessful, itself reduced the amount of that claim from what it would have been at the commencement of the proceedings. Mr Caplan submitted that this could not be right, and that Mr Barnett ought to have incurred the cost of resisting the proceedings on his own behalf and without involving the company, leaving the company either with no representation and taking no step in the proceedings, or at most with such limited representation and participation as would prevent a default judgment being entered, but taking a position analogous to that of an interpleader. At the remedies hearing it was submitted that Mr Barnett should have put WCL into insolvent liquidation rather than procure that it should defend the proceedings at its own expense, jointly with his conduct of the proceedings. The case was not put to us on that basis and I do not need to refer further to that point. For Mr Caplan's purposes it would have been sufficient and appropriate to allow WCL to continue to exist, but not to incur any, or any substantial, expense in relation to the proceedings.

105. By contrast, the judge's conclusion meant not only that WCL could and did use virtually the whole of the sum which it was liable to pay to Ross River in order to defend, unsuccessfully, Ross River's claim against it, but also that Mr Barnett on the one hand obtained a credit by paying sums to WCL (thereby in the judge's view reducing the deficit as between WCL and connected parties) and on the other hand, when the same sum was paid out to the solicitors, that did not increase the deficit, because the judge regarded it as a proper payment. If the judge had taken the view which Mr Caplan urged upon him, the payments into and out of WCL would have been regarded as neutral, because Mr Barnett should have paid the legal costs himself anyway. The deficit would not have been reduced by his payment to WCL, which ought to have been made directly to the solicitors in or towards satisfaction of a liability which only he had incurred.

106. I have referred above to the judge's reasons for rejecting the arguments addressed to him by Mr Caplan on this point. It seems to me that the judge ought to have accepted the contention that the real dispute, throughout the proceedings, was between Ross River and Mr Barnett, and that Mr Barnett's defence of the proceedings ought to have been conducted at his own expense, without any of that cost or liability being shifted to WCL. Mr Caplan showed us passages from Mr Hill's skeleton argument and his oral submissions as to costs, for and at the hearing on 8 and 9 October 2012, which bore this out convincingly. These points were made by Mr Hill in support of the proposition that there ought to be a costs order favourable to Mr Barnett as against Ross River. In support of that proposition Mr Hill made a number of points on the basis that the real contest had always been between Ross River and Mr Barnett. Thus, in the skeleton argument this was said at pages 10 to 11:

> "Therefore the reality is that everything else that was claimed in this action was directed at D2, who was the only possible source of payment of any judgment apart from under the account of JV revenues and the side agreement. The provision of the account and the

> arguments relating to the validity of the side agreement were relatively minor aspects of the case so far as the costs generated by them were concerned.
>
> …
>
> Therefore the reality was that at least by the end of 2010 when costs started to escalate substantially with C's application for a [freezing] order, the real target of C in the litigation was D2 and the substantial proportion of the costs was incurred in defending that target."

107. Mr Hill's skeleton argument put forward figures of £150,000 incurred by the Defendants as at 8 September 2010 and £350,000 as at 18 February 2011. On the footing of a total bill of £1,150,000 (see paragraph [70] above) Mr Caplan pointed out that this showed that at least £800,000 and quite probably more had been incurred during the period when even the Defendants accepted that Mr Barnett was the real target of the litigation. Those costs were therefore incurred in defending him, not really in defending WCL.

108. During the hearing on 8 October 2012 Mr Hill made these points in the course of his oral submissions:

> "… in order to understand who has been successful, we need to look at what the proceedings were about. It was always the claimant's position that the company, WCL, had been deprived of assets, assets had been either taken out, loaned out to other companies, or properties had, it was suggested, been sold for an under-value, in order to deprive WCL of funds which it would otherwise would have had to pay the profit share to the claimant and that it was either Mr Harney or Mr Barnett who had deprived it of those funds. Therefore, these proceedings were about identifying what those funds should have been to pay the profit and then going after the parties who had taken them to get them back. They were never about getting the money out of the company; the claimant's position was always they had gone from the company.
>
> …
>
> The focus of the litigation was a money claim against Mr Barnett, so that was relevant on costs for two reasons. That was the one reason that he was going to be the paying party. The other reason is that it goes significantly to what were the issues which were going to be the dominant issues in the case."

109. Mr Hill supported the judge's reasoning and pointed out, for example, that Ross River had never sought to restrain WCL from using its funds to pay legal costs. That is true but does not seem to me to be of any relevance. He also relied on the formulation of the claim, from time to time, in the Particulars of Claim, and on Ross River's applications for interim relief against WCL during the proceedings, to show that WCL was properly entitled to resist the proceedings itself and at its own expense. It is a fair comment that the formulation of the claim changed from time to time, and that not all

the claims asserted were pursued, some being introduced by amendment and then deleted by later amendment. None of the claims made was asserted only against WCL, however, and the sequence of formulations does not seem to me to make good Mr Hill's point that at any stage WCL had a separate interest from that of Mr Barnett in resisting the proceedings. Nor does that seem to me to follow from the applications for interim relief, especially as it was the actions of WCL procured by Mr Barnett that led to these applications being made.

110. The judge's initial formulation of the fiduciary duty not to allow interest to conflict with duty referred in general terms to not doing anything in relation to the joint venture revenues which favoured WCL to the disadvantage of Ross River. That was subject to the implicit but necessary exception allowing for payment of proper development expenses and of sums which Ross River agreed should be paid. The judge's conclusion as regards legal expenses requires a further exception to be made to this fiduciary duty. This exception is not justified by anything inherent in or directly relevant to the fiduciary duty itself. If Mr Barnett had not been, on the one hand, the person in whose interest WCL would (if at all) resist the proceedings and, on the other hand, the only, and the real, source of funds for WCL to do so, then there might have been something to be said for the idea that WCL had to be allowed to spend its money on resisting the proceedings, and that it was therefore not a breach of the fiduciary obligation already mentioned for WCL to incur liability for legal costs or for Mr Barnett to procure that it should do so, and should satisfy that liability. As it is, however, it seems to me that Mr Caplan's submission is correct that, because the real contest was between Ross River and Mr Barnett, to which WCL was a necessary party but not one which had any separate interest of its own in resisting the claims, therefore it was a breach of the fiduciary obligation for WCL to spend its own money on defending the proceedings, and for Mr Barnett to procure that it should do so. The fiduciary obligation required Mr Barnett to spend his own money in defending the proceedings, if he wished to do so, and he should not have caused WCL to become jointly or severally liable together with him for Geoffrey Leaver's bills. Accordingly, the payments which he made to Geoffrey Leaver via WCL should be regarded as entirely distinct from the joint venture, and the company should be treated as merely being used as a conduit to pass to the solicitors payments that he ought to have made to them directly, being solely liable to the solicitors.

111. Mr Caplan had a narrower submission in relation to the legal fees, based on the manner in which the defence was advanced and conducted. I do not need to refer to that, since I accept his broader argument which does not depend on how the defence was put forward.

Causation

112. Mr Hill had a separate response to Mr Caplan's arguments on the effect of the fiduciary duty. He said that, even if it was a breach of fiduciary duty for WCL to pay, and for Mr Barnett to procure that WCL should pay, sums which were not proper development expenses and had not been agreed to by Ross River, it did not follow simply from this that Ross River was entitled to be paid the difference between whatever amount it will recover in the liquidation of WCL and the full amount to which it was entitled. He said that Ross River would have to prove (and could not do so, on the evidence) that, if the relevant sums had not been paid away by WCL, they

would have been paid by WCL to Ross River. His primary point was that this ignored WCL's liability to other creditors, including, above all, Geoffrey Leaver.

113. The latter aspect of the point is not well made, on the basis of what I have already said about the legal costs aspect. WCL ought not to have been made liable for the legal fees. If therefore there had not been any breach of fiduciary duty, WCL would not have incurred liability to Geoffrey Leaver. That is the major aspect of this point, but not the only one. Mr Hill also submitted that WCL had, or would have had, other legitimate creditors, and that Ross River would have had to have competed with those for recovery of its entitlement, which was not in any respect secured. So far as that is concerned, WCL's only business was in fact the joint venture development, so it is not clear that it had, or should have had, any other creditors than those whose debts were proper development expenditure, leaving aside such modest amounts as would have been due by way of statutory requirements incidental to its corporate status. It has not been suggested that these were or could have been material in amount. Accordingly, it seems to me that other potential creditors can also be ignored.

114. Mr Hill also argued that if WCL had not paid out management fees to Mr Barnett, after the period covered by the agreement as to management fees, then the project would not have been managed, and it could not be assumed that the outcome of the development would have been as good as it was in fact. The period after that covered by the agreement as to management fees started in 2007, by which time the development was complete and the main activity that required attention was to find buyers or tenants. Agents were used for these purposes. I also note that the judge considered payments of £40,000, £28,000 and £52,000 which were said to have been paid to Mr Barnett by way of management fees, but the recovery of which was precluded because the amount allowed for by the agreement in February 2006 had already been drawn in full. At paragraph 147 of his first judgment the judge commented on these three payments, and on Mr Barnett's complete inability in evidence to explain how they were earned as management fees. He said that the payments appeared to be no more than drawings, which were described as management fees once the dispute arose, but that "there was no real basis for that description". Accordingly, even if this might have been a valid point in principle (as to which I have my doubts – it does not appear to have been raised below), it cannot be made good on the facts.

115. Mr Hill also referred to the cause of the loss as regards the £560,000 due under the Side Agreement as being the non-payment by WDL and Mr Harney, but that goes back to the unjustified point referred to earlier as to where the risk of such non-payment lay. It is clear that it lay with WCL (and therefore with Mr Barnett), not with Ross River. Ross River's entitlement under the Side agreement depended only on the Net Profits amounting to £560,000 or more. That was not in any way dependent on whether WDL or Mr Harney repaid what they had borrowed from WCL. Similarly, Mr Hill argued that the use of the so-called "cash-book" – a summary of payments appearing from the documents disclosed by WCL and prepared by Ross River's forensic accountant, Mr Davidson – was too simplistic as it took no account of the ability of entities to which loans had been made out of the development receipts to repay those loans. Since these loans ought not to have been made, it was not for Ross River to bear the risk of their not being repaid. It was sufficient for Ross River to show that sums had been paid out which were not for development

expenditure (or otherwise agreed to by Ross River). That was enough to make WCL and Mr Barnett accountable for those sums. If they could get them back from the recipient, so much the better for them, but that made no legal difference to Ross River's entitlement as against them.

116. Accordingly, I would reject Mr Hill's arguments on causation. It seems to me that Ross River was able to show that WCL and Mr Barnett were accountable, as fiduciaries, for their breach of fiduciary duty in paying away, or in Mr Barnett's case causing WCL to pay away, sums out of the joint venture revenues otherwise than on development expenditure or in ways to which Ross River had agreed. In my judgment they are liable for the full amount so paid away, and resulting loss (e.g. interest lost to WCL), up to the amount of Ross River's entitlement.

Should the remedy be for Mr Barnett to refund sums to WCL?

117. Mr Hill submitted that, if any remedy was to be granted against Mr Barnett, it should require payment to WCL rather than to Ross River. The judge referred to this at paragraph 285 of his first judgment and at paragraphs 83 and 84 of his judgment on remedies.

118. Mr Hill drew an analogy with cases of breach of trust where, if a beneficiary proves that a trustee, or former trustee, has committed breaches of trust from which the trust fund has suffered, he said that the trustee would be ordered to make good the trust fund, rather than to pay money directly to the beneficiary. That is not always the remedy granted, even in a case of breach of trust: see *Bartlett v Barclays Bank* [1980] Ch 515. In the present case, where the essence of the fiduciary duty was that WCL's assets should have been kept intact, without being depleted by unauthorised payments, so as to be available to pay Ross River its due share of Net Profit under the JVA, as varied, and the Side Agreement, where there is no question of any trust fund, and where WCL, the vehicle for the joint venture, has been rendered subject to claims by other creditors (including the solicitors) with which Ross River would have to compete for a dividend in the liquidation, but who ought not to have been creditors of WCL, vis-à-vis Ross River, it seems to me that there is no reason in principle why the remedy should require payment by Mr Barnett to WCL, and every reason in practice and in justice why Mr Barnett should be ordered to make payment of the appropriate amount directly to Ross River.

Calculation

119. The judge found himself in a difficulty as regards evidence relating to particular transactions, because they had been identified by Ross River's forensic accountant but had not been investigated in detail. This situation arose because of the position adopted by the protagonists in the litigation. Mr Davidson identified some 215 payments through WCL's bank account which were labelled connected party transactions – payments to Mr Barnett, to Mr Harney or to persons connected with either or both of them. He asked the Defendants for information about these, but this request was refused. He compiled the "cash book", to which I have referred, so as to record these payments, and to show a running deficit, that is to say a running total of all net connected party transactions from WCL's current account. Mr Barnett was asked about some of these transactions in cross-examination. His initial position, partly maintained in cross-examination, was that no payments had been made which

were not proper joint venture payments. This was shown to be false, and some of his evidence attempting to explain particular payments was also shown to be false.

120. Thus, Ross River was able to show that many payments had been made out of WCL's current account which did not appear on their face to be legitimate joint venture payments, and some of which on examination were certainly not, and moreover these payments appeared to be for the benefit of Mr Barnett, Mr Harney or persons connected with them. Mr Caplan argued with some cogency that in this situation it should not have been necessary for Ross River to demonstrate by reference to each one of the 215 transactions that it was not a legitimate payment. Indeed, for that to be necessary would have reversed the normal burden of proof as between a fiduciary and the person to whom the fiduciary duty is owed. It is sufficient for the latter to put a payment, or a series of payments, in issue, or even simply to require the fiduciary to account for his or its dealings with the relevant funds, and it is then for the fiduciary to prove that the payments were proper. There may be cases in which the beneficiary acts unreasonably in persisting in questioning the fiduciary's account, in which case there may be issues as to the incidence of the costs of the accounting process. But it does not seem to me that it could be said that this is such a case. Accordingly, it seems to me that, to the extent that the judge criticised Ross River for not having proved its case in detail as regards individual transactions, that criticism was not justified. It should have been up to WCL and Mr Barnett to justify the payments which were questioned, in particular the 215 connected party payments. On that basis, none of these payments was shown to the judge to be justified. Mr Barnett is therefore accountable to Ross River for every one of them by way of compensation for his breach of fiduciary duty.

121. The judge held that Ross River's entitlement under the JVA and the Side Agreement, as against WCL, was to the sum of £1,043,926. Ross River has judgment against WCL for that amount, and for most of its costs.

122. Mr Caplan put to us a number of variants of Ross River's claim in monetary terms, depending on our conclusion on the various issues in the case. His primary case is that Ross River should have judgment against Mr Barnett for the amount achieved by deducting from the sum for which Ross River has judgment against WCL the amount which Ross River is likely to recover from WCL in respect of its judgment against WCL for the amount due under the JVA and the Side Agreement.

123. Ross River will be entitled to a dividend in the liquidation of WCL. The latest information from the liquidators gives an estimate of funds available for distribution of just over £244,700, and claims for over £2,965,000. If those are the eventual figures (and ignoring costs of the liquidation) the dividend would be of 8¼ pence in the pound. That would give Ross River £86,171 by way of dividend on its claim for £1,043,926. That is to be deducted from the sum for which Mr Barnett is liable to Ross River.

124. I accept Mr Caplan's submission, on the basis of his primary case as indicated above, that the estimated amount of the dividend is the only deduction that falls to be made from the sum of £1,043,926 in calculating the amount for which Mr Barnett is liable. I would therefore hold that Mr Barnett should be ordered to pay to Ross River the sum of £957,755.

Conclusion

125. For the reasons that I have set out above, it is my conclusion that the judge was right to hold that WCL and Mr Barnett owed fiduciary duties to Ross River, and did so in relation to the amounts due under both the JVA itself (as varied) and the Side Agreement. I would therefore dismiss the cross-appeal by Mr Barnett.

126. On the other hand, although in general terms the judge's formulation of the duties was apt, I consider that he was wrong in his interpretation and application of one of those duties. In my judgment it was a breach of fiduciary duty for WCL to pay, and for Mr Barnett to procure that it paid, any sum other than (a) such as was properly required for development purposes or (b) one to the payment of which Ross River had agreed. It was not open to WCL, in effect, to draw on its anticipated share of the Net Profits so as to make payments not falling within either of these categories. It was a breach of fiduciary duty for it to make any payments not falling within these categories before the time came for the distribution of the Net Profits, and even then it would be permissible only after payment to Ross River of the amount of its prior entitlement under the Side Agreement. In particular, it was a breach of fiduciary duty for WCL to pay legal expenses incurred in defending Ross River's proceedings out of the joint venture revenues. Moreover, in case of any dispute as to whether a payment made by WCL was or was not proper or authorised, it was for WCL and Mr Barnett to prove that it was proper or authorised, not for Ross River to prove the contrary.

127. I also consider that Ross River is entitled to a remedy for the breaches of fiduciary duty which requires Mr Barnett to pay compensation to Ross River directly.

128. In consequence I would allow Ross River's appeal and hold that Ross River is entitled to judgment against Mr Barnett in the principal sum of £957,755.

Lord Justice Fulford

129. I agree.

Lord Justice Mummery

130. I also agree.