IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 7/2004
[2006] NZSC 68

BETWEEN	WYNSTON ALEXANDER CECIL CHIRNSIDE First Appellant
AND	RATTRAY PROPERTIES LIMITED Second Appellant
AND	RICHARD ELMORE FAY Respondent

Hearing: 14 and 15 November 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: P F Whiteside and J V Ormsby for Appellants
H M McIntosh and C R J Hosie for Respondent

Judgment: 6 September 2006

JUDGMENT OF THE COURT

A. The appeal and cross-appeal are each allowed in part.

B. The damages and interest awards made by the Court of Appeal are set aside.

C. The judgment entered for Mr Fay against Mr Chirnside in the High Court is varied from $495,000 to $850,000 plus interest as awarded by the High Court.

D. Judgment is entered for Mr Fay against Rattray Properties Ltd for $850,000 plus interest in the same terms as awarded against Mr Chirnside.

E. The caveat lodged by Mr Fay against the title to the Harvey Norman project is to be removed.

F. Mr Chirnside is to pay Mr Fay costs in respect of the proceedings in this Court in the total sum of $15,000 plus disbursements, to be fixed if necessary by the Registrar. The costs awarded to Mr Fay in the Court of Appeal are increased from $4,000 to $10,000. Costs in the High Court are to remain as fixed by that Court.

REASONS

ELIAS CJ

[1] Three principal points are raised by the appeal. They are: whether parties to a joint venture owe each other fiduciary duties; what remedy is appropriate for breach of such duties; and whether, in arriving at a remedy, a fiduciary who has appropriated the joint venture for himself should be given an allowance for the effort he has made in bringing the venture to profit. I agree with the other members of the Court, but for reasons which differ slightly, that joint venturers owe each other fiduciary duties of loyalty. Like the other members of the Court, I consider that the appropriate remedy where a fiduciary profits from breach of duty is disgorgement of the profit through an account. I differ from the other members of the Court in taking the view that there is here no principled basis to justify an allowance to a defaulting fiduciary who has made a profit from breach of his fiduciary duties.

The joint venture between Mr Chirnside and Mr Fay

[2] From 1997 Mr Chirnside and Mr Fay were associated in a project to develop a commercial property on the old Speights Brewery site in Dunedin. Both men worked on the project, although Mr Chirnside took principal responsibility for progressing it (as he had done in respect of another development, the CRT project, earlier undertaken by the two men through a company vehicle). In September 1999 Mr Chirnside entered into a conditional agreement to purchase the site, as trustee for

a company to be formed. Key to the proposal was attracting a major retail tenant and obtaining planning consents. When Harvey Norman committed in July 2000 to become the major tenant, the development as planned became feasible. The agreement to purchase the land was made unconditional by Mr Chirnside. Mr Chirnside then excluded Mr Fay completely from the venture and proceeded to complete the development through a company, Rattray Properties Ltd, in which his family trust was the major shareholder with shareholders introduced through Mr Chirnside's solicitors, Anderson Lloyd, holding the minority shares.

[3] Mr Chirnside did not immediately tell Mr Fay that he was excluded. He dissembled when tackled by Mr Fay in August 2000 with rumours that finance had been obtained for the project without reference to him. Eventually, on 1 September, Mr Chirnside told Mr Fay that he had "sold" the project because he could not finance it. He declined to give Mr Fay any details of the sale, because he said he was bound by an arrangement of confidentiality. The explanation was untrue. When Mr Fay wrote on 9 October claiming that, as a partner in the project, he was entitled to an account on the sale, Mr Chirnside did not reply to the letter. Nor did he reply to a further letter sent on 31 October, asking for an urgent response. It was not till 27 November that Mr Chirnside acknowledged Mr Fay's correspondence. He admitted that he continued to participate in a restructured venture put together with equity finance arranged through his solicitors, Anderson Lloyd. But he denied that he had been in partnership in the development with Mr Fay and rejected the suggestion that Mr Fay was entitled to an account.

[4] The development was completed about October 2001. It continues to be owned by Rattray. At the trial in September 2002 it was found to have a value net of development costs of $1,290,000.

[5] The proceedings which give rise to the present appeal were brought by Mr Fay in July 2001. Mr Fay claimed, among other alternative relief, an account of all profits "made or anticipated" through the development on the basis that Mr Chirnside had acted in breach of fiduciary duties owed to Mr Fay when he excluded him from the venture. Rattray was named as a defendant on the basis that it had knowingly assisted with the breach of fiduciary duties.

[6] In concurrent findings in the High Court[1] and Court of Appeal[2] it was held that Mr Fay and Mr Chirnside were parties to a joint venture in the development. That conclusion is clearly right. The venture was not one simply in prospect.[3] The parties had embarked upon it by sharing the opportunity (which each had identified separately), by their feasibility calculations together in March 1999, by negotiating to purchase the Speights site (conditionally secured in September 1999), by progressing consents with the Dunedin City Council and working with architects and other advisers to develop the plans during February and March 2000, and by working to gain commitment from a principal retail tenant to ensure the viability of the development.

[7] Both men participated in working up the proposal and dealt with third parties and advisers. Mr Chirnside undertook the primary responsibility for progressing the development (as he had done in the earlier development). Mr Fay acknowledged in evidence that Mr Chirnside did "much more of the legwork on the project than I did". He said, however, that their partnership was not based on equal effort, "but rather on equal financial participation and risk". Mr Fay contributed to the planning and its execution (including through contact with Harvey Norman). On at least one occasion, Mr Chirnside introduced Mr Fay to others as a principal in the development. Mr Fay's ability to fund the development was also critical to the plan until Mr Chirnside managed to obtain alternative funding through his solicitors, when the strategy of securing Harvey Norman as principal tenant succeeded and made the project viable.

The appeal

[8] The findings in the High Court and the Court of Appeal that the joint venture was underway and that both parties had joined it were not directly challenged on

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1 *Fay v Chirnside and Rattray Properties Ltd* HC DUN CP 36/01 20 December 2002 (William Young J) (as to liability), HC DUN CIV-2001-412-00013 15 August 2003 (as to relief).

2 *Chirnside v Fay* [2004] 3 NZLR 637 (Anderson P, McGrath and Hammond JJ) (as to liability), *Chirnside v Fay* (*No 2*) [2005] 3 NZLR 689 (as to relief).

3 Cf *Khan v Miah* [2001] 1 WLR 2123 (HL).

further appeal to this Court and in my view are unassailable. But Mr Chirnside and Rattray (which was found liable at trial on the basis of its knowing participation) appeal against the determinations in the High Court and Court of Appeal that Mr Chirnside owed fiduciary duties to Mr Fay. And both parties appeal against the damages awarded by the Court of Appeal to Mr Fay.

[9] Mr Fay challenges the relief obtained in the Court of Appeal. The Court of Appeal awarded him compensatory damages of $287,500 on a "loss of chance" basis, in substitution for the damages of $495,000 awarded in the High Court on the basis of half of the net value of the realised development. In arriving at the figure of $287,500, the Court of Appeal discounted Mr Fay's half share in the net value of the development by 25% to reflect the risks that the two men would not in the end have come to terms and that Mr Fay's eventual share would have ended up at "distinctly below 50%".[4] In setting the net value of the development, the Court deducted an allowance of $100,000 to Mr Chirnside for his greater efforts before July 2000, reducing as "overly generous" a $300,000 allowance made for the same purpose by the trial Judge.

[10] Mr Fay contends that he was entitled to an account of the profits made by Mr Chirnside and Rattray[5] and that the Court of Appeal was wrong to apply a discount to the profits realised by Mr Chirnside. He also maintains that the valuation relied upon in the lower Courts in arriving at the net value of the development failed to ascribe proper value to some vacant space in the development. And he challenges the deductions made by both the High Court and Court of Appeal as an allowance to Mr Chirnside for his greater contribution to the development before July 2000. (It is common ground that, in relation to his work on the development after July 2000, Mr Chirnside received fees by agreement with Rattray. They have been treated as part of the expenses of the development.)

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4 [2005] 3 NZLR 689 at 697.

5 An earlier claim by Mr Fay that the development is held on a constructive trust for his benefit as to a 50% interest was rejected in the High Court on the basis that it would cut across the interests of the charge-holder bank and would be "clumsy" given the estrangement between Mr Chirnside and Mr Fay. It is no longer live.

[11] Mr Chirnside and Rattray, for their part, appeal against the failure of the Court of Appeal to make a higher allowance for Mr Chirnside's greater effort in putting the development together before July 2000. They maintain that the Court of Appeal was wrong to reduce to $100,000 the allowance of $300,000 deducted by the High Court in settling the net profit in the development.

[12] I have had the advantage of reading in draft the reasons prepared by Tipping J. I agree with him that the appeal against the finding of breach of fiduciary duty by Mr Chirnside must be dismissed, although I arrive at that view rather more directly and therefore express my reasons separately. I agree with the reasons given by Tipping J in concluding that the High Court Judge, in assessing the net value of the development, should have attributed a value to the vacant space and I agree too with the value he arrives at for that space. I add nothing further on that point. I agree, also, that the Court of Appeal would have been wrong to adopt the loss of chance methodology even if damages to compensate Mr Fay for loss had been the appropriate remedy. There was no relevant "chance" requiring assessment. Mr Fay was deprived of an existing, not prospective, interest in the venture. I do not add anything further to the reasons expressed by Tipping J as to why the approach in the Court of Appeal was misconceived.

[13] More fundamentally, I am of the view that both the High Court and the Court of Appeal were wrong to remedy the breach of fiduciary duty by damages to compensate for Mr Fay's loss. Mr Chirnside was obliged to account for the profit he obtained through the venture. That profit could have been determined through sale, but neither party sought sale. The fact that the profit was not realised meant that the Court had to make an assessment of the profit obtained by the defaulting fiduciary through wrongful appropriation of the joint venture.[6] It was however a straight valuation exercise. An account in respect of the unrealised profit in the development was in my view the appropriate remedy. Although, in the event, Mr Chirnside's gain was broadly equivalent to Mr Fay's loss in this case, the compensatory approach adopted in the Courts below in my view obscured the principles in play in the consideration of an allowance to be deducted from the profits. I am unable to agree

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[6] As was done by Millett J in *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 (HC), in the context of an account of profits for copyright infringement.

with the majority view in this Court that an allowance for the work undertaken by Mr Chirnside on the project before July 2000 was appropriate. I would have allowed the appeal by Mr Fay on this point and reversed the court-awarded deduction for Mr Chirnside's remuneration in arriving at the net value of the development. On this approach, and after taking into account the additional value in the development attributable to the unused space (resulting in a net value for the development of $1,900,000, in accordance with the figures set out by Tipping J at [177]), I would have assessed the amount payable to Mr Fay at $950,000.

The parties owed each other fiduciary duties within the scope of the joint venture

[14] Where parties join together in a venture with a view to sharing the profit obtained, their relationship is inherently fiduciary within the scope of the venture and while it continues.[7] The label "joint venture" may sometimes be used to describe what are in fact separate businesses operating at arm's length, with profits taken separately and directly by the participants instead of being realised by the venture itself (as is common in the case of mineral exploration or share-milking for example). That is not the relationship found to have existed here. In my view the venture to acquire and develop the Speights site was indistinguishable from a single transaction partnership between Mr Fay and Mr Chirnside. The fact that the parties may have expected to settle their arrangements later more formally through a corporate structure (as they had done in their earlier joint venture), or through a partnership agreement, does not alter the character of the relationship already established and underway.[8]

[15] Not every breach of duty by a fiduciary is a breach of a fiduciary duty.[9] The distinguishing obligation of a fiduciary is the obligation of loyalty.[10] Within the scope of the joint venture, both Mr Chirnside and Mr Fay were subject to that

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7 *Meinhard v Salmon,* 164 NE 545 at 546 (NY CA, 1928).

8 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 5-6 per Gibbs CJ; 12 per Mason, Brennan and Deane JJ; 14-16 per Dawson J.

9 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16 (CA) per Millett LJ. The same point is made in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 680 (CA) per Gault J.

10 *Mothew* at 18 per Millett LJ.

obligation. Consistently with it, neither was permitted to place himself in conflict of interest with the venture. Each was obliged to account to the other for any unauthorised profit obtained by opportunity arising through the venture. The appropriation of a joint venture by one of the parties to his sole account is as fundamental a breach of fiduciary duty as can be imagined.

An account for the profit obtained by the fiduciary was the appropriate remedy

[16] The breach of fiduciary duties "attracts legal consequences differing from those consequent upon the breach of other duties".[11] The "pre-eminent"[12] remedies for breach of duties of loyalty are recission and profit-stripping through account. It is not necessary for a profit to have been realised; a monetary award can be ordered to reflect the profit obtained.[13]

[17] While compensatory damages are measured by what the plaintiff has lost, an account of profits is measured by what the defendant has gained.[14] Whether the plaintiff has suffered loss is irrelevant, as *Keech v Sandford*[15] and *Boardman v Phipps*[16] illustrate. The liability of defaulting fiduciaries to account for all benefits arises from the requirements of equity that fiduciaries must not place themselves in positions where their duties conflict with their own interests and must not obtain unauthorised profits from their position.[17] Parker LJ said in *Murad v Al-Saraj* of the "no-conflict" rule that it is "neither compensatory nor restitutionary":[18]

> …rather, it is designed to strip the fiduciary of the unauthorised profits he has made whilst he is in a position of conflict. As Lord Keith observed in *Attorney-General v Guardian Newspapers Limited (No 2)* (1990) 1 AC 109 at 262E-F, the remedy of an account of profits: "….is, in my opinion, more

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11 *Mothew* at 16 per Millett LJ.

12 See Conaglen "The Nature and Function of Fiduciary Loyalty" (2005) 121 LQR 452 at 463.

13 *Potton Ltd v Yorkclose Ltd* at 15 per Millett J; *Scott v Scott* (1963) 109 CLR 649 at 662-663.

14 *Attorney General v Blake* [2001] 1 AC 268 at 278 per Lord Nicholls. See also *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 where at 622 Laskin J for the Court made it clear that the measure of damages was not the loss of the plaintiff: "[The plaintiff] is entitled to compel the faithless fiduciaries to answer for their default according to their gain."

15 (1726) Sel Cas Ch 61.

16 [1967] 2 AC 46.

17 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558.

18 [2005] EWCA Civ 959 at [108]. The case concerned not misappropriation of opportunity or property in breach of fiduciary duty but failure to disclose a secret profit and misrepresentation about his financial contribution made by the defendant in a joint venture.

> satisfactorily to be attributed to the principle that no one should be permitted to gain from his own wrongdoing".

[18] Nor is it necessary for the defaulting trustee or fiduciary to have acted in bad faith or to have been conscious of wrong-doing. Lord Herschell in *Bray v Ford*[19] explained why, in a passage cited by Lord Hodson in *Boardman v Phipps*:[20]

> It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect.

Others have explained the rationale as grounded in the difficulty of proof.[21] The approach is not confined to trustees but applies to all fiduciaries, as was made clear in *Regal (Hastings) Ltd v Gulliver*.[22]

[19] An account is also the appropriate remedy where a fiduciary receives an unauthorised benefit. The rule which prevents a fiduciary from profiting from his office without the consent of the principal is part of the wider no-conflict rule which arises from the duty of loyalty.[23] It "reinforces" the wider duty of fidelity, as Lord Nicholls explained in *Attorney General v Blake*:[24]

> Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorised profit.

[20] Damages for breaches of non-fiduciary duties owed by fiduciaries (for example, for breaches of duties of care assumed under contract or imposed by tort law) are assessed under the general principles applicable to such breaches. It is only in respect of breach of the fiduciary duties that the salutary approach of account, even where no loss has resulted to the beneficiary or no benefit could have been obtained by him, is imposed in equity. A fiduciary must account for benefit obtained

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19 [1895] AC 44 (HL).
20 At 111.
21 At 154 per Lord Wright.
22 [1967] 2 AC 134.
23 As suggested by Lord Upjohn in *Boardman v Phipps* at 123.
24 At 280.

in the two circumstances identified in *Warman International Ltd v Dwyer*:[25] first, if there was a conflict or possible conflict between the fiduciary's duty and his personal interest; secondly, if benefit is obtained through the fiduciary's position or by his taking advantage of opportunity or knowledge derived from the position. In *Warman International*, the High Court of Australia affirmed that a plaintiff who has established breach of fiduciary duty is entitled to an account of profits, where the fiduciary has profited. Where there is no profit made but the plaintiff has suffered loss, the plaintiff may elect to seek compensatory damages in equity.[26]

[21] In the present case, Mr Chirnside was in breach of his core duties of loyalty. He diverted to his own account the entire joint venture, in breach of the no-conflict limb of the obligation. In addition, he obtained payments (made to a company owned by him) from Rattray. The High Court and Court of Appeal judgments simply acknowledge that there were payments and do not give details of them. But the unchallenged evidence was that there were two types of payment. Under an agreement dated 11 July 2000 between Mr Chirnside and the Anderson Lloyd shareholders Mr Chirnside's company, Southern Realty Ltd, received from Rattray both an "initial developer's/project manager's fee" of $100,000 and a "management fee" of $2,000 per month from July 2000. These fees have been treated as expenses in assessing the net profit of the development, apparently without objection. But the significance for present purposes of the "initial developer's/project manager's fee" is that it was set to reflect the value of the venture to the new partners at July 2000, value which must have reflected the effort and skill in putting the project together.[27] That circumstance is not considered by the High Court or Court of Appeal in considering what allowance was appropriately made to Mr Chirnside for his effort before July 2000.

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25 At 557.

26 The availability of equitable compensation has been controversial (see Conaglen "Equitable Compensation for Breach of Fiduciary Dealing Rules" (2003) 119 LQR 246), but has been accepted in New Zealand since *Coleman v Myers* [1977] 2 NZLR 225 (CA). See *Day v Mead* [1987] 2 NZLR 443 at 450 (CA) per Cooke P; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301 (CA) per Cooke P (for himself, Richardson, Bisson and Hardie Boys JJ) and at 302 per Somers J.

27 The evidence indicates that 70% of the time spent by Mr Chirnside on the project was before July 2000.

[22] For the net profits wrongfully diverted to the account of Mr Chirnside and Rattray, Mr Fay was entitled to seek account. That is not how William Young J approached the question of relief. He considered that it was "impractical" to provide an account of profits until the development was sold.[28] In the circumstances, he thought the appropriate remedy was "damages (or equitable compensation)" to reflect "Mr Fay's loss associated with his wrongful exclusion at the hands of Mr Chirnside". Although the loss would be "closely associated" with the net gain obtained by Rattray, the "starting point" was "what Mr Fay has lost as a result of being excluded from the joint venture".[29]

[23] The Court of Appeal agreed with William Young J that the correct remedy for breach of the duty of loyalty in the present case was "equitable compensation" for what the plaintiff had lost.[30] It considered that:[31]

> …what Mr Fay "lost" in this case was the opportunity or chance to enter into a joint venture agreement with Mr Chirnside as a result of Mr Chirnside's pre-emptive abandonment of him, which is a quite different thing from a breach of a (putative) agreement.

For the reasons given by Tipping J, I think the "lost opportunity" approach was wrong. More fundamentally, I am of the view that the Court of Appeal, having found breach of the fiduciary duty of loyalty, was in error in looking to the plaintiff's loss rather than the fiduciary's gain as the appropriate redress.

The allowance made in the High Court and Court of Appeal for Mr Chirnside's contribution before July 2000

[24] In assessing what Mr Fay had "lost" as a result of the breach of fiduciary duty, William Young J thought it relevant to consider the "likely terms upon which Messrs Chirnside and Fay would have proceeded"[32] but for the exclusion of Mr Fay:

> [79] Mr Chirnside had a strong moral case for obtaining appropriate recognition of his disproportionate contribution to the project. Mr Fay

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28 (15 August 2003) at [15].
29 (15 August 2003) at [20].
30 *Chirnside v Fay* at 648-650. In *Chirnside v Fay (No 2)*, its judgment on relief, the Court declined to revisit the issue of the approach it took to compensation (see [13]).
31 *Chirnside v Fay* at 650.
32 (15 August 2003) at [77].

> struck me as being an honourable man. He also did not strike me as being mean spirited. I believe that he would have been prepared to recognise that contribution in a fair and reasonable way had he been given the opportunity to do so. As well, although Mr Chirnside's negotiating position was impaired by the difficulty he was going to have in coming up with his share of the equity in the project, his position of influence in relation to Tevcorp Holdings would have given him considerable bargaining leverage.
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> [80] In those circumstances, I think that one way or another Mr Fay would have allowed for Mr Chirnside's contribution to the project and I will allow $300,000 for this contribution.

The allowance of $300,000 was therefore made by the Judge to arrive at a measure of Mr Fay's loss, on the basis that Mr Fay would have agreed to recompense of that order for the additional effort made by Mr Chirnside. There is support for the inference that Mr Fay would have agreed to recompense Mr Chirnside in Mr Fay's evidence. He said, of Mr Chirnside:

> I thought that his greater efforts would [be] compensated for subsequently by way of a separate expense against the profits. We specifically compensated him in this way for his extra work on the CRT project.

Although not referred to in the High Court or Court of Appeal judgments, the joint venture agreement for the CRT project initially provided for Mr Chirnside to be paid a project management fee for the development and for Mr Fay to be paid a marketing management fee for the properties in the development sold by him (at 1.25% of the sale price).[33] Although the project management fee for Mr Chirnside was set at 1.25% of the sale price of the existing CRT properties and was payable on sale or on winding up of the joint venture company, Mr Chirnside was to receive $10,000 on account of the fee on the signing of the building project contract and a further $10,000 on account on practical completion of the project. In addition, he was to receive a fee of $5,000 for keeping the books and records of the company.

[25] Earlier, William Young J had indicated that if the exercise before him had been an account for profits, he would have been inclined to allow $300,000 to Mr Chirnside in arriving at the net profit figure. In making that indication, the Judge explained how he had arrived at the figure by reference to his assessment that Mr Chirnside "had spent around 500 hours on the project up until July 2000".[34] The

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[33] It was subsequently varied to provide a fee for sale to be paid to Mr Chirnside also.

[34] (15 August 2003) at [70].

Judge made no assessment of the hours spent on the project by Mr Fay, and it is not possible to infer that the 500 hours accepted (from the 800 hours estimated by Mr Chirnside) were 500 hours in excess of the time spent on the project by Mr Fay. The Judge did say, however, that Mr Fay's contribution "was of very limited moment compared to Mr Chirnside's contributions".[35]

[26] In arriving at the allowance of $300,000 for Mr Chirnside's "disproportionate efforts in relation to the joint venture", William Young J made no allowance for Mr Chirnside's management of the project after July 2000. At July 2000 he thought the project had already come together when Harvey Norman committed to the lease and after July 2000 Mr Chirnside was paid a project manager's fee by Rattray. Nor did the Judge make any allowance for the financial risk carried by Mr Chirnside after July 2000.

[27] William Young J considered that Mr Chirnside's exclusion of Mr Fay was not "particularly relevant" in considering an allowance for what had happened before July 2000 because, in that period, Mr Chirnside was not in breach of fiduciary duty.[36] He thought that a "substantial sum"[37] should be allowed to Mr Chirnside both because of his disproportionate effort and its contribution to the success of the venture and also because the risk of failure would have fallen principally on him; if the project had failed, the Judge thought that Mr Fay would have reimbursed Mr Chirnside for half his expenses but would not have compensated him for the time and effort he had deployed. Because until Harvey Norman was secured as head tenant the viability of the project was uncertain, the Judge saw:[38]

> …a marked difference between the sort of fee which Mr Chirnside was able to extract from the Anderson Lloyd investors for managing a project which by then had been put together and the sort of "fee" which is appropriate to recognise the entrepreneurial skills and risks involved in what he did prior to July 2000.

Somewhat inconsistently with his earlier reasoning that no allowance should be made for the risk carried by Mr Chirnside after July 2000, the allowance was said by

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35 (15 August 2003) at [75].
36 (15 August 2003) at [71].
37 (15 August 2003) at [76].
38 (15 August 2003) at [72].

the Judge to be appropriate not only for Mr Chirnside's efforts until July 2000, but also for "his acceptance, since July 2000, of the primary risk in relation to the venture". These were the reasons that led the Judge to the "substantial sum" he would have allowed to Mr Chirnside "[i]f the exercise before me had been an account of profits".[39]

[28] There are two principal problems with the conclusion in the High Court that it was appropriate to make an allowance of $300,000 to Mr Chirnside for his efforts before July 2000. The first is that the amount is not substantiated in any satisfactory way and fails to take into account the $100,000 initial fee paid to Mr Chirnside by Rattray. The second (which I consider later) is that the general approach adopted was in error in seeking to put the parties in the position they would have been in had Mr Chirnside scrupulously discharged his fiduciary obligations, effectively on a quantum meruit basis. The starting point, rather, should have been the rule that fiduciaries may not take unauthorised profit and whether, in conformity with principle, it should be tempered in the circumstances by an allowance to Mr Chirnside.

The allowance is not properly substantiated

[29] The initial fee paid by Rattray to Mr Chirnside clearly reflected the value in the venture delivered by Mr Chirnside to Rattray. As such, it must have included an assessment of the entrepreneurial effort in bringing the project together, achieved by July 2000 with the commitment of Harvey Norman. The failure to refer to this payment ignores what is the best objective evidence of the value of the work undertaken by Mr Chirnside to that point.

[30] The Judge's view that there was a "marked difference" between the sort of fee Mr Chirnside could extract from the Anderson Lloyd shareholders for managing the project after July 2000 (when it had already been put together and the risk in the venture was correspondingly reduced) and the appropriate fee for work before July 2000 (when the project was still in doubt) overlooks the fact that this distinction was

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[39] (15 August 2003) at [76].

made in the fees paid to Mr Chirnside under the agreement with the Anderson Lloyd shareholders. The $100,000 initial fee (some of which must have been attributable to the joint venture opportunity rather than Mr Chirnside's skill in bringing it to viability) was distinct from the more modest $2,000 per month fee for managing the project after July 2000. A further comparison available is the fee paid under the CRT joint venture agreement. It suggests an even more modest payment was likely to have been arrived at by these particular joint venture parties. Close comparability of effort among joint venturers may be less important than the fact that each contributes value.

[31] Even if the Judge had been right, therefore, to treat the exercise as one to put the parties into the position they would have been in had Mr Chirnside scrupulously discharged his fiduciary responsibilities, I am of the view that the allowance arrived at cannot be justified. At the very least, it needed to take into account the fee paid by Rattray under the agreement with the Anderson Lloyd shareholders. But, in any event, the figure of $300,000 is arrived at on no properly explained basis.

[32] The Court of Appeal seems to have accepted the general approach in the High Court that the calculation of an allowance was necessary in arriving at the loss suffered by Mr Fay. It reduced the allowance to $100,000, however, on the basis that $300,000 was "overly generous" to Mr Chirnside.[40] The judgment does not elaborate on the reasons why $100,000 was thought appropriate. The Court recorded, and may have accepted, submissions that some allowance should have been made for the fact that one-half of Mr Chirnside's effort would have been on his own account as a 50% joint venture partner and that a rate of $200 per hour for the 500 hours (yielding an allowance of $100,000) would have been more appropriate. Again, however, there was no consideration of the fee paid by agreement with the Anderson Lloyd shareholders or any other discussion of a basis upon which an appropriate fee might be set.

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[40] *Chirnside v Fay (No 2)* at 689.

[33] I consider that allowances of $300,000 or $100,000 cannot be defended on the reasoning put forward in the High Court and Court of Appeal. On the evidence before the Court, I consider that an allowance of less than $100,000 is indicated by the initial fee paid by Rattray. It was the value received by Chirnside for delivering the venture to Rattray. Only part of that value is properly to be attributed to Mr Chirnside, even on the basis that his efforts in bringing the project together were substantially greater than those of Mr Fay. Indeed, on the basis of the CRT joint venture payment, I would have thought the fee component could properly have been set at less, since on the basis there provided for (1.25% of the value realised) Mr Chirnside would have received here at most $146,087 (valuing the project at $11,767,000). That is roughly comparable to the management fee received by Mr Chirnside from Rattray (a total of $138,000 as at 31 March 2003), although applying such a measure to the present venture denies Mr Fay the opportunity he had in the CRT project to make a comparable fee on sale. But in any event, I see no reason to doubt that the fee component in the initial fee paid by Rattray was adequate recompense for Mr Chirnside's disproportionate effort. Mr Fay has not sought to recover any element of the $100,000 payment which is not attributable to Mr Chirnside's efforts and therefore was value which belonged to the joint venture. But the payment itself was I consider sufficient to extinguish any need to make further provision for Mr Chirnside's effort and skill.

No allowance to Mr Chirnside was appropriate

[34] In arriving at his conclusion as to the allowance to Mr Chirnside, the Judge did not undertake any review of the principles upon which allowances may be made for the work and success of a defaulting fiduciary, beyond indicating:[41]

> I have had regard to *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 and *Warman International Ltd v Dwyer* (1995) 182 CLR 544. There is necessarily a broad brush quality to the assessments which I must make.

[41] (15 August 2003) at [65].

The Court of Appeal, for its part, did not question the general approach adopted by the Judge and differed from him only in the size of the allowance it was prepared to make.

[35] I am of the view that the approach taken to the question of the allowance was wrong. The view that the appropriate remedy for breach of the fiduciary duty was compensatory damages led the High Court Judge to assess what the plaintiff had lost against the hypothesis that the duty had been scrupulously discharged and that a generous basis of remuneration for Mr Chirnside (reflecting the risk in the development) had been agreed to by the parties. Although the Judge suggested that the same allowance would have been made against the net profits on an account, it is difficult to reconcile his approach with established principle.

[36] Equity does not require an errant fiduciary to be stripped of gains not properly attributable to the breach of fiduciary duty. For that reason, the High Court of Australia in *Warman International* limited the account in a case of misappropriation of goodwill to two years, after which the profits of the new business were safely to be considered attributable to the defendant's own efforts in carrying on the new business. Similarly, in *O'Sullivan v Management Agency & Music Ltd*,[42] a case of presumed undue influence, the defendants were entitled to a reasonable remuneration which included a small profit element (though one considerably less than they would have been able to obtain on the contracts usual at the time had the plaintiff been independently advised). Dunn LJ in that case said:[43]

> Although equity looks at the advantage gained by the wrongdoer rather than the loss to the victim, the cases show that in assessing the advantage gained the court will look at the whole situation in the round.

More recently, in *Murad v Al-Saraj*, Arden LJ emphasised[44] that the profit from a breach of trust always has to be defined and that a defendant is not to be stripped of profits to which he is entitled on his own account. So, in the present case, Mr Chirnside was entitled to retain his half share of the net profit in the joint venture.

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42 [1985] 1 QB 428 (CA).
43 At 458.
44 At [85].

It was profit he was entitled to on his own account because of the nature of the venture.

[37] But payment for effort in the gaining of the profit for the joint venture is not profit to which the fiduciary is entitled on his own account unless it is an authorised payment. It is effort within the scope of the venture, not outside it. It cannot be cast as a deduction necessary to identify the profit in the joint venture, without conflicting with the "no-profit" rule. So, a trustee is not entitled to remuneration for professional work unless such payment is authorised by the terms of the trust deed.[45] A director is not entitled to fees unless such payments are authorised by the articles of the company.[46] In the absence of agreement, partners cannot obtain compensation for their trouble in conducting the partnership business.[47] In the present case where there was no agreement as to remuneration, Mr Chirnside had no entitlement to payment such as would justify a deduction when settling the profit obtained by the joint venture.

[38] That is not, however, the end of the matter. When a defaulting fiduciary is called to account for profits, the Court may allow him some recompense for his skill and work if the profit is properly attributable to his efforts, as *Boardman v Phipps* established.[48] Allowances have been made to defaulting fiduciaries on this basis in such cases as *Warman International*, *Murad v Al-Saraj, Say-Dee Pty Ltd v Farah Constructions Pty Ltd,*[49] *O'Sullivan v Management Agency, Estate Realties v Wignall*,[50] and *Badfinger Music v Evans.*[51] But the allowances have been modest. They remain exceptional, as Lord Templeman and Lord Goff in *Guinness Plc v Saunders* suggested they should be.[52] And in *Boardman v Phipps*, Lord Denning in the Court of Appeal suggested that allowances were unlikely to be made where a fiduciary has been dishonest, acted in bad faith, or dealt surreptitiously.

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45 *Bray v Ford*.
46 *Guinness Plc v Saunders* [1990] 2 AC 663 (HL).
47 Although the matter is now governed by statute, the pre-existing common law was to the same effect: see *Lindley & Banks on Partnership* (18 ed 2002) at [20-45].
48 See at 104 per Lord Cohen; 112 per Lord Hodson; 127 per Lord Upjohn.
49 [2005] NSWCA 309.
50 [1992] 2 NZLR 615 (HC).
51 [2002] EMLR 2 (HC).
52 At 693-694 per Lord Templeman; 700-701 per Lord Goff.

[39] In *Boardman v Phipps*, the fiduciaries were entirely innocent[53] and the beneficiary was wholly undeserving. As Lord Goff pointed out in *Guinness Plc v Saunders*,[54] it would have been entirely inequitable for the trustees' "overwhelming" claim not to have been acceded to in what were wholly "exceptional" circumstances. Lord Goff considered that it would "plainly" be inconsistent with the general principle to "award remuneration in such circumstances as of right on the basis of a quantum meruit claim", but an "equitable allowance" might in such circumstances be made.[55]

[40] There have been cases where allowances have been made in circumstances where the defaulting fiduciary has not been as blameless. The Court will "look at the whole situation in the round".[56] Generally, allowances have been made where the fiduciary has created extraordinary profits (essentially outside the scope of what was envisaged in the fiduciary relationship) and has not committed significant wrong-doing. Even so, in such cases, the allowances have been modest.

[41] *O'Sullivan v Management Agency* was a case of presumed, not actual, undue influence. The presumption arose out of the inexperience of the young songwriter, who should have been independently advised before entering into a contract with a promoter. The contract entered into was not on more onerous terms than others usual in the music industry at the time. The promoter made an exceptional contribution to the extraordinary success of the plaintiff (success he never achieved before or after the relationship). And yet the allowance permitted to the promoter was considerably less than the benefit he would have received under the usual contractual arrangements of the day.

[42] In *Estate Realties*, sharebrokers were liable for not disclosing to their client that they were purchasing his shares on their own account. The shares were, however, acquired at a fair market price and the substantial profits made by the sharebrokers resulted from their adding the shares acquired to others to create a

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53 At 104 per Lord Cohen. And see Wilberforce J at first instance: [1964] 1 WLR 993.
54 At 701.
55 At 700.
56 *O'Sullivan v Management Agency* at 458 per Dunn LJ.

strategic block. They were created by "nearly two years of effort, skill and risk taking".[57]

[43] In *Badfinger Music v Evans*, a member of a band issued rough recordings earlier made by the band, after exceptional and substantial work by him had turned them into a commercially marketable product. He was able to bring to the task "special qualities which others could not have provided".[58] Although liable to account for the profits made using the opportunity gained as a fiduciary, the Recorder, Lord Goldsmith QC, considered that an allowance for his work was appropriate. He considered that the existence or absence of a conflict of interest was not determinative of whether an allowance to a fiduciary in breach of the no-profit rule was available and that, similarly, the question of honesty, although an important factor, was not determinative. Relevant too was whether the transaction was of a special character, calling for special skills. The defendant in the proceedings had not been dishonest. He had not concealed what he was doing. His conduct was not so egregious as to deprive him of "the undoubted value he provided through his considerable and specialist efforts".[59] On the other hand, it was not appropriate to provide him with the remuneration he might have received if he had acted properly.

[44] In *Say-Dee v Farah Constructions*, the fiduciary acquired neighbouring properties in the knowledge that they could be incorporated into the property development he was managing for his joint venture partners. He was required to account for the profit derived from the properties he had acquired in breach of the no-profit rule, but his "surreptitious conduct and bad faith" did not disentitle him to a modest allowance for his entrepreneurial efforts.[60] His principal wrong-doing was in failing to make disclosure to his partners, who were not in any event able to acquire the adjoining properties on their own account.

[45] None of these cases provide support for an allowance to Mr Chirnside. All were concerned with the application of the strict "no-profit" rule, rather than with a profit obtained in fundamental conflict of interest through conversion to his own

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57 At 630.
58 At [51].
59 At [59].
60 At [252].

account of a venture in respect of which Mr Chirnside owed fiduciary duties. In most of them, the "wrong-doing" was in non-disclosure. Unlike the defendants in *Badfinger* and *O'Sullivan v Management Agency*, Mr Chirnside actively concealed his breach of duty. The payment sought by Mr Chirnside is for work within the scope of the venture giving rise to the fiduciary obligations. It was not the result of extraordinary work, essentially outside the scope of the fiduciary undertaking, as in *Say-Dee v Farah Constructions* and *Estate Realties*. It was work that it was envisaged he would undertake in furthering the joint venture, to the mutual benefit.

[46] I am unable to agree with those who consider there is some significance in the fact that the allowance is sought for work undertaken by Mr Chirnside before he converted the venture to his own account, in breach of his fiduciary obligations. Mr Chirnside is required to account for all profits made through the opportunities he obtained as a fiduciary. Before he excluded Mr Fay, Mr Chirnside as a joint venturer was not entitled to remuneration except by agreement. To grant him an allowance simply for fulfilling the role expected of him within the scope of the joint venture is inconsistent with the no-profit rule and, as indicated, does not fit within the exceptions recognised.

[47] In effect, Mr Chirnside claims payment on a quantum meruit basis, seeking the very recompense he might have achieved by agreement if he had faithfully discharged his fiduciary responsibilities. That approach, in my view, is inconsistent with the approach in *Boardman v Phipps* and *Guinness Plc v Saunders*. This is not a case where a fiduciary would be excluded from all profit in application of a strict rule of equity. Mr Chirnside's effort resulted in gain received by him as part of his profit in the venture. There is no occasion in the circumstances of the case to permit him a fee as well.

[48] Although misconduct may not be a complete disqualification, the conduct here was a direct denial of fiduciary loyalty. Mr Chirnside converted the whole venture and excluded his partner at a time when the venture had "come together". The case is closer to those of appropriation of a specific asset of value, rather than a business opportunity in which all the profit lies in the future and has to be won by

entrepreneurial skill.[61] If Mr Chirnside is to receive by way of deduction from the profit obtained not only the 50% profit to which he was entitled by antecedent agreement but the full benefit he might have expected had he been wholly loyal, the obligation of loyalty is undermined.

Conclusion

[49] I am of the view that the High Court and Court of Appeal were in error in treating the claim as one for compensation. Mr Chirnside was required to disgorge the gain he had obtained through the joint venture. That required him to account to Mr Fay for one-half of the net value of the Speights site, as developed. There was no occasion to reduce the account by an allowance to Mr Chirnside for his efforts before July 2000. There was no agreement between the parties to entitle Mr Chirnside to such payment. Mr Chirnside had already benefited by a payment from Rattray which there is no reason to treat as other than adequate compensation. In any event, the case is not suitable for an allowance to recognise effort under the exceptional discretion recognised in *Boardman v Phipps*.

[50] I would therefore have ordered Mr Chirnside and Rattray to account to Mr Fay for $950,000 together with interest and costs.

GAULT J

[51] I have read in draft the reasons prepared by Tipping J. I agree with the orders he proposes except on one point. I prefer a more direct approach in quantifying one aspect of the relief to which Mr Fay is entitled and would uphold the trial Judge's assessment of the allowance for Mr Chirnside's greater efforts in advancing the venture prior to his breach of duty.

[52] I agree that the relationship between Mr Fay and Mr Chirnside was such as to give rise to fiduciary obligations of loyalty in respect of the property development

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[61] A distinction first made in *In Re Jarvis (decd)* [1958] 1 WLR 815 (HC) and applied in the context of fiduciary liability in *Warman International* at 560-561.

project in issue. The term "joint venture" can cover many forms of arrangement, not all of which necessarily will give rise to fiduciary obligations. In this case, however, the relationship had advanced considerably beyond mere preliminary discussions of possibilities. Mr Fay and Mr Chirnside not only had discussed, formulated and costed the proposed development, but they had gone some distance in implementing it. They had targeted and approached the prospective key commercial occupant. A conditional contract for the purchase of the Speights site had been negotiated and secured. On the findings of fact of the trial Judge, they had embarked upon a joint enterprise on which they were working together in pursuit of a clear objective. That they had not completed a formal written agreement cannot detract from the mutual commitments to the project that plainly existed. Each had a duty to the other not to act against their joint interest in the project. Mr Chirnside breached that obligation of loyalty and appropriated the project to the exclusion of Mr Fay.

[53] The primary remedy for breach of fiduciary duty is an account of profits flowing from the breach. Determination of that account is a matter for judicial assessment on the evidence. It does not matter that the profit has not been realised in money terms.[62] It simply means it is to be determined as a valuation exercise.

[54] The profit flowing from Mr Chirnside's breach is what he gained but would not have gained but for the breach. In this respect the parties' antecedent profit-sharing arrangements are relevant.[63] Here there was evidence (which it was open to the trial Judge to accept) tending to establish that the parties were not proceeding necessarily on the basis of equal participation in the net profits of the enterprise. Mr Fay indicated that he would have expected Mr Chirnside to have the benefit of an adjustment for his greater efforts.[64] To that extent Mr Fay was not deprived of profit and Mr Chirnside did not profit from his breach of duty. Assessment of that benefit is not a matter of discretion but one of quantification in light of the available evidence. The assessment of $300,000 made by the trial Judge was made recognising in this case that the profit gained by Mr Chirnside from his breach of

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62 *Scott v Scott* (1963) 109 CLR 649 at 662-663; *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 at 14-16 (HC).

63 See *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 562.

64 As found by William Young J at [79]-[80] of his judgment as to relief.

duty to Mr Fay was substantially the same as Mr Fay's loss. I would not disturb that assessment.

KEITH J

[55] I agree with the conclusions reached by Tipping J and, with one exception, his reasons. The exception is that on the first issue of the existence of the fiduciary duty I prefer the more direct route followed by the Chief Justice.

BLANCHARD AND TIPPING JJ

(Given by Tipping J)

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Introduction

[56] In 1999 the first appellant, Mr Chirnside, and the respondent, Mr Fay, entered into a joint venture to develop a commercial property in Dunedin. They had earlier undertaken another development as joint venturers. After the joint venture with which this case is concerned had progressed some distance, Mr Chirnside decided to proceed on his own without any further involvement of Mr Fay. He was able to do

this because the contract for the acquisition of the development site was under his control. He subsequently brought in other investors and excluded Mr Fay, who brought proceedings against Mr Chirnside on various causes of action, including breach of fiduciary duty. The second appellant, Rattray Properties Ltd (Rattray), is a company with which Mr Chirnside is associated. It became involved in the joint venture after the exclusion of Mr Fay and in circumstances which have no present relevance. We will not mention it again until its involvement requires attention.

[57] The High Court (William Young J)[65] held that Mr Chirnside was in breach of his fiduciary duty when he excluded Mr Fay from the venture, and awarded Mr Fay damages based on a half share of the net profit attributable to the joint venture. Before that net profit was struck the Judge allowed Mr Chirnside a credit of $300,000 for the disproportionate contribution he made to the venture. The sum awarded to Mr Fay was $495,000 plus interest at 7.5% per annum, from 1 April 2003 until the date of judgment which was 15 August 2003. That sum was calculated on the basis of profit of $1,290,000, less the allowance of $300,000, ie $990,000, divided in half so as to reach $495,000.

[58] Mr Chirnside appealed against the finding that he had breached his fiduciary duty. Mr Fay cross-appealed on the basis that no allowance should have been made to Mr Chirnside and, if that proposition was rejected, that the allowance of $300,000 was too high. The Court of Appeal[66] dismissed Mr Chirnside's appeal and allowed Mr Fay's cross-appeal by reducing the allowance from $300,000 to $100,000. The Court of Appeal dealt also with other issues, which it is not necessary to mention in this introduction. The Court did, however, of its own accord, but after putting the matter to counsel, alter the approach which William Young J had taken to the calculation of damages from that discussed above, to an approach based on the concept of the loss of a chance. The result in the Court of Appeal was a reduction in the award to Mr Fay from $495,000 to $287,500.

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65 HC DUN CP 36/01 20 December 2002 (as to liability), HC DUN CIV-2001-412-0013 15 August 2003 (as to relief).

66 *Chirnside v Fay* [2004] 3 NZLR 637 (Anderson P, McGrath and Hammond JJ) (as to liability), *Chirnside v Fay* (*No 2*) [2005] 3 NZLR 689 (as to relief).

[59] The case falls naturally into two parts, both parties having been given leave to appeal and cross-appeal to this Court on all issues. First, we will examine Mr Chirnside's contention that he was not, in all the circumstances, liable for breach of fiduciary duty because he owed no such duty to Mr Fay. Second, we will examine the several matters which arise on the remedies side of the case. They require attention because we are satisfied, for the reasons we will give, that the Courts below were correct in finding that Mr Chirnside acted in breach of fiduciary duty when he excluded Mr Fay from further participation in the venture.

[60] Before turning to these two dimensions, it is necessary to say something more of the facts of the case. As the judgment of the Court of Appeal is reported, it will suffice if we provide only a relatively brief sketch for the purposes of these reasons.

Background circumstances

[61] The site which the parties were intending to develop is at the corner of MacLaggan and Rattray Streets in Dunedin. The parties called their proposal the Harvey Norman project and it is convenient to adopt the same description. Mr Fay had begun working in real estate in 1970 and, by 1999, had accumulated substantial experience in that field. He had also been involved in property development. Mr Chirnside was a caravan manufacturer who became involved in property development in the mid 1970s, and this then became his primary business. The parties first became acquainted in the early 1980s. In 1996 they discussed working together as property developers if and when suitable opportunities arose. Their arrangement was informal with nothing in writing. They had been involved in one previous joint venture before embarking on the Harvey Norman project. The earlier venture was known as the CRT project. They had also jointly considered other possible projects in Dunedin which did not proceed.

[62] The Harvey Norman project came about in the following way. In the early part of 1997 Lion Nathan Ltd was trying to sell the old Speights Brewery building on the corner of MacLaggan and Rattray Streets. The trial Judge called this the Speights site and we will do likewise. The land was zoned for retail purposes and was near premises occupied by The Warehouse Ltd. The principal impediment to

retail development of the site was its car-parking constraints. In mid to late 1998 Messrs Chirnside and Fay discussed the possibility of developing the Speights site. They visited the site together in March 1999. The car-parking problems were likely to be alleviated to some extent if an adjoining site known as Taunton Mews could be utilised. It was owned by a company associated with Mr Chirnside and his brother. During March 1999 Messrs Chirnside and Fay conferred frequently and in detail. They were involved in making calculations designed to identify the net value of any development of the Speights site and the adjacent Taunton Mews site and the costs associated with each. By this means a possible purchase price for the Speights site was identified.

[63] On the basis of these calculations Mr Chirnside approached Lion Nathan and began negotiations for a conditional purchase of the Speights site. These negotiations were long and detailed – tortuous is how the trial Judge described them. Eventually a conditional purchase agreement was signed in September 1999. The purchaser was described in the agreement as Mr Chirnside "as trustee for a company". The effect of the agreement was really to give the purchaser a six month option. The transaction was conditional on Mr Chirnside, during that period, conducting due diligence and being "satisfied …as to all matters touching upon the property".

[64] From the early stages of their project, Messrs Chirnside and Fay had had Harvey Norman in mind as a potential tenant. They knew that company was looking for retail and warehouse space in Dunedin. At much the same time as Mr Chirnside was negotiating with Lion Nathan, Mr Fay approached Harvey Norman's Auckland office. He was told that Harvey Norman was looking for 8,000 square metres of retail space and 1,700 square metres of warehousing in Dunedin. He had another brief conversation with a Harvey Norman representative in the middle of 1999, the purpose of which was to ascertain the timeframe that Harvey Norman had in mind.

[65] After the conditional purchase agreement had been signed, Messrs Chirnside and Fay worked out possible financial arrangements with Harvey Norman. They did this in October 1999 and Mr Fay spoke to his Harvey Norman contact again in November 1999, giving him details of the Speights site. Mr Fay was told that

Harvey Norman had already considered this site and was not interested in it. Harvey Norman was, however, persuaded that the site was worth considering again, given that the acquisition of the adjoining Taunton Mews site might be of assistance to the development.

[66] From this time forward, Mr Chirnside took over the responsibility for dealing with Harvey Norman. Mr Fay had moved to Christchurch from Dunedin in mid 1999. He did, however, return to Dunedin from time to time and, during February and March 2000, he was involved with Mr Chirnside in a number of meetings with planners, Lion Nathan staff, architects and Dunedin City Council planning staff.

[67] The project became viable when Harvey Norman eventually became committed to it, as the major tenant, on 7 July 2000. By this time Mr Chirnside had, as the trial Judge put it, gone cold on Mr Fay. There were a number of reasons for this, which it is not necessary for us to traverse in any detail. They included the fact that relations between the two men had become strained over the CRT development. The men had somewhat different approaches to business. The trial Judge described Mr Chirnside as a details man, whereas Mr Fay was not. The Judge also recorded that Mr Chirnside had "put far more energy, time and effort into the project than Mr Fay had and could fairly have anticipated a share of the project commensurate with his greater effort. His financial position, however, was not as strong as that of Mr Fay." The trial Judge said that he was "very much left with the view that [Mr Chirnside] was concerned about his ability to negotiate an arrangement as to fair shares in the project given Mr Fay's greater financial resources".[67]

[68] Having lost confidence in Mr Fay, Mr Chirnside decided to exclude him from the venture. He brought into the project investors associated with his solicitors to provide the capital which Mr Fay would otherwise have introduced. The vehicle used was Rattray. Mr Chirnside found it difficult to tell Mr Fay that he had decided to exclude him and the Judge took the view this was illustrated by the fact that, for some months, he simply stopped communicating in any meaningful way with

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[67] At [16].

Mr Fay. Mr Chirnside was found by the Judge to have dissembled and to have delayed in advising Mr Fay of his exclusion. Once the Harvey Norman tenancy was secured and various other matters had been attended to, the conditional purchase agreement with Lion Nathan was confirmed and the project proceeded in the name of Rattray, without any involvement on Mr Fay's part.

The nature of the relationship

[69] Against that background the trial Judge considered that the answer to the question whether Messrs Chirnside and Fay were joint venturers was "relatively straightforward". He held that they were in a joint venture relationship. The Court of Appeal came to the same conclusion:[68]

> Mr Whiteside's argument, on the facts, was that what the Judge himself described as a "loose arrangement" was so loose that it did not even deserve the commercial appellation the Judge gave to it. The short answer under this head is that there was evidence on which the Judge could form the view (as he did) that there was here a joint venture of a commercial kind. We are not disposed to interfere with that inference, founded as it was on findings of primary fact. In a significant measure, those findings involved findings of credibility. The Judge cast a critical eye over the evidence of both Mr Fay and Mr Chirnside - so much so that Mr Fay complained on the appeal that the Judge had been too critical of him - but even with the deficiencies which the Judge noted with respect to Mr Fay's evidence, or more accurately his demeanour when giving it, the Judge was still satisfied that, on the critical matters, these two men were commercially associated in the manner Mr Fay had said they were. Given the primary facts as found by the Judge, it has not been shown that he erred in concluding that a commercial joint venture existed.

[70] In his submissions for Mr Chirnside in this Court, Mr Whiteside did not challenge these findings as such. He did, however, challenge the proposition that the relationship between the parties, however characterised, gave rise to fiduciary duties. We think it helpful to say at once that, in our view, the parties had indeed entered into a joint venture. The Court of Appeal[69] said, a little inconsistently, that there was, in a commercial sense, a joint enterprise but no joint venture agreement yet entered into. They considered that state of affairs was not fatal to a claim that there

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[68] At [45].
[69] At [47].

was nevertheless a fiduciary element in the relationship at the relevant time. By joint venture agreement it may be that their Honours meant a written agreement; but the absence of a written agreement does not preclude there being a joint venture.

[71] A little later,[70] the Court of Appeal said that it did not accept Mr Whiteside's argument that there cannot or should not ever be a fiduciary relationship between parties negotiating towards a joint venture. While it does not ultimately matter what description is given to the relationship, we consider that the case in this respect is quite simple, as the trial Judge suggested. The parties were working together towards a common goal which they expected would be for their mutual benefit. The trial Judge found that there was no partnership between them, but it can fairly be said that their relationship was analogous to that of a partnership. From the time the parties agreed to work together to develop the Speights site, they can properly be regarded as having entered into a joint venture for that purpose. Indeed, by the time of Mr Fay's exclusion, a number of important steps had already been taken towards the implementation of their common purpose. In the end the key point is not how, precisely, the relationship is described, but rather whether the relationship between the parties was of a kind which gave rise to fiduciary duties on each side.

Did the relationship give rise to fiduciary duties?

[72] Both the trial Judge and the Court of Appeal were of the view that the relationship between Mr Chirnside and Mr Fay was of a fiduciary kind. We agree, and will discuss the matter only to the extent necessary to deal with the submissions made by counsel on this branch of the case. When we speak in these reasons of a relationship of a fiduciary kind, or a fiduciary relationship, we are speaking of a relationship which gives rise to fiduciary obligations, irrespective of what may be the principal nature of the relationship or what other obligations may also arise from it. For example, a relationship which is of a contractual nature may involve fiduciary as well as contractual obligations. A relationship of an inherently fiduciary kind may involve duties which have no fiduciary element. Relationships which do not

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[70] At [50].

generally give rise to fiduciary obligations may nevertheless have a fiduciary dimension.[71]

[73] Many cases, textbooks and articles in learned journals have considered when and against what criteria the courts will find that a relationship gives rise to fiduciary duties. In essence, there are two situations in which that will be so. In the first, the relationship is of a kind which, by its very nature, is recognised as being inherently fiduciary. Most cases involving a breach of fiduciary duty are of this kind. They fall into one of the recognised categories of relationships which are inherently fiduciary. These include the relationships of solicitor and client, trustee and beneficiary, principal and agent, and doctor and patient.[72]

[74] There is a strong case for saying that most joint venture relationships can properly be regarded as being inherently fiduciary because of the analogy with partnership.[73] The relationship between partners is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith; and they must, in all matters relevant to the activities of the partnership, put the interests of the partnership ahead of their own personal interests.[74]

[75] The second situation in which a relationship will be classed as fiduciary depends not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified. No single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind. The literature in this field is voluminous. No useful purpose would be served by an attempt at a general survey.

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71 There is a helpful commentary on this subject in Butler (gen ed) *Equity and Trusts in New Zealand* (2003) at [14.2] ff. We will refer to this work hereafter simply as *Equity and Trusts*.

72 Such relationships will almost always give rise to fiduciary duties on the part of the relevant party, albeit, as noted at [72] above, a breach of duty by a fiduciary is not necessarily to be regarded as a breach of fiduciary duty: *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 680 and 688, *Bristol v West Building Society v Mothew* [1998] 1 Ch 1 at 16 per Millett LJ and *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 WLR 567 at [29] approving Millett LJ's approach in *Mothew*.

73 See the discussion in *Equity and Trusts* at [14.3.6], commencing at 418.

74 See *Equity and Trusts* at [14.3.6], fn 444..

[76] As a convenient starting point we refer to the decision of the Privy Council in *New Zealand Netherlands Society "Oranje" Inc v Kuys*,[75] and to the more recent decision of the Court of Appeal in *Day v Mead*.[76] In *Kuys*, Lord Wilberforce, for the Board, said that fiduciary obligations will apply:[77]

> …whether the case is one of a trust, express or implied, of partnership, of directorship of a limited company, of principal and agent, or master and servant, but the precise scope of it must be moulded according to the nature of the relationship. As Lord Upjohn said in *Boardman v Phipps*:[78]
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> > "Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."

His Lordship's reference to cases of implied trust, as well as express trust, is of significance as will appear later. It is significant also that the Board emphasised that a person in a particular relationship to another may be in a fiduciary position with regard to part of his activities but not with regard to other parts.[79]

[77] *Day v Mead* was referred to by the High Court in *Estate Realties Ltd v Wignall*.[80] The Judge in that case observed:

> The word "fiduciary" derives from the Latin word "fiducia" the primary meaning of which is trust. Important secondary meanings are confidence and reliance. The cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other, either generally or in the particular transaction: see per Casey, J in *Day v Mead* where His Honour said that the relationship in question in that case "generated that degree of confidence and trust which in my view justifies the intervention of equity".

[78] The only other case which should be mentioned at this stage is the more recent decision of the Privy Council in *Arklow Investments Ltd v MacLean*.[81] The judgment of their Lordships was delivered by Henry J. He said that the concept of a duty of loyalty:[82]

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75 [1973] 2 NZLR 163.
76 [1987] 2 NZLR 443.
77 At 166.
78 [1967] 2 AC 46.
79 Also at 166.
80 [1991] 3 NZLR 482 at 492 per Tipping J.
81 [2000] 2 NZLR 1.
82 At 4.

> …encapsulates a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal.

[79] The reference to "interests of the principal" was appropriate in the context of that case but the concept is of general application. A little later their Lordships described as apposite a passage from the judgment of Millett LJ in *Bristol and West Building Society v Mothew*.[83] His Lordship had there focused on the need for the circumstances to give rise to a relationship of trust and confidence. This observation was linked with the idea that a fiduciary was someone who had undertaken to act for or on behalf of another; a point to which we will have occasion to refer again below.

[80] It is clear from the authorities that relationships which are inherently fiduciary all possess the feature which justifies the imposition of fiduciary duties in a case which falls outside the traditional categories; all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in *Arklow* as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests. There can be little doubt that, at least prima facie, the relationship between Mr Chirnside and Mr Fay was such that Mr Fay was entitled to repose and did repose trust and confidence in Mr Chirnside. Hence their relationship was, at least prima facie, of a fiduciary kind.

[81] On that basis we turn to address Mr Whiteside's submission that no fiduciary element arose in the particular circumstances of the relationship between his client and Mr Fay. Counsel's contention, in summary, was that the appropriate test for whether Mr Chirnside was under a fiduciary obligation to Mr Fay was whether Mr Chirnside had undertaken or agreed to act for or on behalf of Mr Fay's interests. Mr Whiteside submitted that, as this had not been shown, no fiduciary obligation arose and Mr Chirnside was free to abandon Mr Fay and pursue his own interests.

[82] Counsel's proposed test is not a correct statement of the law on this point. It has a strong contractual flavour which does not properly reflect the approach of

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[83] [1998] Ch 1 at 18.

equity. This contractual flavour was heightened by Mr Whiteside's further submission that the necessary undertaking or agreement had to be express and could not be implied. The simple answer to this submission is that equity imposes an obligation to eschew self-interest when the circumstances require. The obligation does not arise only when expressly undertaken. To hold otherwise would be to confine the powers of equity to situations akin to express trusteeship and would emasculate the breadth of equity's traditional reach by its use of concepts such as constructive trusteeship and its imposition of fiduciary obligations. Indeed, it will be recalled that in *Kuys* Lord Wilberforce spoke of cases of trust "express or implied". He thereby recognised that fiduciary duties need not be expressly undertaken.

[83] Mr Whiteside cited, in support of his submission, a passage from the judgment of Gault J in *Liggett v Kensington*.[84] This is the *Goldcorp* case that subsequently went to the Privy Council.[85] The passage cited by Mr Whiteside reads:

> Generally it is appropriate to look for circumstances in which one person has undertaken to act in the interests of another or conversely one has communicated an expectation that another will act to protect or promote his or her interests.

We observe, however, that Gault J immediately went on to say:[86]

> There are elements of reliance, confidence or trust between them often arising out of an imbalance in strength or vulnerability in relation to the exercise of rights, powers or the use of information affecting their interests. Telling indications may be that persons having taken, or been entrusted with, opportunity to protect or benefit others stand in a position also to prefer their own interests. Assistance is to be gained by way of analogy from relationships generally regarded as giving rise to fiduciary obligations such as those of trustees, partners, solicitors, investment advisers, stockbrokers and the like.

[84] In the same vein, Mr Whiteside cited the following passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corporation*:[87]

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v*

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84 [1993] 1 NZLR 257 at 281 (CA).
85 See *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.
86 At 281-282.
87 (1984) 156 CLR 41 at 96-97.

> *Boardman* [1967] 2 AC 46 at 127; [1966] 3 All ER 721 at 758-91]), viz trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

Similarly, Mr Whiteside drew our attention to the fact that in the present case the Court of Appeal had cited the words of Millett LJ in the *Mothew* case, to which we have already referred. His Lordship spoke of a fiduciary as someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which gave rise to a relationship of trust and confidence.

[85] Mr Whiteside sought to build out of these passages support for his proposition that before fiduciary duties can arise there must be an express undertaking or agreement by the proposed fiduciary to act in the interests of the other party. There is, in our view, no basis for concluding from the passages cited that the Judges involved were intending to confine fiduciary relationships to cases of express undertaking or agreement. Nor were the Judges professing to lay down that a mandatory ingredient of a fiduciary relationship is an express undertaking to act for or on behalf of another. At the very least the undertaking can be implicit from the circumstances, and the true principle, in our view, resides in the idea that the circumstances must be such that one party is entitled to repose and does repose trust and confidence in the other. The existence of an agreement or undertaking is no more than a frequent manifestation of such a circumstance.

[86] Mr Whiteside also drew attention to the discussion of the topic of fiduciary relationships by Dr Bean.[88] There the author draws a distinction in commercial contexts between what he calls antagonistic transactions and collaborative transactions. The flaw in the submissions which Mr Whiteside built out of this

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[88] In Chapter 3 of his work *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (1995).

distinction is that the relationship between the parties in the present case should undoubtedly be characterised as collaborative rather than antagonistic. We cannot accept Mr Whiteside's submission that the parties had not reached sufficient agreement or understanding on key issues to move this transaction from one of antagonism to one of collaboration. The history of the parties' relationship and equitable principle alike gave rise to an implication of equal sharing unless agreement was subsequently reached for a different outcome. In a case like the present, where Mr Chirnside appropriated to himself Mr Fay's share in the venture, the burden lies on him to show that there should be a departure from a starting point of equal sharing. He has not satisfied that onus.

[87] Returning to Mr Whiteside's principal submission on this aspect of the case, it is clear that it is not necessary for there to be an express undertaking or agreement to act in the interests of another before a fiduciary duty can arise. It does not, for present purposes, matter whether one sees the fiduciary obligation as one which is imposed by reason of the nature of the relationship, or as one which, in the light of that relationship, is impliedly accepted. In some cases, essentially the traditional categories, the implied acceptance rationale may be apposite and in others, of the particular kind, the imposition rationale may be preferable. What is clear is that Mr Whiteside's express acceptance or undertaking thesis is not soundly based.

[88] In our view the Courts below were undoubtedly right to find that the relationship between Messrs Chirnside and Fay was such that Mr Chirnside owed Mr Fay fiduciary duties of which he was in breach when he unilaterally excluded him from the venture and its profits. It is inherent in this conclusion that we cannot accept Mr Whiteside's further submission that the parties were not in a position of mutual trust and confidence. In our view the relationship between the parties was such that each party owed fiduciary obligations to the other. We reject the proposition that the relationship had not reached the point where it could be said that obligations of mutual trust and confidence arose. Having given Mr Whiteside's submission on this point careful consideration, we are not persuaded that the Courts below erred in their conclusions in this respect.

[89] Our conclusion is supported by the joint judgment of Mason, Brennan and Deane JJ in *United Dominions Corporation Ltd v Brian Pty Ltd*.[89] Their Honours held that a fiduciary relationship can arise and fiduciary duties can exist between parties who have not reached, and who may never reach, agreement upon the consensual terms that are to govern the relationship between them. They then referred in particular to prospective partners who have embarked upon the intended partnership business or venture. *Equity and Trusts* also says, rightly, that fiduciary obligations will apply even in the absence of any undertaking of such by the fiduciary.[90] The authority cited for that proposition is the decision of the Supreme Court of Canada in *KM v HM*.[91]

[90] We are similarly unable to accept Mr Whiteside's submission that there was no public policy reason for the imposition of a fiduciary obligation. We need only repeat that we regard the relationship between the parties as analogous to one of partnership. The very fact that the parties had not thought it necessary to enter into a detailed formal agreement before embarking on their joint venture suggests that each was reposing trust and confidence in the other as they had in their earlier venture.[92] The circumstances of the case are such that they were entitled to do so. It is, in short, a case for the intervention of equity. The fact that the parties were not contractually bound or had not contractually worked out all the details of their relationship should not, in present circumstances, preclude the ability of Mr Fay to turn to equity for assistance. Equity, as the keeper of consciences, responds by saying to Mr Chirnside that in the circumstances his conduct was contrary to good conscience and therefore susceptible of equitable intervention.

General observations on joint ventures

[91] Before leaving this aspect of the case it may be helpful if we make the following general remarks. The essence of a joint venture which is not yet

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89 (1985) 157 CLR 1 at 12.
90 At [14.2.9].
91 (1992) 96 DLR (4th) 289 at 324 per La Forest J.
92 This point is also made in the *United Dominions* case cited in the previous paragraph.

contractual is that it is an arrangement or understanding between two or more parties that they will work together towards achieving a common objective. It is fallacious to think that there can be no joint venture unless and until all the necessary details have been contractually agreed. A joint venture will come into being once the parties have proceeded to the point where, pursuant to their arrangement or understanding, they are depending on each other to make progress towards the common objective. Each party is then proceeding on the basis that he or she is acting in the interests of all or both parties involved in the arrangement or understanding. A relationship of trust and confidence thereby arises; each party is entitled to expect from the others loyalty to the joint cause, loose as the formalities of the joint venture may still be. This in essence is the position which was reached between Messrs Chirnside and Fay. Neither of them was thereafter entitled to act solely in his own interests.

[92] The resulting fiduciary relationship is not one from which a party is unable to withdraw, albeit withdrawal will usually require appropriate arrangements to be made in consideration of the severance of the joint interests and the release of the parties from their duties of loyalty to each other. Because there is, as yet, no contract between the joint venture parties, each will ordinarily be free to withdraw, on giving the other notice to that effect. On the giving of that notice duties of loyalty for the future will come to an end but confidentiality obligations may remain; and any assets, tangible or intangible, held on behalf of the joint venture will still usually be held on trust for both the erstwhile joint venturers. Appropriate steps will be necessary to agree, or obtain some external resolution as to how those assets are to be dealt with. There is, in a general sense, some analogy with the steps necessary when a formal partnership is dissolved.

[93] The point, in short, is that joint ventures, like partnerships, can generally be brought to an end by appropriate notice.[93] The previous joint venturers must, however, still act equitably towards each other in the steps necessary to bring the affairs of the joint venture to a conclusion which is fair to all concerned. The further

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[93] See *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 at 760 (CA) per Blanchard J. This aspect was not addressed in the Privy Council.

the joint venture has progressed the more complex those obligations may be. Once the venture becomes contractual the contract will normally govern what is to happen on the termination of the venture or the withdrawal of a party from it. In the absence of contractual regulation, equitable principles will supply the solution.

The loss of a chance issue

[94] The High Court calculated the monetary relief to which Mr Fay was entitled on a conventional disgorgement/account of profits basis or, more accurately, by a direct compensatory analogy with that method. The Court of Appeal was not asked by either party to depart from the approach of the High Court. The Court of Appeal did, however, think it appropriate, on its own initiative, to propose a different approach and, after considering the submissions of the parties, the Court adopted that approach and re-calculated the money sum payable by Mr Chirnside to Mr Fay accordingly. The approach which commended itself to the Court of Appeal was based on the concept of loss of a chance. Mr Fay contended in this Court that the Court of Appeal was in error, both in principle and in detail in the approach which it took. Mr Chirnside endeavoured to support the loss of a chance basis of the Court of Appeal's assessment. It had resulted in a reduction in the amount he was ordered to pay. As we consider the Court of Appeal erred in principle in the approach it took, it will not be necessary to examine the calculations the Court made in implementing that approach.

[95] The key difference between the way in which the High Court approached the question of monetary relief and the method adopted by the Court of Appeal can be stated quite simply. It is the difference between damages based on a notional disgorgement of profits made, but not realised, on the one hand, and compensation for being deprived of the chance of participating in a profitable venture, on the other. The key problem with the loss of a chance approach in the present case is that it is inconsistent with the essence of the liability finding that the parties were joint venturers: see [69] above. Mr Fay did not lose the chance of entering into a profitable joint venture. He was already a party to that venture. It is, however, appropriate to examine the matter in somewhat greater detail.

[96] At the start of its second (relief) judgment, the Court of Appeal said:[94]

> It is not necessary for this Court to re-traverse its liability findings in this case. Indeed, to do so would run the risk of confusion with the language used in that judgment. It is sufficient for present purposes to say that Messrs Fay and Chirnside were negotiating towards what the parties termed a "joint venture" agreement. An agreement had not been finalised when Mr Chirnside brought into the project partners other than Mr Fay, and excluded him from the development. The project subsequently went ahead to completion with those new parties.
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> This Court determined that, at what might be termed the "point of departure" of Mr Chirnside, there was extant a fiduciary relationship between him and Mr Fay. We said there was "... a duty of loyalty between these two men. The chief incidence of that duty was one of good faith. The import of that obligation was that there would be no presumptive hijacking of the incipient transaction by either man (or his interests); and no destruction of their relationship without good faith efforts to come to terms". It necessarily followed, in our view, "that those elements not having been observed, what Mr Fay 'lost' was the chance to come to satisfactory terms with Mr Chirnside or his interests".
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> We further indicated that "the essential task of a Court under the head of equitable compensation is to compensate whatever real loss or detriment the plaintiff may have suffered in the particular case". What Mr Fay "'lost' in this case was the opportunity or chance to enter into a joint venture agreement with Mr Chirnside as a result of Mr Chirnside's pre-emptive abandonment of him", which this Court saw to be a quite different thing from a breach of a "putative" agreement.

[97] The Court then went on to observe that what it contemplated was an assessment by counsel of what the damages awarded (if any) should be, on a loss of chance basis. It must immediately be noted that at [6] the Court said that the parties were "negotiating towards" a joint venture agreement. That observation is inconsistent with the substance of the Court's liability judgment. Nor, for the reasons given earlier, is it consistent with what we regard as the correct analysis, namely that the parties were already in a joint venture relationship when Mr Fay was excluded. There was, at least implicitly, an agreement between the parties to work together to develop the Speights site. But, more importantly from the equitable point of view, the relationship was, beyond doubt, that of joint venturers. It does not matter what the strict position may have been in contract.

[98] The Court of Appeal's remedies discussion was, in our view, immediately derailed by this inconsistency with the basis upon which the parties had been found

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[94] At [6]-[8].

to be in a fiduciary relationship. There was, as Mr McIntosh put it for Mr Fay, no relevant element of chance involved. Mr Fay's equitable entitlement, as assessed by the trial Judge, was to have Mr Chirnside pay compensation on the basis of disgorgement of the profits he had made from the half share of the venture he had appropriated from Mr Fay. Conceptually the loss of a chance approach involves discounting for contingencies. But here there was no relevant contingency. Mr Chirnside cannot be heard to suggest that if Mr Fay had remained involved the Taunton Mews property might not have been able to be acquired. The simple fact is that it was acquired and its acquisition by Rattray was instrumental in achieving the profit from which Mr Fay was excluded.

[99] The Court of Appeal gave no convincing explanation why it thought it necessary or appropriate to depart from the approach taken by the trial Judge. His was undoubtedly the conventional basis for awarding monetary relief in a case of the present kind. The Court might perhaps have been put on guard by the fact that neither side had suggested that the trial Judge had erred in principle in the way he approached the issue of monetary relief, relying as he did on an earlier decision of the High Court and a decision of the High Court of Australia.

[100] It may be that the range of remedies open to the Court, when compensating for breach of an equitable obligation, includes compensation on a loss of chance basis. The issue in this case is not one of jurisdiction or power but of appropriateness. In its liability judgment,[95] the Court of Appeal spoke of cases in which the Court must assess the prospects of success of a particular opportunity had it gone forward. But, in the present case, the opportunity had gone forward; its potential had been realised, at least to the point of demonstrating an actual enhancement in value which formed the starting point of the trial Judge's assessment. No element of chance came into the issue of the existence of a joint venture. Nor did any element of chance arise in relation to profitability. The joint venture had already demonstrated its profitability.

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[95] At [70].

[101] Mr Whiteside was faced with a difficult task in seeking to uphold the decision of the Court of Appeal on this point. That difficulty was increased because most of the discussion in the Court of Appeal focused on its jurisdiction or power to adopt a loss of a chance approach rather than on the appropriateness of the approach in the circumstances of this case. Most of Mr Whiteside's submissions were based on what we regard as the erroneous premise that the parties still had some way to go before they became joint venturers. It was on this premise relevant to consider the chances of their reaching the necessary "agreement" which would have made their relationship one of joint venture. Although this was an understandable approach for counsel to have taken, it seems to us that it suffers from the same flaw as that which beset the reasoning of the Court of Appeal. The argument is inconsistent with the premise on which the antecedent breach of fiduciary duty was found to have occurred.

[102] In summary, therefore, we are of the view first, that the Court of Appeal gave no sufficient reason for its departure from the way the trial Judge assessed the sum he found payable; and second, that the Court of Appeal's substituted method was, in any event, flawed because the case did not involve any relevant chance or contingency. In loss of a chance cases the posited outcome is necessarily hypothetical. In this case the outcome is sufficiently known. Mr Fay's cross-appeal on this point must be allowed. The case must be dealt with on the same basis as that which was adopted in the High Court. This basis represented equitable compensation or damages assessed by analogy with disgorgement of profits. There had been no sale so as to realise profits, so the valuation figure for the project substituted for the absent sale price. It remains for us to consider two further issues which the parties called the allowance issue and the vacant space issue.

The allowance issue

(1) The judgments below

[103] In his liability judgment William Young J said[96] that he rather thought (although this would be a matter for evidence and argument at the resumed hearing) that the relief to which Mr Fay was entitled would have to allow for the "substantially disproportionate contribution to the project which Mr Chirnside made". The Judge made an allowance of $300,000 under this head in his relief judgment.[97] The heading to this part of the judgment is "Allowance for the disproportionate efforts of Mr Chirnside". The Judge commenced by saying that he had had regard to *Estate Realties Ltd v Wignall*[98] and *Warman International Ltd v Dwyer*.[99] He then observed that there was necessarily a broad brush quality to the assessments which he had to make.

[104] The Judge did not take into account Mr Chirnside's work from the time when Mr Fay was excluded. From that time Mr Chirnside obtained a project manager's fee and the Judge inferred that Mr Chirnside had been appropriately recompensed for his time and effort from the winter or perhaps the spring of the year 2000.

[105] The Judge also excluded from his calculations any allowance for the fact that Mr Chirnside was sole guarantor of the National Bank. He observed that he was a little uncomfortable about Mr Chirnside not receiving an allowance for the financial risks involved. He said, however, that the reality was that the guarantee was given when Mr Chirnside was in breach of his duty to Mr Fay and was part and parcel of the arrangements associated with Mr Fay's exclusion from the joint venture. If Mr Chirnside had not breached his duty to Mr Fay, the latter would have joined in whatever guarantee was required. The Judge also considered that it was most unlikely that Mr Chirnside would ever be called on to answer the guarantee.

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96 At [53].
97 Commencing at [65].
98 [1992] 2 NZLR 615 (HC) (the second stage of that litigation).
99 (1995) 182 CLR 544.

[106] The exclusion of this dimension, which was undoubtedly within the Judge's discretion, does, in our view, have some bearing on what should be the appropriate approach to other matters which, as the Judge put it,[100] amounted to the efforts of Mr Chirnside prior to July 2000.[101] The Judge found that up to that time Mr Chirnside had spent a great many hours on the project. He referred to a schedule of attendances which had been put in evidence by Mr Chirnside. It shows the estimated total time spent on the project by Mr Chirnside from March 1999 to December 2002 at 924 hours. If the post-July 2000 hours are deducted, the total hours spent by Mr Chirnside before then come to 805. The Judge recorded[102] that the schedule of attendances was the subject of "some analysis" from Mr McIntosh. He did not elaborate but from this it can be inferred that there was no cross-examination of Mr Chirnside on the document. We have not been able to find any in the record and we were not referred to any.

[107] The Judge then said: "For present purposes I am prepared to work on the basis that Mr Chirnside had spent around 500 hours on the project up until July 2000". The reduction from 800 hours to 500 hours is not explained or elaborated. It may derive from Mr McIntosh's so-called analysis or it may be a combination of that factor plus the Judge's attempt to recognise that not all his hours could properly be regarded as a disproportionate contribution by Mr Chirnside.

[108] The context of the Judge's whole discussion was, of course, Mr Chirnside's disproportionate contribution and it is a reasonable conclusion that the Judge's ultimate figure of 500 hours represented the Judge's best estimate, on an hourly basis, of how many hours should count for the disproportionate contribution. Subject to any analytical aspect of the reduction from 800 to 500 hours, the figure of 500 additional hours spent by Mr Chirnside presupposes that Mr Fay had himself put in 300 hours and this, looking at the evidence broadly, seems to be a figure that would be very generous to Mr Fay. We can fairly conclude that, by 500 hours, the

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100 At [69].

101 This was the date by which the Judge was satisfied Mr Chirnside was clearly in breach of his fiduciary duty. It is not possible to fix the date on which Mr Chirnside first became in breach of that duty. This makes it difficult to determine what aspects of his disproportionate work were performed prior to breach and which after breach. All that can safely be said is that the greater part of the relevant work seems to have been done prior to breach.

102 At [70].

Judge meant to say that 500 additional or disproportionate hours from the beginning of the project up until July 2000 should be taken to be Mr Chirnside's disproportionate contribution. Viewed in that way, we consider that this assessment was well within the competence of the trial Judge and could not reasonably be varied on appeal.

[109] The Judge then went on to consider whether any of that time should be disallowed on the basis that Mr Chirnside was gearing things up to exclude Mr Fay. He came to the view that there should be no such discount. The Judge then said he could see a marked difference between the sort of fee that Mr Chirnside was able to extract from the Anderson Lloyd investors for managing a project which, by then, had been put together and the sort of "fee" which was appropriate to recognise the entrepreneurial skills and risks involved in what he did up to July 2000.

[110] He went on to say that in assessing a fair reward for Mr Chirnside's disproportionate efforts, more was required than simply fixing a modest or even a substantial hourly rate in respect of his time. The Judge was of the view that significant allowance should be made for the risk of failure which would have fallen disproportionately on Mr Chirnside, and also a reward for success which had principally been due to Mr Chirnside's efforts. The Judge then observed that what Mr Fay did was of very limited moment compared to Mr Chirnside's contributions and that it was Mr Chirnside who "very substantially carried out the principal burdens associated with the joint venture".

[111] The Judge said that if he had been doing a strict accounting of profits, he would have been inclined to allow $300,000 for Mr Chirnside's efforts up until July 2000 and his acceptance, since July 2000, "of the primary risk in relation to the venture". The Judge then indicated that he felt the same figure should be taken on the basis of equitable damages, they being a surrogate for an account of profits.

[112] The Court of Appeal dealt with this topic[103] under the heading "Allowance to Mr Chirnside for additional work". Their Honours recorded that in their liability judgment they had been inclined to the view that the trial Judge's assessment had

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[103] At [41] ff.

been somewhat favourable to Mr Chirnside. They then dealt with the matter, after recording the submissions made on Mr Chirnside's behalf, in the following two cryptic paragraphs:[104]

> The trial Judge found that Mr Chirnside had probably done about 500 more hours on the project than Mr Fay, up to July 2000; Mr McIntosh complained that, from that point of time, the Judge did not allow for the fact that Mr Chirnside would have had to have done one half of that work as his contribution in any event; and he did not make any allowance for the value of Mr Fay's work. Mr McIntosh further said that the $300,000 allowance equates to $1,200 per hour for 250 hours, and that something in the order of $200 per hour would have been fair - or something more like $100,000.
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> We agree with Mr McIntosh that the Judge's allowance was overly generous. We fix a sum of $100,000 under this head.

[113] The first thing to note is that the Court of Appeal interpreted the Judge's reasoning as being that Mr Chirnside had probably done about 500 "more" hours on the project than Mr Fay up to July 2000. This interpretation is consistent with the way we have understood William Young J's approach. The Court of Appeal then recorded a complaint by Mr McIntosh that from July 2000 William Young J had not allowed for the fact that Mr Chirnside would have done "half of that work" as his contribution in any event and that the Judge had not made any allowance for the value of Mr Fay's work, presumably post-July 2000. This complaint is illogical in that the Judge had not made any allowance in favour of Mr Chirnside for post-July 2000 work. The allowance was premised on the basis of Mr Chirnside's disproportionate contribution pre-July 2000. Furthermore, taking the allowance off the top before striking the profit to be divided between the parties allows for the "half of that work" point.

[114] The Court recorded a further proposition advanced by Mr McIntosh concerning hourly rates and the like. All the Court then did was simply to say that it agreed with Mr McIntosh that the Judge's allowance was overly generous. It substituted the sum of $100,000 without any analysis of how that figure had been reached or why the Judge's approach was overly generous. This, in our view, is unsatisfactory. The Court of Appeal did not demonstrate any principled case for disturbing the trial Judge's assessment.

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[104] At [44] and [45].

(2) Counsel's submissions in this Court

[115] Mr Chirnside seeks restoration of the trial Judge's figure of $300,000. Mr Fay submits that no allowance should have been made or, alternatively, that there is no justification for interfering with the figure of $100,000 fixed by the Court of Appeal.

[116] Mr Chirnside's written submissions dealt with certain legal questions and then set out various matters from which it was said that, without his disproportionate contributions, there would have been no success in the project. He relied on having:

(a) approached Lion Nathan and negotiated the purchase of the Speights site;

(b) undertaken the due diligence exercise;

(c) negotiated and secured the anchor tenant – Harvey Norman;

(d) personally met all associated expenses in the sum of $71,487.60 – for which he was reimbursed;

(e) personally guaranteed 100% of the bank borrowings to enable the Harvey Norman project to proceed;

(f) operated an office throughout the relevant period incurring overhead expenses;

(g) secured the adjacent Taunton Mews site; and

(h) devoted at least an additional 500 hours to the project.

[117] The submissions then elaborate on some of these points and make reference to the schedule of total hours spent, to which we have already referred. The essence of the submission is that to fix an allowance based simply on an hourly rate flies in the face of reality. Skilled property developers cannot be purchased or employed on an hourly rate basis. The remuneration of developers is assessed by reference to the value of the project. All in all, counsel submits that the trial Judge's allowance fairly and appropriately recognised the substance of Mr Chirnside's disproportionate effort and his value to the project.

[118] The written submissions made by Mr Fay refer to a number of authorities and summarise the three main reasons advanced by Mr Fay why there should be no

allowance and why, if the Court rejects that proposition, the Court of Appeal's allowance should stand.

[119] First, it is submitted that the allowance for Mr Chirnside's extra contribution "in addition to a full half share" was wrong as a matter of law. The second submission is that making an allowance means that there is no sanction for Mr Chirnside's conduct. Thirdly, Mr Fay's argument is that the allowance was, in any event, inappropriate in the particular circumstances of the case. However, when developing this point counsel said that Mr Fay admitted that Mr Chirnside carried out more work on the project than he did before he was wrongly cut out.

[120] The submissions which followed seem to us to miss the point that Mr Chirnside actually contributed a disproportionate amount of work and effort *before* breach. Furthermore it is doubtful whether Mr Fay could simply have paid someone else to do the work which Mr Chirnside did. This proposition is not supported by any persuasive evidence and appears inherently dubious. Mr Fay's ultimate submission is that $100,000 for 250 hours work was manifestly excessive, equating to nearly $400 per hour.

(3) The law on allowances to breaching fiduciaries

[121] As earlier noted, in this area of the case William Young J relied on the decision of the High Court in *Estate Realties* and that of the High Court of Australia in *Warman International*. We will come to them a little later. The Court of Appeal did not refer to any authority on this topic. The decision of the House of Lords in *Boardman v Phipps*[105] is an influential authority in England on the question of making allowances to errant fiduciaries in the process of requiring them to account for profits made from their breach of fiduciary duty. The speeches in that case contain detailed reviews of earlier case law going back as far as *Keech v Sandford*.[106]

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105 [1967] 2 AC 46.
106 (1726) Sel Cas Ch 461.

[122] The principle which has developed from *Boardman v Phipps* and subsequent cases is that there is a presumptive requirement that the errant fiduciary disgorge all profits made by dint of the breach. There is room, however, for the Court to exercise its discretion to allow the errant fiduciary some measure of allowance or recompense for effort, skill and enterprise in making those profits, if it would be unjust not to do so. All the relevant circumstances must be taken into account. The more reprehensible the fiduciary's conduct, the less inclined the Court may be to make any allowance or to be liberal in the amount awarded. The essence of the exercise is to define fairly the profit for which the fiduciary is required to account.

[123] When *Boardman v Phipps* was before the Court of Appeal, Lord Denning observed that if the defendant had done valuable work in making the profit, the Court in its discretion could allow him a recompense. Everything depended on the circumstances. If there was bad faith the defendant might not be allowed any remuneration or reward.[107]

[124] Another influential English case is *In Re Jarvis (decd)*.[108] In that case Upjohn J, who later sat as Lord Upjohn in *Boardman v Phipps*, emphasised that in this field each case depended very much on its own facts. For example, the principles applying where the breach of duty related to the running of a business were different from those applying where the breach related to a specific asset. This distinction was picked up and adopted by the High Court of Australia in *Warman International*.

[125] An early case of some general moment is *Docker v Somes*.[109] There Lord Brougham took the analogy of money spent by a fiduciary on purchasing a piece of steel or a piece of silk which the fiduciary then worked up into goods of the finest quality where the finished work exceeded by many times the value of the original material. As to that, his Lordship said:[110]

> …[these] are cases not of profits upon stock, but of skilful labour very highly paid; and no reasonable person would ever dream of charging a

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107 [1965] Ch 992 at 1020.
108 [1958] 1 WLR 815.
109 (1834) 2 My & K 655; 39 ER 1095 (HL).
110 At 668.

> trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit … .

[126] This is a very early manifestation of the principle that if an errant fiduciary applies to the raw material in respect of which he has committed a breach of duty, whatever that material may be, some skill, labour or expertise which increases the value of the raw material, it will not necessarily be equitable to hold him to account for the full enhancement in the value of the ultimate article. Still less is this so where, as in this case, the fiduciary is entitled to a beneficial share in the venture and did much of his work on it prior to any breach of duty.

[127] The trend of the authorities already mentioned was adopted by the Court of Appeal in England in *O'Sullivan v Management Agency & Music Ltd*,[111] and very recently by the same Court in *Murad v Al-Saraj*.[112] *O'Sullivan v Management Agency* is significant for the Court's acceptance that some moral turpitude is not a bar to the making of an allowance if, on the overall balance of the equities between the parties, it is fair to do so. *O'Sullivan v Management Agency* was a case of an account of profits being directed following the setting aside of a contract procured by undue influence. The role the guilty party played in generating the profit was recognised in the Court's order. *Murad v Al-Saraj* is significant for its consistency with *O'Sullivan v Management Agency* and for its endorsement of the general approach taken by the High Court of Australia in *Warman International*.

[128] In New Zealand the most recent authority is the decision of the High Court in *Estate Realties*, upon which William Young J relied. There the Judge, after a detailed review of the authorities, summed the matter up in these words:[113]

> In deciding what profits or gains have been made the Court must consider all the circumstances of the case. There is no absolute bar or rule against allowing costs, expenses and other deductions or allowances in favour of a fraudulent or morally blameworthy fiduciary. The exercise is essentially to define fairly the profit made or the gains derived from the transaction impugned. The nature of the breach of duty and the circumstances in which it occurred are relevant, as are the circumstances in which the gains or profits were derived and the amount of personal input from the fiduciary which was necessary to enable the gains or profits to be achieved. The

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111 [1985] QB 428.
112 [2005] EWCA Civ 959.
113 At 631.

> jurisdiction is not penal. The fiduciary must not be robbed but, if guilty of improper conduct, cannot claim as of right to be rewarded, let alone liberally rewarded, for discretionary elements such as skill, labour, expertise and personal exertion.

[129] The second case upon which William Young J relied was the decision of the High Court of Australia in *Warman International*. A branch manager had appropriated to himself a business opportunity in the form of an agency contract. The opportunity arose while he was working for the plaintiff. He was found guilty of breach of fiduciary duty. The Court[114] delivered a joint judgment which commenced by saying that the appeal raised the questions whether an account of profits should be awarded in favour of a successful plaintiff in an action for breach of fiduciary obligation and, if so, the basis upon which such an account should be taken in all the circumstances of the particular case.

[130] The following points were made in *Warman International*. The exercise of allowing some recompense or reward to the errant fiduciary when defining the profits which must be the subject of disgorgement is not usually capable of mathematical precision. A reasonable approximation is often all that can be achieved. Equitable remedies must be fashioned to fit the nature of the case and its particular facts.[115] This is the same point as that made by Lord Upjohn in *Boardman v Phipps*.[116] In *Warman International* their Honours adopted the comments of Upjohn J in *Jarvis* about there being a difference between appropriating a business or a business opportunity on the one hand and a specific asset on the other. They observed that in the former situation a significant proportion of the profits may have been generated by the skill and efforts of the fiduciary.

[131] Their Honours emphasised that the rule requiring accounting for profits could be taken to the extreme of becoming a vehicle for the unjust enrichment of the plaintiff. They made the important point that the onus is on the errant fiduciary to satisfy the court that an allowance should be made. As a general rule a fiduciary

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114 Mason CJ, Brennan, Deane, Dawson and Gaudron JJ.

115 As Fletcher Moulton LJ observed in *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728-729, fiduciary relations are of many different types and the way in which equity intervenes is very much influenced by the type of breach with which the case is concerned and the circumstances in which the breach has occurred.

116 See the citation from *Kuys* at [76] above.

must not be allowed to benefit from a breach of fiduciary duty unless there has been some antecedent agreement for profit sharing. But, whether or not there is such an agreement, the court may make an allowance for skill and expertise and expenses incurred in generating those profits.

[132] It is of relevance to the antecedent agreement point that the trial Judge in the present case found that had the Harvey Norman project proceeded with Mr Fay still involved, he, Mr Fay, would have agreed to recognise Mr Chirnside's disproportionate contribution in a fair and reasonable way. It is a reasonable inference that this may have included an element of disproportionate profit sharing. The Judge's finding was not of course of any actual agreement, but of what was likely to have been acceptable to Mr Fay if the project had proceeded to fruition without any breach of duty on Mr Chirnside's part. It is a legitimate factor to be weighed in the overall discretion, but it is not, in our view, a route of itself to the determination of this aspect of the case. Mr Chirnside did not advance it as such.

[133] It is also appropriate to mention the decision of the House of Lords in *Guinness Plc v Saunders*.[117] This case was discussed in some detail in *Estate Realties*,[118] and involved the general rule that those who voluntarily accept fiduciary obligations are not entitled to any remuneration nor any profit, save that which is expressly allowed to them by the instrument creating the obligation. *Guinness Plc v Saunders* was a case where a single asset (a sum of money) rather than a business or similar venture was in issue. A company director had received money for services rendered to the company. The articles of association expressly governed the basis on which directors could be remunerated for such services. The remuneration which the director had received had not been approved under the processes required by the articles. The director was required to account to the company for it.

[134] The rigour of the rule which applies to those who expressly accept trusteeships or similar fiduciary obligations should not necessarily be applied to those upon whom a fiduciary obligation is imposed. They, necessarily, have no express basis upon which they may claim any remuneration or reward for the profit

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117 [1992] 2 AC 663.
118 At 626 ff.

which they have generated and which equity requires them to disgorge to their beneficiaries. It is not in accordance with the generally flexible approach of equity to deny fiduciaries of an involuntary kind any chance of profit sharing or remuneration by means of the rigid application of a rule designed to apply to voluntary trustees.

[135] We turn next to examine how the New Zealand text writers deal with the issue under discussion. We refer first to *Civil Remedies in New Zealand*[119] and then to *Equity and Trusts*. The matter is addressed in *Civil Remedies* at [8.3.3], where there is a discussion of what is described as quantification of disgorgement. The learned authors of this chapter[120] say that although equity regarded the entire factually caused gain as prima facie recoverable, it did nevertheless on occasion permit the defendant an allowance for his time, skill, and effort in generating the profit. The authorities cited for this proposition are *Boardman v Phipps*, *Guinness Plc v Saunders*, *O'Sullivan v Management Agency* and *Warman International*. It is suggested that while the allowance may be simply part and parcel of defining the extent of the profits, functionally the allowance for skill and effort operates as a rule of remoteness. It is not necessary to explore that refinement here. The authors then say that in *Guinness Plc v Saunders* the House of Lords sought to retreat from this approach but that a more liberal view appears to prevail in New Zealand and Australia. This statement is supported by reference to *Warman International*, *Estate Realties* and also the decision of Fisher J in *Cook v Evatt (No 2)*.[121]

[136] There are several relevant references to the subject in *Equity and Trusts*. At [14.2.7] the author contrasts aspects of flexibility and rigidity in fiduciary law, and suggests that rigidity tends towards certainty, a desirable goal where vulnerability is significant and liability potentially broad. As to this we observe that while there may be some rare cases where it is necessary in the overall interests of justice to have a rigid or near rigid equitable rule, the original purpose of equity was to modify the rigour and rigidity of the common law. We would certainly not wish to encourage

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119 Rt Hon Peter Blanchard (consulting ed) (2003).
120 Ross Grantham and Charles Rickett.
121 [1992] 1 NZLR 676 at 691 (HC).

rigidity in equity, save in cases where the justification for that rigidity is compelling.

[137] The author turns, at [14.6.3], to the subject of allowances for the purpose of an account of profits. The text says that the court may grant a fiduciary an allowance in recognition of efforts expended on a transaction. The author suggests that usually such an allowance is permitted only if the fiduciary's breach is innocent. There then follows this passage:

> Indeed, in *Guinness plc v Saunders* the House of Lords affirmed the strict approach, taking the view that an allowance should be made only in "exceptional circumstances" where the claim is "overwhelming" and where it would be "inequitable … for the beneficiaries to step in and take the profits without paying for the skill and labour which has produced it". Moreover, an allowance is not to be made where it would "provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests". After all, a non-innocent fiduciary will rarely be deserving of equity's sympathy – permitting an allowance undermines the prophylactic and deterrent aspects of fiduciary law.
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> However, in New Zealand a less strict approach appears to prevail. In *Estate Realties Ltd v Wignall* Tipping J held that an allowance is available, even if the fiduciary acted other than innocently. It is submitted that the approach in *Wignall* is unsound and incompatible with the approach of equity in this field. It should not be followed for the reasons given in *Saunders.*

[138] It is inherent in what has already been written that we do not consider the approach taken in *Estate Realties* is unsound. Nor is it incompatible with the approach of equity in this field. To apply the *Guinness Plc v Saunders* case in the rigid way which the learned author of *Equity and Trusts* seems to favour, is not, in our view, an appropriate use of equitable doctrine. The subject requires a much more detailed and sophisticated examination than the half page contained in *Equity and Trusts*. There is, for example, no discussion of *Warman International*.

[139] We observe, finally, that a survey of other recognised texts demonstrates broad acceptance of what we might call the *Estate Realties/Warman International* approach which commended itself to the trial Judge in the present case.[122] What is

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[122] See Dal Pont and Chalmers *Equity and Trusts in Australia and New Zealand* (2 ed 2000) 121; Hanbury and Martin *Modern Equity* (17 ed 2005) at [21-005]; Hudson *Equity and Trusts* (4 ed 2005) at [12.5.3]; Ford and Lee *Principles of the Law of Trusts* (3 ed 1996) at [22640]; Waters *Law of Trusts in Canada* (3 ed 2005); and, in particular, the detailed and thoughtful review in

said in Snell's *Equity*[123] exemplifies the general approach of the text writers in other common law jurisdictions. Indeed it is somewhat more restrictive than some of them. Snell says that a fiduciary who has acted in breach of fiduciary duty, and against whom an account of profits is ordered, may nevertheless be given an allowance for the skill and effort employed in obtaining the profit which he has to disgorge. This will be done when, as it was put by Wilberforce J at first instance in *Boardman v Phipps*,[124] it would be inequitable for the beneficiaries to step in and take the profit without paying for the skill and labour which produced it. Snell notes that this power is used sparingly out of concern not to encourage fiduciaries to act in breach of duty. But if making an allowance in a particular case cannot sensibly be regarded as giving that encouragement, the rationale for a sparing approach is reduced. In the present case, as we have seen, most of the relevant work was done prior to the breach and the interests of fiduciary and beneficiary were not relevantly in conflict.

(4) Application of law to present case

[140] William Young J was making a judicial assessment in deciding whether, and to what extent, to allow Mr Chirnside recompense and remuneration for his disproportionate contribution to the joint venture. Any appeal from his judgment in this respect must recognise that in such circumstances there is no absolutely right or wrong answer. We do not consider it can be said that in relying on *Estate Realties* and *Warman International* the Judge erred in principle, or that he was plainly wrong in his decision to make some allowance. We will examine the amount of the allowance as a separate issue.

[141] It cannot reasonably be said that the Judge overlooked some relevant fact or circumstance or took anything irrelevant into account. We reject the argument that the Judge was not entitled to make an allowance; nor do we consider that the making

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Glover *Equity, Restitution & Fraud* (2004) at [7.55] ff which, inter alia, expressly endorses the *Estate Realties/Warman International* approach and is sympathetic to the view that, although appropriate to the facts of *Guinness Plc v Saunders*, the reasoning of their Lordships in that case was too rigidly expressed. To the same effect is the casenote on *Murad v Al-Saraj* written by Professor Mitchell McInnes of the University of Alberta in (2006) 122 LQR 11 at 15.

123 (31 ed 2005).

124 [1964] 1 WLR 993 at 1018.

of an allowance, in addition to the half share to which Mr Chirnside was otherwise beneficially entitled, involved any error of law or wrong exercise of discretion. The reality is that Mr Chirnside was entitled to his full half share in any event. The allowance reflected the effect of his disproportionate contributions on the value of Mr Fay's half share. As we will demonstrate below, the true extent of the allowance was $150,000, not $300,000.

[142] We cannot accept Mr Fay's second submission that the making of an allowance means that there is no sanction for Mr Chirnside's conduct. It was not the purpose of the surrogate accounting exercise upon which the Court was engaged to apply a sanction or punishment for the breach of duty. The true purpose of the exercise was to fix compensation or damages on the basis of disgorgement of profits properly analysed. While a refusal to make an allowance or its lack of liberality, if that course is appropriate, could be seen as having penal effect, the reason for such an outcome is simply that the errant fiduciary will have failed to satisfy the Court of the justice of making any or a more liberal allowance. That this might be seen, at least by the fiduciary, as penal is understandable but it is important there be no confusion between effect and purpose.

[143] Mr Fay's third and fourth submissions put in issue the appropriateness of making any allowance in the circumstances of this case and its size. The latter aspect was designed to support Mr Fay's resistance to Mr Chirnside's request that we restore the trial Judge's figure. We do not consider that William Young J can be said to have been plainly wrong in exercising his discretion to make an allowance in favour of Mr Chirnside, especially when the allowance reflected pre-breach efforts by him. In any event his breach of fiduciary duty cannot be characterised as involving dishonesty. It bears a significantly closer resemblance to a breach of contract than to anything fraudulent. Mr Chirnside seems to have believed he was entitled to act as he did. It was open to the Judge to find that Mr Chirnside had a strong moral case for obtaining appropriate recognition of his disproportionate contribution to the project.[125] While, to use words employed in *Estate Realties*, Mr Chirnside's conduct is not to be applauded, we do not consider it should result in the making of no allowance at all. More precisely, we do not consider that

William Young J can be said to have been plainly wrong in the view he took of the matter.

[144] It is relevant also, although this was not the focus of the submissions, that there is no room for any suggestion that the breach of duty opened the way for, or facilitated, the making of the relevant profit or the doing of the relevant work for which allowance is now being made. As we have already emphasised more than once, the relevant work was done prior to the breach of duty, albeit there is some difficulty in pinpointing exactly when Mr Chirnside's disloyalty to Mr Fay first manifested itself. At no stage of this litigation has it been suggested that this factor alters the jurisprudential basis of the allowance issue. Specifically, no discrete causation issue has been raised, nor has it been suggested that because most of the relevant work was done before the breach Mr Chirnside was entitled to recompense, either as of right, or without any account being taken of the fiduciary breach. No suggestion was made of a quantum meruit approach or something legally analogous to it. It is therefore unnecessary, and would be inappropriate, to explore the possibility that the pre-breach aspect might justify an approach different from that of simply weighing it in the exercise of the court's discretion. That brings us, finally, to the size of the allowance.

[145] It will be recalled that William Young J's figure of $300,000 was reduced by the Court of Appeal to $100,000. We do not consider that the Court of Appeal demonstrated any proper basis for making this reduction. The reasoning employed by the Court did not justify the conclusion that the trial Judge's assessment was in error. It is appropriate first to be very clear about the effect of the trial Judge's order. The key point is that he deducted the sum of $300,000 from the profit before the residual half shares were struck. The order was not framed as requiring a payment by Mr Fay to Mr Chirnside out of his, Mr Fay's, residual half share. If that had been the Judge's approach, Mr Chirnside would indeed be receiving the sum of $300,000; that would be the sum changing hands as a result of the making of the allowance. But the Judge's order was not to that effect.

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[125] (15 August 2003) at [79].

[146] The result of $300,000 being deducted from the profit attributable to the joint venture before the equal shares were struck is that half of that amount comes from what would have been the half share to which Mr Chirnside was, in any event, entitled. The profit was fixed by the Judge at $1,290,000. A half share of that sum is $645,000. That is the sum Mr Fay would have received if there had been no allowance. The deduction of the sum of $300,000 from the starting figure results in a balance of $990,000, of which half is $495,000. This is $150,000 less than the figure that would have been payable to Mr Fay without any allowance to Mr Chirnside. This sum of $150,000 is the effective award for Mr Chirnside's disproportionate contributions. This is all that Mr Fay was required to pay Mr Chirnside in that respect. The half shares which, without any allowance, would have accrued to the parties have respectively been increased and diminished by the same sum of $150,000. The difference between the sums payable to the parties is therefore $300,000 but that is not the amount of the allowance. It is not appropriate, in present circumstances, to count as an allowance something which Mr Chirnside was already entitled to receive on account of his beneficial half share. Viewed both in that light, and more generally, we do not consider there was any justification given for the Court of Appeal's decision to reduce the trial Judge's figure at all, let alone to $100,000, which would, of course, make the effective allowance only $50,000.

[147] The Court of Appeal appears to have accepted three criticisms of the trial Judge's approach. First, it was said that he did not allow for the fact that Mr Chirnside would have been obliged to do half the relevant work as his contribution in any event, and that the Judge did not make any allowance for Mr Fay's work. In respect of the latter point, the reduction of Mr Chirnside's hours from 800 or thereabouts to 500 implies an allowance for Mr Fay's work, not necessarily to the extent of 300 hours but to an extent the Judge considered reasonable. As to the former complaint, the fact that the Judge took the allowance off the profit, before dividing the balance, has the effect of recognising that Mr Chirnside was working as much for himself as for Mr Fay.

[148] The Court of Appeal then recorded Mr Fay's proposition that the $300,000 allowance was equal to $1,200 per hour for 250 hours and that something in the

order of $200 per hour would have been fair – or something more like $100,000.[126] All the Court then said was that it agreed with Mr McIntosh's submission that the Judge's allowance was "overly generous". The Court did not explain why it had implicitly approved the reduction from 500 to 250 hours for the purposes of the hourly rate calculation. As the allowance had already come off the top, effectively halving its relevant impact, it is unclear why the number of disproportionate hours must also be halved.

[149] There is one aspect of the Judge's reasoning which has caused us some hesitation. Shortly before expressing his conclusion on the allowance issue, the Judge said[127] that the exercise he was carrying out was "not an account of profits but rather an assessment of equitable damages". He added that this assessment required a consideration of "what Mr Fay lost as a result of his exclusion from the joint venture rather than Mr Chirnside's gain". His Honour nevertheless observed in the following paragraph that the damages he fixed were a "surrogate for an account of profits". We have asked ourselves whether the Judge's reference to Mr Fay's loss rather than Mr Chirnside's gain improperly influenced his approach to the allowance issue. We do not consider it did. In the present case Mr Fay's loss can be seen as the obverse of Mr Chirnside's gain. In substance the exercise the Judge undertook was to define the profits which Mr Chirnside was being required to disgorge. The Judge's language of loss did not reflect the actual basis of his calculation. Nor do we consider it indirectly skewed his allowance approach.

[150] There is, however, a point which has led us to the view that we should look afresh at the amount of the allowance made by the Judge. There is nothing in his judgment which enables us to be satisfied that his ultimate figure was calculated on a basis which appropriately recognised the need for restraint in the amount fixed. In the same way as the court should be cautious and not make an allowance to an errant fiduciary unless a clear case for doing so is made out, so too should the court generally be restrained in the amount awarded.

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[126] In fact, as Mr Fay now submits, an allowance of $100,000 for 250 hours work represents an hourly rate of $400 not $200.

[127] (15 August 2003) at [77].

[151] The need for restraint was recently reinforced by the New South Wales Court of Appeal in *Say-Dee v Farah Constructions Pty Ltd*.[128] In that case a joint venturer had surreptitiously used information acquired in the course of pursuing the joint venture in order to acquire property adjacent to the joint venture site for its own advantage. This conduct was in breach of fiduciary duty. In calculating the profits which the party in breach had made, the Court made an allowance in its favour for its entrepreneurial skill and efforts in taking advantage of and turning to profit the business opportunity it had appropriated to itself. This allowance was deemed appropriate despite the surreptitious way in which the errant fiduciary had behaved. But the need for restraint in the amount of the allowance was emphasised. The amount fixed was deliberately "not liberal" in view of the need to deter others from committing breaches of fiduciary duty. *Say-Dee v Farah Constructions* is the closest case to the present of which we are aware and was decided after both the High Court and the Court of Appeal judgments in the present case were given.

[152] It would have been possible for us to remit the issue to the High Court. The trial Judge is, however, no longer readily available in that Court. Although there is a paucity of evidence directed to the question of the proper allowance, there is a strong interest in bringing this case to a close and the compass of the present issue is relatively small in the context of litigation as a whole. We therefore propose to do the assessment ourselves on the available material.

[153] The number of hours of disproportionate work done by Mr Chirnside before any breach of his duty to Mr Fay has already been established at 500.[129] The appropriate course is to fix the allowance in terms of an hourly rate which must necessarily balance the need for restraint against the commercial reality that, as the trial Judge observed, it is unlikely that the joint venture could have employed someone to do what Mr Chirnside did on an hourly rate, even if that rate was generous. We consider that in all the circumstances Mr Fay should pay Mr Chirnside at the rate of $200 per hour (net) for his disproportionate hours. In order to achieve that net result, the total allowance must be fixed at $200,000. As has already been indicated, if that amount is deducted from the total before equal division takes place,

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128 [2005] NSWCA 309 at [251] per Tobias J (Mason P and Giles JA concurring).
129 See [108] above.

the net amount changing hands is $100,000 which represents 500 hours at $200 per hour. Mr Chirnside's appeal must succeed to this extent and the consequence will be taken into account in the revised figures to be found at the end of these reasons.

[154] Since preparing these reasons, we have had the opportunity of considering in draft the reasons given by the Chief Justice. There are only two points on which we think it necessary to comment. The first concerns the sum of $100,000 paid by Rattray to Mr Chirnside. At no stage of the argument did counsel suggest that this feature of the case had the relevance which the Chief Justice has ascribed to it. Indeed the point did not feature in argument at all. Furthermore there is nothing in the judgments below or, so far as we can find in the evidence, which indicates the basis upon which this sum of $100,000 was fixed or the detailed nature of the consideration which Mr Chirnside provided for it. We have therefore not found it possible to ascribe any significance to the point. The second aspect concerns the relevance of the percentage fee received by Mr Chirnside for the earlier CRT project. On the basis of 1.25% of value realised by the present project, Mr Chirnside would have received a little short of $150,000 net, as the Chief Justice has demonstrated.[130] This is effectively the net allowance made by the trial Judge. The net result of our approach is significantly less because of the need for restraint.

The vacant space issue

[155] In order to arrive at a figure for the total value of the project William Young J made an assessment of the rental stream to be derived from the property. This required him, inter alia, to assess the rent likely to be obtained from a hypothetical tenant of an area of vacant space within the complex. He took this to have an area of 2,600m², consisting of 1,800m² on the upper level of the old bottling hall of the Speights Brewery adjacent to the tank room of the brewery and 800m² for the tank room itself. But in order to connect those two spaces in a usable manner it would be necessary for any developer to construct a new floor in the tank room level with the existing upper level of the bottling hall.

[156] The Judge found that such a space of 2,600m² could, on the face of it, be suitable for bulk retailing. He took note of an unsuccessful effort by the parties, before they fell out, to lease this space to Spotlight Stores NZ Ltd (Spotlight) and of

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130 At [33] above.

the fact that a rental had been attributed to the space by a valuer in 2000; but he said that at the hearing before him no serious attempt had been made on behalf of Mr Fay to place a value on this specific proposal. He referred to Spotlight's rejection of the parties' proposal of a rental of $90 per m² in which Spotlight had said that the proposal was not conducive for a retail business and that the area in question was "a secondary area suitable for warehousing or car parking", although the letter from Spotlight did go on to comment that "the site could work for us if you were to get your architects to revisit the design", noting the need for "a prominent entrance at the front of the building".

[157] The Judge declined to value the vacant area as potential retailing space. He said he did not know how marketable it would be at a rent in the order of $100 - $120 per m² as suggested on behalf of Mr Fay. Structural alterations to the complex as a whole would be necessary to make the area attractive for bulk retailing. A vacancy allowance would have to be made and the Judge did not believe he should be expected to assess it without specific valuation evidence addressed to it. He was also unclear about the effect on the revenue that might be derived from the space of any necessary provision of car parking.

[158] The Judge therefore adopted the approach taken by Mr Dick of MacPherson Valuations Ltd (MacPherson), called by the appellants, which the Judge considered to be broadly comparable with the approach taken in a valuation done in December 2002 for Rattray by DTZ New Zealand Ltd (DTZ). Accordingly, William Young J proceeded on the basis of a rental for the vacant space of $25 per m² for use as storage only. That rental produced, after rounding, a rent figure of $1,220,000 for that space. He deducted $65,000 for operating and management expenses leaving a net rental stream of $1,155,000 to be capitalised.

[159] The Judge had earlier observed that Mr Dick had apparently not thought that a new floor would have to be created if the vacant area was used for storage only, so he made no allowance for the cost of that work. Later in his judgment, however, William Young J made a vacancy allowance for the property as a whole of $93,000 which again adopted an assessment made by Mr Dick.

[160] Because of the broad brush "loss of a chance" approach to compensation taken by the Court of Appeal that Court did not find it necessary to attribute any particular rental or value to the vacant space.

[161] In this Court Mr McIntosh, as he apparently did also in the Court of Appeal, made extensive submissions concerning the treatment of the vacant space, urging upon us the appropriateness of recognising its potential for retail use. Mr Whiteside not only disputed this but advanced a cross-appeal which asserted that in fact a deduction should have been made by the Judge for the cost of a new floor in the tank room because, counsel said, it would be necessary even if the use of the area was confined to storage.

[162] Although the matter involves only a factual determination it is necessary for us to enter upon it because of the absence of any finding by the Court of Appeal on the issues raised before it by counsel concerning the vacant space.

[163] We begin with the valuations which were done for Rattray for its own purposes. The first of these was by Mr Fletcher of MacPherson in August 2000. It valued the vacant space for retail purposes by attributing a rent of $115 per m². After capitalisation, the valuer deducted one year's rent as a vacancy allowance and also took off a sum for rates, insurance and other expenses during that period. No mention was made of any cost of constructing the floor. But in September 2000 MacPherson presented a further report to Rattray in which it reduced its overall valuation by an amount which was its estimate of the work required to make the area ready for leasing for retail purposes.

[164] The next valuation was done for Rattray by DTZ in December 2002 for mortgage purposes. The valuation mentioned the need to construct a new floor for 822m² of the space which, added to 1,810m², "could reasonably be converted to an office/retail type use". That gave a total area of about 2,600m². The area was valued for car parking only with what is described as a notional nominal rent being given for the area requiring a new floor. Although the valuation report did not directly state what the nominal rental was, it is mentioned in a later valuation in connection with the litigation as having been $20 per m². The DTZ report valued retail space at

$120 per m², warehouse space at $90 per m² and administrative space at $55 per m², with the comment that those figures were at the lower end of the range. The report suggested a good prospect of future development and an increased rental flow from the undeveloped area.

[165] Mr Dick and Mr Sellars of Fright Aubrey Ltd, instructed respectively for the appellants and the respondent, both did valuations in March 2003 for the purpose of the litigation. As we have seen, Mr Dick ascribed a rental of $25 per m² on the basis of use for storage but with no allowance for the cost of the floor.

[166] Mr Sellars called the space "undeveloped retail" and valued it on the basis of an engineer's feasibility report from Mr Marsh of Duffill Watts & King Ltd. This was unfortunate since it was effectively conceded by Mr Fay at trial that, apparently as a result of a misunderstanding by Mr Marsh, the area covered in his development scheme did not coincide with the boundaries of the vacant space and it would have been impossible to proceed with it without obtaining co-operation from Harvey Norman. Mr Sellars had accepted in his report that marketability would be affected by the geographic location and upper floor situation of the area. He noted that Mr Dick had assessed $25 per m² but had not given consideration to the potential of the space for conversion to retail use. He also noted the DTZ valuation of $20 per m². He concurred, however, with the original MacPherson valuation done in 2000. He said that any prudent investment purchaser would consider the potential for retail development.

[167] In his oral evidence Mr Sellars had to concede the difficulties in the way of the Marsh proposal but he said that the fact that it was not feasible did not necessarily mean that another retail proposal for the vacant space would not be feasible. He suggested a rental figure of $100 per m² for use as retail or a figure of between $40 and $60 per m² for light storage depending upon configuration and access. These figures appear to have been related to the proposed layout for Spotlight. In cross-examination of Mr Sellars it was apparent that he had not actually gained access to the areas in question.

[168] Mr Dick, who had inspected that space, described it as very internal with limited street exposure and quite dark. It had limited attractiveness "in its present form". He said he did not attribute retail value because it had been vacant since the development opened and efforts to lease it had been unsuccessful. He considered it was inappropriate to attribute any development potential given the time that it had remained unlet. However, as Mr McIntosh pointed out to us, it is unclear whether any real efforts had been made in this direction after the present litigation commenced.

[169] The person who demonstrated that the Marsh proposal was not feasible was Mr Macknight, a consulting engineer. He also pointed to the need for a new floor. During his cross-examination, however, he had the Spotlight proposal referred to him and, when asked whether there were any deficiencies in that plan, answered "not to my knowledge". He said it was substantially different from the Marsh plan and would involve "far less building costs". He appeared to accept that various potential problems, for example relating to the provision of an escalator, could be overcome. It seems also from his cross-examination that, if there proved to be a difficulty about car parking, a dispensation might be available. He was asked about the economic viability of the Spotlight plan and said that the only significant new structure would be the area of floor over the bottling plant "so it's relatively easily done compared to say the Duffill Watts & King proposal".

[170] That was the evidence which was before the trial Judge. But there has been an occurrence since the trial concerning which evidence was admitted in the Court of Appeal which is supportive of Mr Fay's position on the vacant space. Despite having contended that it was unsuitable for retail or office use, the respondents in July 2004 prepared material advertising the space for such use, describing it as having "extensive on-site car parking" and "a high profile". There has been no denial from the respondents that this advertising, which is exhibited to an affidavit from Mr Fay, refers to the vacant space. Indeed, it is said in the material to be Stage Three of the Harvey Norman Centre.

[171] Having carefully reviewed the evidence which was before the Judge and taken into account the appellants' advertising of the property since the trial we have

reached the view that it was not appropriate for the Judge to assess the rental stream for the vacant space on the basis that usage would be for storage only. Mr Dick appears to have almost disregarded the retail potential of the space because he was advised by Mr Chirnside that efforts to lease it had been unsuccessful. There is, however, no evidence of any such efforts other than the approach to Spotlight. Mr Dick made no other investigation in relation to the development potential. Apart from Mr Dick's evidence, the other valuation evidence indicates that the vacant space is probably capable of being let for retail or office use, as appears to be the view of the appellants which has led them to begin advertising it as such.

[172] There are undoubtedly some imponderables, as noted by William Young J, and, of course, the new tank room floor would have to be constructed. A significant discount from the retail rental figures mentioned in the MacPherson and DTZ reports in 2000 and 2002 and in Mr Sellars' evidence should be allowed. We are satisfied, nonetheless, that Mr Dick's figure of $25 per m² does not adequately reflect the value of the space. In our view, the appropriate rental figure on a retail/office basis, taking account of uncertainties and contingencies, should not be less than $75 per m² and we propose to adopt that figure. The 2,600 m² area should have been capitalised at that figure and deductions made from the capitalised amount in various respects including the sum of $452,000 for the cost of the new floor, that being a figure upon which the parties are now agreed, and of the equivalent of 18 months' rental as a vacancy allowance. That was the amount of the vacancy allowance which Mr Sellars suggested, Mr Dick having put forward 16 months. The taking of the longer period recognises that precision in relation to such things as rates and insurance cannot be achieved.

[173] We record that without seeking leave Mr Fay tendered in this Court, after the hearing of his appeal, yet more evidence on the issue of the rental value of the vacant space. This further material related to the figure at which some of the vacant space has recently been let. This figure represents the rental achieved some years on from the date at which the trial Judge was required to make his assessment of the potential rental value of the space. Mr Fay's filing of this material, without seeking and

obtaining leave, was irregular.[131] The further evidence relates only indirectly to what figure the trial Judge should have adopted. Furthermore, if we were to receive it on the basis that it showed present value rather than potential value at the date of trial, adjustments would have to be made elsewhere, for example in relation to the costs necessarily incurred in achieving the rental.

[174] If the exercise was to be reopened on one side, it would have to be reopened on the other side. The settled position reached, for example on the costs necessary to achieve the rental, would have to be re-examined as well. To do this would have required something approaching a general inquiry into all aspects of the issue on a present day basis. We do not consider this to be appropriate in the circumstances of this second appeal. The primary focus must be on whether the trial Judge erred on the material in front of him.

[175] The Court of Appeal received some updating evidence. The case for the admission of yet further updating evidence in this Court would have to be compelling before it was appropriate to receive it. That is not the case here. We therefore decline to admit this further material.

The capitalisation rate

[176] Mr McIntosh sought to have this court adjust the overall capitalisation of rental rate which the Judge had set at 10.15% after considering the rates suggested by valuers or used in their reports. He said that this was the rate used by DTZ. Mr Sellars had suggested 10% and Mr Dick 11%. The Judge said he was closer to Mr Sellars on this issue. The Court of Appeal made no comment about the rate but seems to have accepted 10.15%. We are not satisfied that any basis has been shown for differing from the Courts below.

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[131] Rule 40 of the Supreme Court Rules 2004.

Revised calculations

[177] After a detailed discussion the trial Judge assessed the rental stream to be capitalised at $1,155,000. This of course was on the basis of $25 per m² for the 2,600 m² of vacant space. We have concluded that the appropriate rental figure for this space should be $75 per m². This results in an increase in the rental stream of $130,000. Capitalised at 10.15% this produces an extra $1,280,788. There must be an appropriate vacancy allowance in relation to the additional rental. The trial Judge's vacancy allowance was calculated on the basis of $25 per m². The additional rental is $50 per m². On the basis of 18 months the necessary adjustment is $195,000. There must also be a deduction for the costs of making the vacant space lettable. As noted earlier, the agreed figure for this aspect is $452,000. Finally it is necessary to adjust the disposal costs allowance worked out by the Judge on the basis of 2.1% of capitalised value. The increased capitalised value of the rental stream being $1,280,788, the appropriate additional allowance on this head is $26,896. The capitalised figure of $1,280,788 for the additional rental less the necessary deductions is $606,892. This figure must be added to the Judge's figure of $11,160,000 for the total value of the project. The adjusted total value becomes, on a rounded basis, $11,767,000. The costs of the development assessed by the Judge as totalling $9,870,000 do not change. Hence the adjusted net gain made on the project is $1,897,000, which can appropriately be rounded to $1,900,000.

[178] From that sum must be deducted the amended allowance to Mr Chirnside of $200,000, resulting in a figure of $1,700,000 for equal division. Mr Fay's half share is $850,000; an increase of $355,000 on the trial Judge's figure of $495,000.

Formal orders

[179] It follows that the appeal and cross-appeal must be allowed to the extent indicated in the foregoing reasons. Mr Chirnside has succeeded in part on the allowance issue and Mr Fay has succeeded on the vacant space issue. Mr Chirnside has failed in his attempt to avoid liability altogether. The order for damages in the

sum of $287,500 made by the Court of Appeal in its second judgment dated 29 June 2005 must be set aside. The amount for which judgment was entered for Mr Fay in the High Court must be varied from $495,000 to $850,000.

[180] That brings us to the position of Mr Chirnside's investment vehicle, Rattray, the second appellant in this Court. It has the ownership of the Harvey Norman project. Rattray accepts that judgment should also be entered against it and we would accordingly direct that judgment is to be entered for Mr Fay against Rattray Properties Ltd in the sum of $850,000 plus interest from 1 April 2003 at 7.5% per annum, as ordered by the Judge in respect of Mr Chirnside. In the absence of any order directed to the property itself, Mr Fay accepts that the caveat he has lodged against the title to the Harvey Norman project should be removed and there must be an order to that effect.

Costs

[181] Each party has had a measure of success in this Court, albeit Mr Chirnside has failed in his principal endeavour to avoid liability altogether. The hearing in this Court extended over two days. Bearing in mind the relative success and lack of success of the parties and all other aspects, we consider that Mr Chirnside should pay costs to Mr Fay in respect of the proceedings in this Court in the total sum of $15,000 plus disbursements, to be fixed if necessary by the Registrar. The costs awarded to Mr Fay in the Court of Appeal should be increased from $4,000 to $10,000. Costs in the High Court should remain as fixed by that Court.

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