IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 7/2004

IN THE MATTER	of a Civil Appeal and Cross Appeal	
BETWEEN	**WYNSTON ALEXANDER CHIRNSIDE AND RATTRAY PROPERTIES LIMITED**	
	Appellants	
AND	**RICHARD ELMORE FAY**	
	Respondent	

Hearing 14 and 15 November 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

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

CIVIL APPEAL

10.06 am

Elias CJ Thank you.

Whiteside May it please your Honours I appear for the appellant and with me my learned junior Mr Ormsby.

Elias CJ Thank you Mr Whiteside, Mr Ormsby.

McIntosh May it please your Honours my name is McIntosh, it appear with Mr Hosie for Mr Fay.

Elias CJ Thank you Mr McIntosh, Mr Hosie. Yes Mr Whiteside.

Whiteside May it please your Honours. The whole issue which arises on the appellants' appeal is whether a fiduciary obligation is owed to the respondent by the firstnamed appellant when they had discussed together the possibility of redeveloping two commercial sites in Dunedin into a new retail outlet. Both the High Court and the Court of Appeal found in favour of the respondent on liability but in my respectful submission struggled to articulate the basis on which the appellants were found to be a fiduciary and the respondent their beneficiary. These parties chose not to enter into either a written or an oral agreement as to the basis on which this proposed project should be investigated over a lengthy period of time primarily by the firstnamed appellant. The parties were experienced and indeed senior businessman and each had operated and was operating his own business. Neither was commercially naive and neither was unable to protect his position. The respondent regards the absence of an agreement as extremely important because it demonstrates the respondent trusted the firstnamed appellant. Equity does not intervene just because one party trusts another. Every day in the commercial and business would positions of trust are abused. But that does not necessarily require the intervention of equity.

And Lord Mustall referred to this point in the PC appeal from New Zealand in the case of **Re Goldcorp Exchange**. I'm afraid it's not in the bundle of authorities. The Court of Appeal decision is in the respondent's bundle reported of course under the name of **Liggett v Kensington** ([1993] 1 NZLR 257 (CA)), that's Tab 9, but I can just briefly refer to a passage in the speech of Lord Mustall. The report is [1995] 1 AC at page 74. And the passage that I want to refer to is at page 98. And hl said that many, this is about paragraph E of the report, many commercial relationships involve just such a reliance by one party on the other. And to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary would as it seems to their Lordships have adverse consequences far exceeding those foreseen by Lord Justice Atkin in Re Wade. It is possible without misuse of language to say that the customers put faith in the company. That their trust has not been repaid. But the vocabulary is misleading. High expectations do not necessarily lead to equitable remedies.

So in my submission this case does with respect raise an important point of principle worthy of consideration by this Court. And I want if I can commence by analysing the judgments below.

Gault J Would you like to try and article the point of principle you say is raised.

Whiteside The point of principle that's raised is whether these parties should be held to be in a fiduciary.

Gault J Well that's a factual assessment. The point of principle must be where is the line drawn such as gives rise to a fiduciary relationship isn't it. It's not about these parties, the point of principle.

Whiteside No sir, I'm sorry.

Gault J It would help me if we could find out just what the point of principle is.

Whiteside Well the principle that I've tried to advance in the submissions is really at paragraph 2.3 of the summary of the submissions Sir. And I submit the appropriate test is whether the respondent established that the firstnamed appellant had agreed or had undertaken or agreed to act for or on behalf of the respondent's interests.

And your Honour's right. Essentially the courts below have said, as a matter of fairness, this relationship had developed to such a point that there should be a fiduciary obligation.

Elias CJ Well I don't read the first instance Judge to be saying that. I read him as saying that there was a joint venture. And if there is a joint venture you don't really need to start with these very general propositions do you because the law as to the obligations of joint ventures inter se is pretty well dealt with.

Whiteside Yes Ma'am but the Court of Appeal said that while he articulated it in that way, that wasn't really supported by the evidence and that all that could be said was that they had sufficiently proceeded along a joint enterprise.

Elias CJ Yes I realise that, I was picking up on your reference to both judgments in the lower courts.

Whiteside Yes there is a difference in the judgments.

Elias CJ Yes.

Whiteside You're right Ma'am. In the High Court the Judge, pretty briefly and without articulating the basis on which he found that there was a joint venture, said that he was satisfied that there was.

Elias CJ Well isn't the principle which governs that is whether steps have been taken in furtherance of the joint venture. Isn't that the test.

Whiteside No in my submission the test is whether or not there's an agreement that these two parties are in a joint venture, that they are joint ventures.

Keith J Is it not possible Mr Whiteside simply to go to the existence of the joint venture. I think that's the Chief Justice's point.

Whiteside But if a joint venture is in existence, in my submission there must have been an agreement reached.

Keith J Which is often implicit isn't it rather than express.

Whiteside Well it can be implicit. I accept that.

Tipping J Isn't the real point how specific the agreement has to be before you've got a joint venture in the sense that Justice Young was referring to. Obviously this wasn't one where all the I's were dotted and the T's were crossed but I think what the Judge meant was that they had agreed in principle if you like or in concept.

Whiteside Yes I accept that Sir. But I submit that's not sufficient to a point.

Tipping J Yes, that's the key point isn't it.

Whiteside To a point of fiduciary obligation. And I want to urge the Court to accept that the appropriate test is whether the appellants or in particular the firstnamed appellant can be said to have undertaken or agreed to act in the best interests of the respondent. To have set aside his own interests and to act as fiduciary.

Tipping J If the agreement is sufficiently specific to amount to a contract you wouldn't need any fiduciary relief. Where fiduciary relief comes in is in situations that are short of contract. Is that not.

Whiteside Well that's the way the matter's certainly been approached by the courts in say in Australia in the Hospital Products case (**Hospital Products Ltd v United States Surgical Corporation** (1984) 156 CLR 41).

Tipping J So it's not enough to say, to deny a fiduciary agreement that there wasn't an agreement, a fiduciary duty, that there wasn't an agreement amounting to a contract. Because there doesn't have to be. The point of principle if there is one, and it may be just factual, is how far do you have got to have gone to get some sort of consensus.

Whiteside Well that's certainly the approach in the lower Courts. I'm urging this Court to say in a commercial context that that as a matter of policy is unsatisfactory because it leaves matters in the air. It means that these types of issues will have to be re-litigated again and again on the particular facts for the Court to say these parties have gone sufficiently along the path but we can draw the line here and say they're now in a fiduciary obligation.

Elias CJ Most litigation's like that.

Whiteside Well certainly a lot is Ma'am. But in my submission it's not necessary in a situation where you have what in the, what Dr Bean in his book

has described as a horizontal relationship. That these parties are able, these parties were well able to have an agreement from 1998 when they first talked about looking at projects as to the basis on which they would proceed to do so. And so in my submission there is an opportunity in these types of cases for the Court to set out principles on which a fiduciary obligation can be said to arise.

Gault J Are you really saying there's no such animal as a joint venture. That it must be simply something which equity will recognise as the assumption of fiduciary obligations one to the other.

Whiteside Well that's the approach of, certainly the approach of the High Court Judge Sir. But its not the approach that I'm urging on this Court.

Gault J Well that's what I'm trying to ascertain is what your principle that you want us to adopt is.

Whiteside I want you to adopt the principle that a fiduciary obligation should only apply in, to use Dr Bean's word, a horizontal relationship where there is an undertaking by the fiduciary to act in the best interests of the beneficiary.

Tipping J Can that undertaking be implicit.

Whiteside Not in my submission. This is really where Mr McIntosh and I part company.

Tipping J Yes.

Whiteside In the vertical relationship, the solicitor-client, clearly it can be implicit. Because it arises out of the essence of that relationship where there is vulnerability on the part of the beneficiary and where the parties are unequal then it can be implicit. But in my submission where you've got a commercial horizontal relationship the Court should say that an implicit undertaking is not sufficient.

Elias CJ But I would have thought that the cases established that the obligation to act in the best interests is one imposed by equity, not a matter of conscious undertaking in all cases.

Whiteside Well it's been articulated in certain of the cases as based on an undertaking that I've referred to in the submissions. It's probably fair.

Elias CJ But is the undertaking, you're saying that the undertaking is one to act in the best interests of the other. In the case of a joint venture it's a common undertaking and equity imposes the obligation to act in the best interests surely.

Whiteside Well there are certain cases where the courts have said it's difficult to articulate these issues and that type of approach has been undertaken.

But the consequence of the fiduciary relationship here is that of course one businessman, the firstnamed appellant, was not longer able to act in his best interests. He was no longer able to act as ordinarily a commercial businessman whose talking about a business prospect with another can act. Namely to always look after in this case his own interests. And that is why I submit that where we're dealing with this type of relationship, it must be an explicit undertaking that's been made by one party which leads to the disappointment and the imposition of the fiduciary obligation.

Blanchard J Is it any the less an undertaking if it's implicit.

Whiteside Well if, sorry if implicit will suffice Sir then of course it wont be any the less. Because equity will say, we're not going to draw a distinction between the type of fiduciary relationship and an implicit. Implicit suffices, it's no worse or no less a … than an explicit undertaking.

Tipping J How do you reconcile the need for an express undertaking with equity acting on the conscience of the person said to owe the duty. Because that would not work.

Whiteside Well ordinarily in the vertical relationship that's right Sir. But the cases have frequently said of course that the fiduciary obligation is different in different factual circumstances. And therefore it's if you like the purest form of fiduciary obligation which always arises in the vertical relationship that is tested by looking at good conscience.

Tipping J But that would virtually rule out any conscience based intervention in horizontal relationships.

Whiteside Unless it flows from an undertaking given by the fiduciary to put aside.

Tipping J An express undertaking.

Whiteside Yes Sir given by the fiduciary to put aside his best interests and now act solely in the interests of the beneficiary.

Gault J Well that's, you keep saying acting in the interests of the beneficiary or the other person. In these horizontal relationships it must be acting in the best interests of the joint venture mustn't it.

Whiteside Yes Sir. But the difficulty with that is here these are commercial parties. And a particularly complicating factor here of course was that the firstnamed appellant owned along with his brother one of the properties that turned out to be the key to the.

Gault J Yes I understand that, the factual situation. But I'm still struggling with the applicable principle here. And it seems to me if you want to draw some distinction between horizontal and vertical and at the same time draw a distinction between commercial and non-commercial

we're getting very complicated when one would have thought that equity focuses on a particular relationship and whether explicit or implicit obligations are imposed upon the conscience of the party.

Whiteside Well I see the force of that Sir. But I do submit that you've got to look at the context and there are different fiduciary obligations that arise in different factual circumstances depending on the nature of the relationship. But I do accept that it can be said that the fiduciary obligation is owed to, if there was, a joint venture. So it's not solely the respondent. But the difficulty then is to articulate the basis of the joint venture.

Elias CJ But isn't it, it just seems to me all of this emphasis on horizontal and vertical overcomplicates matters substantially. Joint ventures are well recognised. They are undertakings to pursue a profit in common. They commonly occur between commercial parties. I'm bound to say that I think in answer to the question put to you by Justice Gault, you're really arguing against the category of joint ventures and the imposition of obligations by equity upon those who undertake joint ventures.

Whiteside No Ma'am I'm not. I'm saying the potential joint venture is the context in which these fiduciary obligations are said to arise. And it's important in my submission to achieve certainty to have a principle basis on which one can say a fiduciary obligation arises. Here you've got two parties well able to look after their own interests. They choose not to reach agreement on a whole range of issues affecting this joint venture. The only basis in my submission in which the equity should say for these parties in this relationship that there is a fiduciary obligation is if it is.

Elias CJ If there is a joint venture.

Whiteside If there is, A if there is joint venture. And B, if the fiduciary has undertaken to act in the best interests of these two parties.

Gault J Well if it's to be explicit you could get joint ventures which are carried right through. And then after successful implementation one just walks away and says nothing explicit. That would be absurd.

Whiteside Well that would probably be a contract with respect Sir. That would be an agreement.

Blanchard J Well not necessarily. Because these types of ventures develop and people go into them on a very very broad framework and gradually as they overcome problems it narrows down and it may not be that you get all the terms sorted out until right at the end. But as Justice Gault said it would be ridiculous if during that process one party could not only walk away, that's one aspect, but could appropriate the fruits of

what's been done on behalf of both of them, maybe by himself, maybe by the other person.

Whiteside Well the answer with respect to that is that it's open to the parties who are operating on an equal footing to sort out their arrangements. To sort out.

Blanchard J But that's not the way things happen in practice. People do trust one another. And there may be an informal allocation of tasks without any specific agreement. It may be simply an understanding but equity has the ability to say that parties are not free simply to walk away and appropriate the fruits. They may be free to walk away before contractual obligation has been formed. But not just to then appropriate the fruits.

Whiteside Well Sir again in my submission it comes back to them being able to. And in the one case where they did have a joint venture of course they did enter into a written agreement.

Blanchard J Mm.

Whiteside Which set out the basis on which they were to operate.

Blanchard J Nothing surprising about that.

Whiteside And indeed they even entered into that before the land involved in that project had been purchased. Before the contract had been completed.

Tipping J Is this your client's essential escape from the findings below that he submits that there is no fiduciary relationship because there has been no such express undertaking as you have referred to.

Whiteside Yes Sir.

Tipping J That's the kernel of his liability appeal.

Whiteside And the fallback position is, if the matter's simply to be dealt with on the facts, and equity's not to be restricted in any way, that this was not a relationship of mutual trust and confidence.

Tipping J On the facts?

Whiteside On the facts.

Tipping J Yes.

Whiteside So that if you're going to take the approach that it's simply a matter of drawing a line, the principle is to draw a line in the sand, that you say these parties have gone so far along the path towards completing this project that they must be said to owe fiduciary obligations or that in

this case the firstnamed appellant owes fiduciary obligations, in my submission on the facts given the very early stages and the lack of any decision or agreement on any essential terms, that it's not appropriate to impose a fiduciary obligation.

Elias CJ Could the matter be put the other way, that it's essential to your argument that there was no joint venture.

Whiteside No Ma'am. In my submission if a joint venture is simply going to arise and I accept there are some cases which seem to support this where two businessmen talk about a project in the loose way that these people did, then there's got to be a further step. It's got to be shown that in fact there was mutual trust and confidence that arose between the parties so that equity has to intervene to protect one of those parties.

Blanchard J I'm not sure I understand that. Are you suggesting that there can be a joint venture but no mutual trust and confidence.

Whiteside Well in my submission yes. Because.

Blanchard J Wouldn't be much of a joint venture would it.

Whiteside Well that's the issue that arises on these facts as it were. Complete absence of any decision as to the basis on which the matter was to proceed, who was to do what, what the limits of authority were, what the position was over expenses that were being incurred. All those, the lack of indicia and the fact that while it's very easy as of course the respondent said in his evidence to say that he simply trusted the firstnamed appellant, there's no evidence here that the firstnamed appellant trusted the respondent or was relying on the respondent.

Gault J Well that gets into the facts but we have a situation where they are in decision about a development, they secure a conditional contract to purchase one site. They put together a proposal which they submit to Harvey Norman. On what basis are they doing this. That each is looking after his own interest?

Whiteside In the absence of any agreement otherwise, that's my submission. That the respondent was certainly hoping to be invited in but he left the firstnamed appellant to do all the work and it was a mammoth task to put this project together. It took nearly.

Gault J That's your assessment of the evidence which doesn't really accord with that of the Judge. But it just seems to me that your insisting upon an agreement in effect before any rights of an equitable nature can arise is too rigid.

Whiteside Well that's my submission in this type of commercial arrangement where businessmen are well able to look after their own interests and protect their own position.

Tipping J I think your submission amounts to this doesn't it, that in this type of arrangement there's no remedy short of contract unless there's been an express undertaking to look after another interest. That's really it in a nutshell I think.

Whiteside That's the principle that I'm urging this Court to adopt.

Keith J Is that really supported by the authorities Mr Whiteside. I was just looking at **Khan v Miah** ([2001] 1 All ER 20) there for instance where the House of Lords just seems to proceed on the basis that nothing express is needed.

Whiteside Well there of course the basis on which the party was denying a partnership was that the business hadn't started. And the House of Lords rightly said well that didn't matter that they hadn't opened for business. They clearly had entered into a partnership.

Elias CJ But the terms weren't sorted out. Because the business hadn't got under way. The test applied by the House of Lords was simply whether a step had been taken pursuant to the venture. And in that case there'd been the acquisition of the lease hadn't there I think.

Whiteside Yes. Well they'd arranged finance. They'd gone a lot further than what these parties had.

Keith J But that's a factual assessment isn't it. And there was no requirement of an explicit agreement in that case.

Elias CJ Can you remind me what volume you find this in.

Whiteside This is in the respondent's bundle.

Keith J Tab 8.

Whiteside Tab 8.

Elias CJ Yes thank you.

Whiteside I think the factual matter that's important here Justice Keith is at page 23 of the report. In Lord Millet's speech, paragraph B. By this time the parties had already spent some 51,000 pounds on the venture. It is common ground that the whole of this expenditure was incurred in the course of their venture and with the agreement and authority of all four parties. The Judge found they held themselves out as partners jointly entered into all these activities together. Agreed upon the division of their tasks. So there was an agreement there on those matters.

Keith J The case is not actually decided in contract is it. Because there's a sharp comment somewhere about avoiding nominalism isn't there.

Tipping J Wasn't this as to when you got from joint venture to partnership.

Keith J Mm.

Tipping J Wasn't that the essential point. There was no doubt that there was a joint venture. The issue was whether it had got as far as partnership.

Whiteside Yes and the Court of Appeal had rather surprisingly held that the critical issue was whether or not the business had opened.

Tipping J I didn't see this case frankly as being particularly illuminating on whether you'd got to a joint venture because that was a given.

Whiteside Yes Sir. Because all these things had already happened.

Tipping J Yes.

Keith J Without explicit agreement I think.

Tipping J Yes, oh absolutely. I don't think the case helps on the appellant, the present appellant on whether there was a joint venture myself, in principle I don't think it really touches upon that.

Whiteside Upon the point.

Tipping J Yes.

Whiteside I agree Sir.

Elias CJ Well except that if we're searching for a test, the test suggested by Lord Millett is whether the parties have actually embarked upon the venture upon which they had agreed. And so one would have thought that the test is had they agreed on the venture to be carried on in common. And that's the issue on which the trial Judge held in this case that they had. And they'd taken steps to further it. The Court of Appeal came to a different assessment on the facts it seems to me.

Whiteside Yes Ma'am.

Elias CJ They said that they hadn't got to the stage of a joint venture. But I would have thought that that really is where the case is centred, whether there was a joint venture. If so, it seems to me that equity supplies the obligations and whether the parties have agreed to undertake obligations of trust in relation to each other is irrelevant because equity supplies that deficiency.

Whiteside Well I think Ma'am you're actually going further than what the Court of Appeal is saying. You're essentially saying, if on the facts there was a joint venture, then that's the end of it.

Elias CJ Yes.

Whiteside The Court of Appeal said that because of the five factors which they elucidated, they were satisfied that this was a relationship of mutual trust and confidence and therefore the fiduciary obligations arose. It might be helpful just to perhaps if I can take the Court to the essential findings both in the High Court judgment. The case that was pleaded by the respondent and I don't need to go through the pleadings, but essentially what was claimed here was what was called a relationship between these two parties. But the case was argued on the basis that there was a partnership. And that was the primary basis for the respondent's claim at the trial but his fallback position was that if it was not a partnership then the relationship was such as to give rise to the fiduciary obligations. Now it's paragraph 47 to 50, page 59 of volume 1 of the white volume.

Paragraph 47, the Judge says, having held that they were joint ventures and of course he didn't explicitly say that earlier but that statement is really derived from paragraph 29 at page 50 of the judgment where the heading appears in the judgment Were Mr Fay and Mr Chirnside joint ventures? Despite having a good deal of respect for Mr Chirnside, I think the answer to this question is relatively straightforward. And then the Judge analyses the facts and then looks at the legal characteristics of the relationship. He says at paragraph 47, having held they were joint ventures it remains for me to characterise in legal terms the relationship. So that the Judge certainly didn't take the Chief Justice's point that its simply sufficient to say they were joint ventures, therefore there must be fiduciary obligations and a fiduciary duty.

But he went on at paragraph 50 or paragraph 49, I'm of the view that they had performed enough to be fairly regarded as engaged in a joint venture associated with the Harvey Norman project. I do not think it matters that Fay was excluded before all aspects crystallised. That said, I hesitate to conclude that Messrs Fay and Chirnside were partners in the legal sense. This is primarily because it was never intended by them that the Harvey Norman project be carried into fruition in their joint names. Rather it was their intention once the deal was crystallised, the joint venture vehicle would be formed which would settle the contract and complete the development.

Elias CJ This is looking at what the joint venture was. It's not questioning the imposition of equitable obligations if it is a joint venture. It's simply trying to identify what the joint venture was.

Whiteside Well in paragraph 50 he's saying that the joint venture vehicle would no doubt involve perhaps family trusts and the like.

Elias CJ Yes.

Whiteside So that's right Ma'am. And then at 51 he goes on, this is something of a technical quibble and is not inconsistent with a venture generally being regarded as a joint venture with each of the parties owing the usual fiduciary obligations to each other. And that probably is your point Ma'am. And he cites Marr (**Marr v Arabco** (1987) 1 NZBLC 102).

Now the Court of Appeal decision is at, on this point, is at page 99 at paragraph 42. At common law there's no separate legal concept of a joint venture. 43, it's a commercial term used to describe two or more persons associating together to a commercial end. And in New Zealand law the persons associated in that venture may have their relationship regulated by contract. They may be partners. They have a joint venture company. Although associating in some degree, there may be no formal legal relationship between them at all. Mr Whiteside's submissions fall to be considered under two heads. The facts, and whether any legally cognisable relationship had come into being between these two men. He did not accept there was here a commercial joint venture, let alone a legally cognisable relationship. Mr Whiteside's arguments on the facts was that what the Judge himself describes as a loose arrangement was so loose it did not even deserve the commercial appellation the Judge gave to it. The short answer under this head is 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.

Elias CJ I'm sorry, what paragraph are you at.

Whiteside 45, page 99.

Elias CJ Oh yes.

Whiteside We're not disposed to interfere with that inference found as it was on findings of primary fact. In a significant measure those findings involve findings of credibility. The Judge cast a critical eye over the evidence of both. So much so that Mr Fay complained 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 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's not been shown that an earlier commercial joint venture existed. And then he deals with the issue that Mr, then the Court deals with the issue that Mr Chirnside claimed that nothing had been resolved and that he had told Mr Fay that.

And at paragraph 47, turning to the law, in our view the fact that there is in a commercial sense a joint enterprise but no joint venture agreement yet entered into, is not fatal to a claim that there may nevertheless have been a fiduciary relationship at the relevant time. So

the Court of Appeal said effectively there was here a joint enterprise. And for the reasons articulated at paragraph 50, the Court said we do not accept Mr Whiteside's argument that there cannot or should not ever be a fiduciary relationship between parties negotiating towards a joint venture.

Elias CJ Well that's very strange isn't it because they're said that there was a commercial joint venture and then they've slipped back into saying that the parties were negotiating towards a joint venture.

Tipping J I think they must have meant in a fully contractually flowered form.

Elias CJ Yes, yes.

Keith J 47 talks about that. No joint venture agreement.

Elias CJ Well I've got question marks beside 47.

Tipping J Yes quite.

Keith J Well agreement there sounds like a formal agreement.

Elias CJ Yes it does.

Tipping J The terminology here is a little slippery I think is part of the problem.

Blanchard J A few lines down they again use the phrase, an evolving joint venture.

Keith J Mm.

Blanchard J Which I would have read as meaning that there's already a rudimentary joint venture but it's going to be refined.

Whiteside Yes Sir I accept that. They're basically saying well there's hardly an agreement here but there were decisions. And therefore that's sufficient because they were on a joint enterprise. And then they say for many years now, at paragraph 50, New Zealand law has accepted in principle that whilst there are still, there are some well defined and long established categories of fiduciary's, a fiduciary duty may nevertheless be raised upon the special facts of a given case. There's no reason in principle why that doctrine should not apply to an evolving joint venture. The real question and matter of law is what in principle is required to be established for the fiduciary doctrine to be invoked. And what is important here is less the particular verbal formulae which is adopted than a proper appreciation of the purposes which fiduciary law serves. Fiduciary law is not concerned with private ordering, that is it's not the function of fiduciary law to mediate between the various interests of the parties who are dealing with each other. That's the contract. Fiduciary law serves to support the integrity and utility of relationships in which the role of one party is

perceived to be the service of the interests of the other. It does so by imposing a specific duty of loyalty.

Tipping J I have to say Mr Whiteside that I have real difficulties conceptually with the apparent thought here. The first sentence in that paragraph sounds rather neat. But actually, I know it's explained by the second sentence, but what does it actually mean. It seems to suggest that all relationships between private parties to look after their various interests have to be contractual. Well that can't be right.

Whiteside That's right Sir.

Tipping J With great respect I suspect that they've put that rather high. And although it may not have affected the ultimate conclusion, it doesn't help you because I would have thought that. they're going to some distance your way there, but I rather think they've gone too far your way.

Whiteside Well I certainly don't argue that.

Tipping J No.

Whiteside The only claim that the plaintiff could have brought in this case was in contract and because there wasn't a contract, that's the end of it. Because fiduciary law is not involved with private ordering. So I agree.

Tipping J Yes.

Whiteside And then there's a reference both to the Canadian case of Hodgkin v Sims and the Court of Appeal in Bristol and **West Building Soc v Mothew** ([1998] Ch 1) and paragraph 55, at page 102, we do not find it necessary for present purposes to go beyond this concise and authoritative exposn of the basis of this doctrine. And that's from the judgment of the PC of Justice Henry that's at paragraph 54. The issue with respect to liability in this case is therefore, was the relationship between Mr Fay and Mr Chirnside at the relevant times such that they were obliged to act towards each other within appropriate bounds of loyalty and hence good faith. And we think the answer to this question is yes.

Tipping J Mr Whiteside before you move off this page. Is the first sentence of Lord Justice Millett's extract from Mothew some inspiration for your high level submission.

Whiteside Yes it is.

Tipping J I thought it probably was. Well are you going to develop that at all because it seems to me at least first sight that House of Lords isn't

confining it to someone who has undertaken. He is just saying that if someone had undertaken, they are a fiduciary.

Whiteside Well it's been touched on in two or three of the cases which I set out at s.5 of my submissions on page 9.

Tipping J Well if you're going to come to it that's fine. I just didn't want that to go past without some consideration. Because it's certainly my understanding of it is not that it is an essential ingredient of, but simply that if it's there it indicates a fiduciary or can indicate a fiduciary relationship.

Keith J Well that's supported by the, this is not intended to be an exhaustive list in the sentence isn't it.

Tipping J Quite, quite.

Elias CJ And.

Whiteside But that with respect relates to the duties, that statement about the core list.

Tipping J Well.

Whiteside The consequences of the fiduciary obligation, what the duties are.

Tipping J But with respect I would have thought it was wrong to read Lord Justice Millett as saying that it is a necessary ingred of a fiduciary relationship that the fiduciary has undertaken.

Gault J Because he's not limiting it to horizontal arrangements is he.

Elias CJ No, no.

Whiteside No well patently in the vertical relationship ordinarily either expressly or by implication the fiduciary has undertaken.

Elias CJ It's a long since I've really got into the theory of these things. But my recollection is that fiduciary duties arise as a matter of special facts in many cases and this is a stmt of principle directed at special facts, fiduciary duties. But equity has long recognised specific categories of relationship in which fiduciary duties are imposed. And joint ventures are one of them. So if it's a joint venture it seems to me, and this may be very simplistic, but I would appreciate your help on it. If it's a joint venture it seems to me that's the end of the matter. Fiduciary duties are imposed. If they haven't got to a joint venture, then there may be some equitable obligations which are imposed such as for example to protect confidentiality, if they hadn't got to that point. But I would have thought that things here turn very much on the question of fact found against you by the trial Judge but I think slightly fudged by the Court

of Appeal that there was a joint venture. If there was a joint venture, do you still stay, do you, that there has to be an additional assumption of fiduciary responsibility.

Whiteside Well it depends on how one defines joint venture. There can be no doubt for instance in the partnership situation that there are fiduciary obligations. There would be certain categories of a concluded joint venture which was so close to a partnership as to almost amount to a partnership where fiduciary obligations would clearly arise. But I guess it does come back to the facts here, I've just talked about Justice Young's judgment, he doesn't really articulate the basis on which he finds that there was a joint venture. And so in my submission the analysis and the view that the Court of Appeal reached is the correct one, that the most that can be said is that they were evolving towards a joint venture. That they were in discussions. That they were talking to each other. But because so little had been agreed, in my submission one cannot characterise this properly as a joint venture.

Gault J That is to focus upon the discussions between them and to ignore the actions that occurred. What they did.

Whiteside Well I take your honour's point. What they did was they had some decisions, that they exchanged some feasibility studies which were really just figures, there were no details about the development as it were, the actual physical work that had to be done, and they were largely provided by the firstnamed appellant. There were the two letters written to the tenants. And there were some phone calls made by the respondent to Harvey Norman. Those are the actions that were taken which could be said to relate to an evolving joint enterprise. But balanced against all that are the many matters which I set out in my submission which they hadn't discussed. And which they hadn't agreed upon.

Keith J But the trial Judge does deal doesn't he under that heading that you take us to Mr Whiteside at the beg of paragraph 29, over the next almost 20 paragraphs, I think 29 through to 46, he runs through evidence about the underlying relationship.

Whiteside Yes that's right.

Keith J And comes to a conclusion which he indicates in 29 so that there are a lot of actions there aren't there, as well as the decisions you mentioned.

Whiteside Well there are certainly a lot of actions by the firstnamed appellant.

Keith J Mm.

Whiteside But in terms of what the respondent did it is essentially in my submission encapsulated in what I've put to Justice Gault in response to his question.

Keith J Mm.

Elias CJ But you can have a joint venture where one party is to provide finance. It just depends what the nature of the division of responsibilities is. It just doesn't seem to me profitable to look at what was done by your client as demonstrating that there wasn't a joint venture here. I mean it seemed to me reading the evidence there were in fact a number of other matters that could have been relied upon by the trial Judge, in particular the fact of the conditional contract, known to both, the extension of time and so on. But these are questions of fact aren't they.

Whiteside Well it's certainly a question of fact if my primary submission is not going to be accepted as to whether, as I urge, this Court to make a finding that in fact there wasn't a relationship of mutual trust and confidence and that they hadn't moved sufficiently along the path in this evolving joint enterprise to justify, given it is a horizontal relationship, the intervention of equity.

Gault J Don't you accept that it's a matter of degree whether they've moved sufficiently along the path. It seems to be recognised by the trial Judge and he found as a fact they had. Now where can you go from there.

Whiteside Well I accept of course I'm faced with the findings of the trial Judge in that regard. But it's still in my submission open to this Court to look at what had happened on the facts and say, as a matter of principle, they hadn't moved sufficiently far along this evolving joint enterprise.

Gault J No, you're asking us to say as a matter of fact are you.

Whiteside Yes. I'm asking this Court to make a finding that this wasn't a relationship of mutual trust and confidence and that on the facts they hadn't moved sufficiently far.

Gault J But you accept there's a point at which they have reached a sufficient distance along the track as to give rise to obligations.

Whiteside If my primary submission.

Gault J If your primary submission fails.

Whiteside Yes Sir. Yes Sir because if this Court's going to say, well we're not going to hide bound equity, equity must achieve what's fair on the facts, then despite my submission that it's undesirable in a commercial relationship where the parties have the ability to contract and sort these things out in advance, then obviously it becomes a matter of fact as to whether a fiduciary obligation has arisen.

Tipping J Well haven't we got nearly concurrent findings of fact on that. I know there's a degree of disharmony if you like to some extent between the

approach of the trial Judge and the approach of the Court of Appeal but they both seemed to think that it had gone far enough to call it in broad terms a joint venture.

Whiteside Well that's a matter of looking at, it's getting into a conflict here as to which judgment's going to be given the primary weight, but I criticise in my submissions the five factors which I was about to come to in review the Court of Appeal, the issues that they relied on to say sufficiently had occurred here.

Tipping J But maybe through different routes but in the end we've got a finding haven't we in both courts that there was a joint venture. Although the Court of Appeal's language is not entirely consistent.

Whiteside Yes Sir. I certainly take issue with these five factors that appear in the Court of Appeal's judgment as the basis on which they held sufficient had occurred. In terms of the trial Judge's findings of course, he, as Justice Keith has pointed out, does an extensive review of the facts and he sets out the factors that point both ways and in the end in my submission it can be fairly said he didn't find it a very easy decision on the facts. That he found that finely balanced, I think that's a fair interpretation of the judgment. And I guess, in my submission, to that extent it would be open to this Court to say, well the trial Judge had difficulty, it's open to us to look at the evidence again and reach a view as to whether sufficient had occurred her to justify the imposition of a fiduciary obligation.

Keith J Paragraph 29 he says he found it relatively straightforward but you're saying that by the time you get through to paragraph 46 there's been a lot of "on the one hand and on the other hand".

Whiteside Well there clearly is.

Keith J Yes.

Whiteside And he articulates strong pointers.

Keith J Mm, mm.

Whiteside Which go the other way.

Keith J Mm.

Tipping J I personally, the question I got Mr Whiteside which may or may not be something you would wish to comment on, was that the Judge was looking for something rather too precise to indicate a joint venture. That he was sort of almost trespassing into the partnership concept. And I don't make this as a criticism because I think he examined it very carefully. But I just wonder whether the threshold for a joint venture wasn't implicitly being set pretty high by the trial Judge.

Whiteside Well that's probably a reflection of the way the plaintiff's case was put. Because as I indicated it was primarily based on partnership.

Tipping J Mm. I think that may have.

Whiteside And that was a case which I strongly refuted.

Tipping J And this reference to Kia's case, Khan v Miah or whatever the name of it, seems too to be a reflection of the partnership dimension of the argument.

Whiteside Well it was very strongly relied on by my learned friend, it was the primary case that he relied on to support the imposition of fiduciary obligation here.

Tipping J Mm. But I have to say that as an impression I think that that may have infected the trial judge's approach to joint ventures. Because it doesn't take much to set up a joint venture does it. There has to be some sort of broad consensus as to where you're jointly heading. But once you've got implicit agreement as to where you're heading and one or two steps in that direction, and it may be that there was more here, I would have thought you could fairly say you've got a joint venture. Now this is quite different from your point as to whether equity should intervene. But you have really got a joint venture haven't you, from close to the beginning, very close to the beginning. Consensus and at least some focus on what the project is.

Whiteside Well again the evolving joint enterprise was the term that the Court of Appeal used.

Tipping J You have two people implicitly agreeing to work together to some joint end.

Whiteside On a pretty unarticulated basis.

Tipping J Oh yes.

Whiteside In terms of who's going to do what and what are the limits of authority. Who are we going to engage as the consultants. How are they going to be paid. And who's going to do all the work.

Tipping J But in fact this one had gone as far as a conditional at last contract hadn't it before the acquisition of the main substance of the joint venture property.

Whiteside Yes Sir, with a personal guarantee being given by the firstnamed appellant's company.

Tipping J Absolutely so they'd gone, it's not as if they were just chatting about it in the pub.

Whiteside No, Sir.

Tipping J I can understand one hesitating to intervene in that situation. But Here it seems with respect to the courts below, that they had gone quite some distance. I mean you're saying, it seems to me that what your client is really saying is it hadn't got enough specificity in it.

Whiteside To label it as a joint venture yes.

Tipping J Yes. Whereas it needs specificity for a contract. But I just wonder whether we're not looking for a sort of over-refinement in relation to. Because this is why we need equity because there wasn't a contract.

Whiteside Well again it comes back.

Tipping J And I know that's begging the question.

Whiteside It comes back to the social utility issue again. Why does equity need, the point I try to develop under paragraph 8, public policy reasons for the imposition of fiduciary duty. Why does equity need to intervene. What's the social utility here that equity needs to intervene to protect. These people are experienced businessmen well able to articulate and reach agreement as to the basis on which they're going to investigate projects.

Elias CJ That's an argument against equity.

Gault J That's moving to even higher ground that you can only have contract.

Whiteside No I'm not saying you, well in a collaborative relationship you can only have contract unless there's an agreement to, or undertaking short of contract, to act in the bests interests of another party.

Tipping J Equity is needed because the rigour of the law is not yet satisfied. The law would say, no contract, go away. Equity says, no, that's too harsh. The chances that we'll intervene if, in all good conscience, the party with the fiduciary, alleged fiduciary duty should be accountable. Now that's all very trite. But I just wonder whether we aren't just looking for too much precision before we allow equity to intervene. Because as I say you don't need it if there's a contract. You need it if the conscience of someone in the position of your client should answer a demand for compensation.

Whiteside Yes, and weighing in that is whether or not the parties were able to protect their position. Weighing in that balance, coupled in my submission with whether or not there's an undertaking to act. But if that's not acceptable, then on these particular facts, had this

relationship developed to require equity's intervention as a matter of fairness.

Tipping J Yes well on the facts, both courts below, albeit for differing reasons, have held against your client. There'd have to be something pretty powerful wouldn't there to displace that if I can put it like that.

Whiteside Well if I can just take the Court now to the reasons that the Court of Appeal articulated for finding that they were satisfied of the requirement to impose the fiduciary duty.

It's at paragraph 57. Which is page 103. Perhaps at 56. The Court accepted that the analysis in the High Court judgment on the fiduciary point was not extensive but it's plain enough the Judge did consider on the facts there was here a fiduciary obligation. In our view the relevant factors can conveniently be ordered under 5 heads. First, the Harvey Norman project was not a one off dealing between these two men. They had already mounted one agreed joint venture and their relationship was still ongoing. Although in Mr Chirnside's eyes this earlier venture had not been entirely successful, it seems that on the evidence Mr Chirnside was not entirely straightforward about that. But in any event he'd not terminated the relationship. They mean by that that he'd not articulated to the respondent his concerns. Secondly, each man had something to contribute to the Harvey Norman venture. Mr Fay more in terms of contracts and money and knowledge of Dunedin. Now with respect that somewhat overstated the position because the first named appellant had also been a resident of Dunedin since birth and he'd been for many years in business in Dunedin in the property development field. Mr Fay certainly was a real estate agent. And there was a finding of the trial Judge that Mr Fay had more in terms of money, that he was able to contribute more in terms of money. Mr Chirnside in the form of detailed work. The point is that each many was looking for something from the other which gave rise to a degree of mutuality. And thirdly each in fact contributed to the venture what was understood to be their part so far as it had advanced. And fourthly the evidence was that but for the contributions from each side the venture would not have reached the point where it could be concluded. Fifthly there was common ground that there was here a relationship of confidence which would have been independently actionable if breached.

Tipping J The use of this word confidence in two senses. What it really means is confidentiality does it.

Whiteside Yes, yes, confidential information.

Tipping J Yeah.

Whiteside And then at paragraph 50, these factors in combination are such that they lead to 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.

Now just dealing with the five factors at paragraph 57, the second third and fourth factors really are in my submission closely linked. The first factor I cannot dispute, there was the CRT venture. There was certainly evidence from the first named appellant about his disappointment with the respondent's efforts in that. This project was still ongoing at the time that the respondent moved from Dunedin to Christchurch in the middle of 1999 which was actually before the contract with Lion Nathan Ltd was signed. Now in terms of the contributions to the project and the fact that they were each contributing to the venture what was understood to be their party, there was no evidence about a discretion as to how they were going to investigate these projects. How they were going to allocate responsibilities. How they were going to sort out division of tasks.

Tipping J Is that not explicable because they were just carrying on from an earlier venture where presumably each did various things.

Whiteside On the earlier venture, the one they did do, the evidence from the first named appellant was that he had invited in the respondent.

Tipping J Yes.

Whiteside There were three parties to that venture, Combined Rural Traders, for whom a purpose built retail outlet to service their farming clients was established in Dunedin. But it also involved the sale of the property from which CRT were already operating and some other properties, adjoining properties that CRT owned. And the reason that the respondent was involved in that project was because of his skills as a land agent and his ability to sell those properties. And indeed if we look at the agreement, there's, I probably don't need to take the Court to it, but there was provision for a fee to be paid to the respondent for the sale of these properties and there was a fee to be paid to the first named appellant for his project management involvement in supervising the construction of this new building.

So, sorry I've just lost my train, point in relation to the point you made.

Tipping J What I was inquiring Mr Whiteside was the absence of evidence about discussions as to allocation of tasks might have derived from the fact that they had been involved in this previous venture and sort of in effect knew what each would likely be doing.

Whiteside Well that wasn't claimed by the respondent in his evidence.

Tipping J The Court of Appeal's point as I read it was simply that there was a sort of combination of skills which gave them together greater force than if they were acting singly. This was the so-called degree of mutuality as I read what the Court was endeavouring to say.

Whiteside Well with respect the evidence didn't support that.

Tipping J Mm.

Whiteside Because the fact is, looked at objectively, almost single-handedly the first named appellant carried out this project. Certainly there were telephone calls made to Harvey Norman. But all the key negotiations with Harvey Norman were carried out by the first named appellant. After the letter that was written in Nov 1999 all the follow up work was done by the first named appellant. The critical, the starting point was that in January 2000 Mr Champion who was based in Sydney came over to inspect the site. The respondent was nowhere to be seen when that site visit took place. All the discussions and the visit which took place in Dunedin were conducted by the first named appellant. And then info was supplied by the first named appellant to Harvey Norman in Sydney. And in April 2000 the position was reached where Harvey Norman indicated that the area allocated was insufficient and they indicated that they were no longer interested. So at that point the first named appellant had to reconfigure the space that was to be taken up by Harvey Norman. And he had to pursue them for 3 months. In fact he ended up in the beginning of July giving them an ultimatum that unless they agreed to sign the agreement to lease which they'd had for some time, by the 7th of July.

Gault J Didn't I read somewhere there was a finding by the Judge that after they'd indicated disinterest, their interest was rekindled by Mr Fay.

Whiteside There had been an approach to Harvey Norman by a previous property developer, Mr clear in Dunedin who had an option on the Lion Nathan site and who had approached Harvey Norman. And initially that's right. In one of these telephone discussions Harvey Norman, not Mr champion who did all the negotiations but a person in Auckland, had indicated they'd looked at the site and they were not interested. And Mr Fay did mention that this development that was going to be done involved the use of the neighbouring property. But the critical point is after the letter was written it took considerable efforts, solely carried out by the first named appellant without any reference to the respondent over 6 months before the agreement to lease was completed.

Blanchard J On what basis was Mr Fay talking to Harvey Norman.

Whiteside He was talking to Harvey Norman, (a) he was a real estate agent.

Blanchard J Did he have an authority.

Whiteside He didn't have an authority signed.

Blanchard J Are you suggesting that he was doing all this in order to earn real estate commission.

Whiteside Well that was one possibility. The other possibility was that he would have been invited in to participate if the venture was able to proceed in terms of providing finance and becoming an equity shareholder.

Just in terms of resources of course, what Mr Fay said was that there were practical benefits in his dealing with Mr Chirnside because he no longer had any staff working for him and that Mr Chirnside had his own office and part time typist, so he had an established administrative base which he thought we could both use if they were in business together. So there's an element of opportunism here in this. There's no discussions formulated in the evidence that Mr Fay gave, the respondent gave, showing any meaningful discussions as to the basis on which they should proceed.

Gault J But against that one has to bear in mind the reference in the correspondence from your client inviting him to get in touch with him or Mr Fay.

Whiteside Yes Sir, I accept.

Gault J That reflects some understanding of the relationship between them.

Whiteside Yes that letter was much debated in the evidence. I accept the force of that Sir that that reference is in the letters. It was in both letters that were sent both to Spotlight and to Harvey Norman. But that really was following up the initial approach that the respondent had made. But the fact still was that all the negotiations from that point were not conducted by the respondent as the.

Gault J How relevant is that if it is reflected in the correspondence that they're working together, but subsequently one of them carries out negotiations. I mean how does that help you.

Whiteside Well it does with respect Sir because the finding of the Court is that the first named appellant was looking to the respondent to use his skills. That's the finding in this paragraph of the judgment. And that he had something to contribute in terms of contracts. And each contributed to the venture what was understood to be their part. Now the respondent constantly claimed that his part was to secure the tenants. But that in fact is not what happened. And that's the relevance of it Sir. And in my submission the evidence does not support the fourth proposition that but for the contributions from each side the venture would not have reached the point where it could be concluded. This was a ship that was being steered entirely over a long period of time and over

difficult negotiations by the first named appellant. And you get some evidence of that in the hours that, the schedule of attendance's by the first named appellant which is in the blue volume, volume 8 at pages 1,002 to 1,003. This was a significant commercial development of some complexity conducted over a lengthy period of time, single handedly by the first named appellant.

Elias CJ Couldn't this be, the reference the venture would not have reached the point where it could be concluded, the turning point in terms of this going forward was the securing of the head tenancy and that's when the agreement was made unconditional and isn't that the point that's critical here.

Whiteside Ma'am you're certainly right, until the tenant was secured by the first named appellant the agreement, the venture couldn't get off the ground. And it was critical. But it wasn't any effort on the part of the respondent.

Elias CJ But I don't see that that comes into it really. The fact is that the two of, that the conditional agreement was able to be translated into a firm agreement, your client was then or considered himself free to look to alternative financing to carry on the project in the knowledge that the respondent was available to provide finance. In other words the equivalence of effort has never been a requirement of joint ventures.

Whiteside Well in the absence of agreement, in my respectful submission it would normally be implied.

Elias CJ What, sorry. That there'll be equivalent effort?

Whiteside Equivalent effort. Or agreement that compensation will be provided on an agreed basis. But that wasn't talked about either. The respondent never said look, you're doing all this effort, you're doing hundreds of hours extra effort. We need to have an arrangement as to the basis on which you're to be compensated for that. It was just never raised.

Elias CJ I'm not sure that that, I'm not sure on what basis you say that that's so significant in a joint venture arrangement where the critical aspect was the ability to finance matters once the tenant was secured, once they firmed up on the contract. Why wasn't just the fact of having somebody who was willing to participate sufficient to enable the venture to continue.

Whiteside Well the difficulty with that Ma'am is that there was no community by the respondent that he had finance arranged. He had been to his banker and he had certain discussions and he'd secured, he had in place an arrangement from the bank to provide sufficient funds for half of the deposit. But that wasn't communicated or discussed with the first named appellant. He didn't in fact have any arrangements in place for the equity funding required to complete the development.

Elias CJ But there was a discretion that your client and his family didn't think that they could provide their share of the finance.

But that.

Elias CJ So finance was being discussed Mr Whiteside.

Whiteside Yes the response to that Ma'am was that he, the respondent, would see what he could do.

Elias CJ Yes.

Whiteside It was a very general discretion and there was no comeback, there was no response from the respondent, look I've been to the bank, I've got 1.5 million dollars in place to become an equity partner in this project.

Elias CJ Well maybe there was no concern that he couldn't turn up with the money. And that's the basis upon which the venture had gone ahead.

Whiteside Well in my submission one would expect with commercial business people like this if they had a discretion when the appellant raised the fact that he was approaching Annis and Lloyd and the respondent indicated he wasn't happy with Annis and Lloyd, he'd had a falling out with them and he didn't want them involved in this project and that he might be able to do some more, that the respondent if his role was the provision of finance while all the work was done.

Elias CJ No his share of the finance which seems to have proceeded on the basis of a 50 percent contribution.

Whiteside That was what he approached the bank about yes.

Elias CJ Mm.

Whiteside One would have expected the respondent to come back and say, I've got the finance arranged. Further to the discretion we've had, I am able to provide more money. This is what I've arranged. That didn't happen.

Elias CJ Well there wasn't the opportunity was there.

Whiteside There was the opportunity following the discretion in April for the respondent to go to his bank and sort out whatever finance he could.

Tipping J Was there not also an obligation on this thesis on your client to inquire before he cut Mr Fay loose.

Whiteside Well no, in my submission, because of course his view was that he wasn't under an obligation.

Tipping J Well of course but this is on the hypothesis. I know that was his view. But I'm putting to you that that was a somewhat bold view I would have thought in view of the relationship that they'd had over a period of time.

Whiteside Well in my submission the thesis is that if the real contribution that was to be made by the respondent here was finance, then the obligation and the expectation would be that the respondent would fully informed the first named appellant as to where he was in reliance to finance.

Tipping J Well that's the ideal I suppose but if you're working together as these men were on any view of it, working at least in some sort of joint way towards an end, you'd have thought that one wouldn't cut the other loose without some say so.

Whiteside Well with respondent that's just the point.

Tipping J I'm only putting this in the pot on the basis that you're making quite a lot of capital out of the fact that Mr Fay didn't come to Mr Chirnside and say where he was up to. I'm just saying, well it could equally be said that Mr Chirnside didn't inquire.

Whiteside Yes but if the hypothesis is that it was the respondent's contribution was going to be finance, it's my submission that the obligation was on the respondent to keep the first named appellant fully informed and one would have thought also if that was the basis for the understanding, the first named appellant would have been inquiring about the finance. But of course that wasn't really the case of either party.

Tipping J Well the Judge wasn't terribly impressed with certain aspects of both sides' evidence was he. He had to do the best he can with witnesses who he had certain difficulties with in those respects.

Whiteside What really seemed to influence the trial Judge as much as anything was the lack of frankness I expect is a fair way of, or how the Judge saw it, when it was clear that the project was going to proceed. And the correspondence and the delay in responding indicating that the first named appellant's view was that he had no obligation, that the matter was always to be dealt with when it was clear the contract was going to proceed and it was only then that there would be a discretion about the vehicle and who the parties were going to be who were going to proceed for this development. But Your Honour's right, that he was highly critical, the trial Judge was highly critical of the respondent's evidence, this proneness to exaggeration he described it in his judgment.

Tipping J Well perhaps.

Elias CJ Alright, we'll take the morning adjournment now thank you.

Court adjourns 11.36 am
Court resumes 11.57 am

Elias CJ Yes Mr Whiteside.

Whiteside Thank you Ma'am. Just on this issue of finance that we were talking about before the break, I make the submission that if in fact the understanding between these parties was that the respondent's contribution was to be by way of finance, one would have expected the respondent to have been contributing to the expenses and providing finance while this project was investigated.

Blanchard J Was he asked.

Whiteside No he wasn't asked. But that shows.

Blanchard J But people in these situations often don't give much thought to what expenses are being incurred or prefer to wait to be asked.

Whiteside Yes but this was a significant project which went on for many months before it came to fruition where the respondent was aware that a number of professional people were being instructed and had to provide services to make the project come to fruition. Of course there was a philosophical difference between the parties about this. There'd been a disagreement on the CRT project because the respondent's approach to professional fees had been to try and get them deferred or ask them not to send any bills until it was seen whether or not.

Blanchard J We've all encountered clients like that.

Whiteside Yes but of course the approach of the firstnamed appellant was, this was a small town. He was in the business of property development. He was reliant on these professional people for services in any given project and therefore they had to be treated on a proper professional basis.

Blanchard J But Mr Fay didn't ever refuse to contribute to expenses.

Whiteside No Sir. That's right, yes.

Blanchard J He was just never given the opportunity.

Whiteside No but he presumably knew, and accepted this in evidence, that, well no his approach when asked why didn't you raise the issue about professional fees being incurred and whether you should be contributing was, well I simply assumed they would be doing it on the basis that if the project didn't come to anything, no fees would be charged. Now in my submission that was unrealistic given the nature

of this project. And the number of professional persons who were engaged.

Gault J Mr Whiteside, the Judge seems to have placed some considerable weight on what he saw as prevarication by your client and what do you say about the finding to that effect and its impact on the case bearing in mind it would seem to be a pretty strong indication of how your client perceived the relationship if it were necessary to behave as he was found to have done.

Whiteside Well Sir with respect human beings react differently in situations like this. My response would be obviously that the firstnamed appellant did feel uncomfortable about the situation.

Elias CJ Why. Why on your analysis.

Whiteside Why on my analysis? Because it might be thought that he should have told the respondent what he thought about him and what he thought about whether he should participate in this joint venture or be able to participate in this joint venture or possible joint venture, in this project, at an earlier stage. The letter that he wrote clearly sets out his position, it's quite unequivocal as to how he felt about the situation. That there was no agreement and that.

Elias CJ The letter was written, what about more than a month wasn't it after the dye had been caste.

Whiteside Well it was actually a wee bit later than that.

Elias CJ Was it?

Whiteside There were initially some.

Elias CJ It was in November wasn't it.

Whiteside There were initially some telephone discussions. And then correspondence. It's volume 8.

TP Is it page 48?

Whiteside No, volume 8.

Gault J The telephone discussions were the prevarication I was talking about. The telephone discussions were found to constitute prevarication weren't they. And given that finding, doesn't it say something about how your client perceived the relationship.

Whiteside No Sir, he took legal advice.

Gault J Well I understand he took legal advice. But he'd prevaricated and was found to have done.

Whiteside Yes Sir. But the answer to that is that maybe he did fell uncomfortable, well the answer I've already given. He felt uncomfortable that he had not earlier.

Gault J Well is it not open to a Judge to infer from that discomfort there was an understanding that the relationship perhaps was a little closer than he subsequently maintained it was.

Whiteside Well that thesis in my submission would be sound if all people reacted in a similar fashion in a situation like this. People do react differently.

Gault J Well we're talking about an inference the Judge drew and it seems to me that it was an inference that was open to him to draw.

Whiteside Well the answer to that I submit is that while no doubt any of us in a similar situation would react by immediately responding and setting out the position, this firstnamed appellant decided that he wanted to take legal advice and ascertain what his rights were. Whether in fact there was a partnership, which was what was claimed of course.

Elias CJ Well there's plenty of authority to say that joint ventures are partners for the purpose of the venture. So I'm not sure the significance of the language is as important as all that.

Whiteside No. Getting back to Justice Gault's question, the answer really is that he chose and in my submission he was entitled to choose, to take time to respond and take legal advice and that in those situations one shouldn't draw an adverse inference and that it was more important to look at what happened up until that point in time to ascertain whether or not the fiduciary obligation should be owed. It comes back really to the passage I opened up with from Lord Mustall. That no doubt he had disappointed the respondent. And maybe he felt bad about that. But that doesn't mean that he had a fiduciary obligation and that he'd breached a fiduciary obligation.

Gault J Thank you.

Whiteside Now just on the issue of contributions that they each made to the project and the issue I was taking with paragraph57 of the Court of Appeal's judgment. Can I take you to the trial Judge's finding on these issues of the respective contributions at paras 43 and 45. paragraph43 on page 57, item 1 in relation to the points that have been raised against fiduciary obligation. The first point that the Judge made was that Mr Fay was not a details person whereas Mr Chirnside is. It's not surprising in detailed negotiations that that is the so-called area of expertise claimed by the respondent, to negotiate with tenants, were left to Mr Chirnside and that Mr Fay did not involve himself in these

negotiations. If I was involved in a property venture with Mr Chirnside I would be content to leave the details to him. If I was involved in a property development venture with Mr Fay, I would wish to attend to the details myself. So here's a finding about the skills that the respondent had to contribute to this venture which the Court of Appeal said was one of the factors that leads to a finding of mutual trust and confidence.

Gault J I wonder if you're misreading what the Court of Appeal said. Mr Fay more in terms of contacts, money and knowledge. Not contracts.

Whiteside Well the third finding is that each contributed to the venture what was understood to be their part. Well the case of the firstnamed appellant of course was that there was no understanding because these matters were never discussed. But the respondent's claim was that he was there to negotiate and secure the tenants. That was his role. And here we have an express finding by the trial Judge that that's not what happened and it's not surprising because the respondent didn't have the skills to attend to that function. And again it's part of the fourth point, that but for the contribution from each side the venture would not have reached the point. Again the respondent's alleged claimed skill and role is not supported by the trial judge's finding.

Para 45 at page 58 of the trial Judge's judgment Mr Fay was in many respects an irritating and unsatisfactory witness. He was not good on dates and times. He had an exaggerated and indeed overblind view of his own ability and the significance of his role in the Harvey Norman project. He was indeed generally prone to exaggeration. So again it conflicts with the finding that the Court of Appeal made that here they each had their own skills and they had their own roles to play. Findings in my submission that are not supported by what the trial Judge found.

Now if I can turn to the principle approach that I urge the Court to adopt here of basing the fiduciary obligation on an undertaking. Can I just refer you to my submissions at paragraph4.9 on page 8 of the submissions where Justice Wilson noted in Frame v Smith ((1987) 42 DLR (4^{th}) 81 (SCC)) an extension of the fiduciary obligations to new categories of relationship presupposes the existence of an underlying principle which governs the imposition of fiduciary obligation. The failure to identify an apply a generally fiduciary principle has resulted in the Courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite the oft repeated declaration that the category of fiduciary relationships is never closed.

And Prof. Sealy in an article which I accept is quite dated now but in the Cambridge Law Journal, analysed the two primary categories of fiduciary relationship as the control of property and an undertaking to act.

Elias CJ Mr Whiteside what are you developing here orally with us.

Whiteside I'm developing the proposition that in my submission there should be a principled approach and that the Court should say that is an undertaking or an agreement to act.

Gault J Going back to the preceding paragraph where it talks about established list of categories, do you say joint venture relationships are not within the established list of relationships.

Whiteside I accept Sir that a joint venture which is really a partnership or so close to a partnership that it does not matter, in other words it really is effectively a partnership for a one off venture, limited in time for instance, then that is … category. But I do submit that an evolving joint enterprise which is the highest this can be put at, is not such an established relationship.

And the two categories that Prof. Sealey identified were the control of property, and that's a typical trustee beneficiary relationship, or an undertaking to act. Or as Lord Justice Asquith said in **Reading**, whenever the plaintiff entrusts to the defendant a job to be performed.

Now just dealing with the cases where the requirement for an undertaking has been articulated, Justice Gault in the Goldcorp case in the Court of Appeal, I set out at 5.2 of my submissions a passage from Your Honour's judgment where Your Honour said generally it's 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.

And then there are passages in the judgments of the High Court of Australia in the Hospital Products case which is in my bundle of authorities at tab 2.

Elias CJ These are all special facts fiduciary relationship cases.

Whiteside These particular cases?

Elias CJ Yes, yes. I really struggle to see why it's necessary to go to them when we're dealing with joint ventures.

Whiteside Well I don't accept the proposition that we're dealing with a joint venture.

Elias CJ Yes.

Whiteside And I do submit that when the Courts have articulated the basis of the fiduciary obligation in, I want to use Prof. Bean's analysis, in a

horizontal relationship, they have not infrequently resorted to a requirement to look for an undertaking and these are those cases.

Gault J Creating an expectation, which you just quoted, is hardly an express undertaking.

Whiteside Well I agree Your Honour's words are general and some of these later passages that I'll come to are more specific.

Blanchard J So Justice Gault was wrong was he.

Whiteside Ah, well I'm perfectly happy for the purposes of these arguments to adopt.

Gault J That's a very tempting question.

Whiteside To adopt what His Honour said. In my submission that is an appropriate basis for a fiduciary obligation.

Tipping J It's this whole business of it's got to be express which I come back to Mr Whiteside and find your greatest difficulty from my point of view is that it's got to be express. Which is, I hope I haven't misquoted you, but I quite firmly noted that at an earlier stage. And that is your case isn't it.

Whiteside Yes Sir.

Tipping J It's got be express.

Whiteside Yes Sir.

Tipping J You can't imply it or you can't infer it. You can't build on a legitimate expectation. You can't do anything. It's got to be actually expressly articulated. I hereby agree to act for you or to look after your interests.

Whiteside Oh it doesn't have to be that express.

Tipping J Well.

Whiteside But there's got to be a discussion between parties in a collaborative relationship, that's the critical, I accept implied undertakings in the solicitor-client relationship because it's not necessary to articulate the undertaking there. But in a commercial context, where parties are on an equal footing and there is no one who's under a disadvantage or a disability, which is where equity frequently intervenes, I do submit that it's got to be, there's got to be an agreement.

Tipping J Well classically there are some relationships where the trust element is inherent. There are others where it is not inherent but in respect of which it can be undertaken or indeed imposed by dint of the way the

relationship evolves. It seems to me you are trying with respect to emasculate the power of equity to intervene to a degree which I would need a persuasion of that you can only intervene when there's been this express undertaking of a responsibility.

Whiteside I'm just wanting to restrict equity's power in this type of relationship here.

Tipping J Well why this type of relationship.

Whiteside Because, for the social utility reasons. These parties were well able to govern their relationship by contract. And therefore there is not the degree of disability or vulnerability as it's frequently called existing in this relationship which requires the imposition of fiduciary obligation.

Tipping J So the principle is that if the parties are well able to govern their relationships by contract, whether it be joint venture or any other relationship, equity should keep out.

Whiteside Yes.

Tipping J I understand the high level point you're making.

Whiteside The judgment of Justice Mavis in Hospital Products I've set out there. The accepted fiduciary relationships some time referred to as relationships of trust and confidence or confidential relationship. And he gives there examples. The critical feature of these relationships is that the fiduciary undertakes or agreed to act for or on behalf of or in the interests of another person in the exercise of the 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 its responsibility to adopt an expression used by the Court of Appeal.

Blanchard J On your analysis, trust and confidence wouldn't come into it. Either you've got a contract or an undertaking which amounts to the same thing or you haven't.

Whiteside In this type of fiduciary or alleged fiduciary relationship, yes Sir.

Gault J The hospital products case is probably one of the stronger ones and my recollection of it, I haven't read it for a while, was that because these were commercial parties, it wasn't appropriate to find a fiduciary relationship. But the Court didn't go so far as to say, because they are commercial parties, unless there is an express agreement, there can

never be fiduciary relationships. That's why they went into all of the elements of fiduciary relationship.

Elias CJ They weren't dealing with joint venture. And joint ventures are ventures undertaken with a view to profit. They're going to occur always in the case of commercial activity and are likely to involve commercial parties. Hasn't the imposition of fiduciary obligations in that, isn't the imposition of fiduciary relationship in that context predicated on an acknowledgement by equity that parties to joint ventures are vulnerable visa viz each other.

Whiteside Well if there is an undertaking to act.

Elias CJ Yes.

Whiteside In the best interests of another party, it's frequently in the mine situation where someone has got the mining rights for instance, then the courts say, because it's agreed that one party is acting in a representative capacity, there are fiduciary obligations. I accept that.

Elias CJ But if they are pursuing a common idea with a view to profit, they're both in possession of that idea. It's possible for one party to cut the other one out and appropriate the idea. Equity hasn't permitted that.

Whiteside Well I just want to refer directly in answer to that to Justice Dawson's judgment in this Hospital Products case. If you go to page 63 of my casebook. Page 492 of the report, line 32 on the left hand column. A fiduciary relationship does not arise where one of the parties to the contract has failed to protect themselves adequately by accepting terms which are insufficient to safeguard his interests. At page 63 line 32 or line 30 on page 492 of the report where a relationship is such that by appropriate contractual provisions or other legal means, the parties could adequately have protected themselves but have failed to do so there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement between them. And in my submission, the second sentence is apt to this situation.

Keith J There was here a contract though wasn't there. I just wonder whether you're taking that sentence out of context.

Whiteside Well I accept Sir it follows on from, the first sentence deals with contract. But the Judge does go on to say that where the relationship is such that by appropriate contractual provisions or other legal means, you can get protection, then it's not appropriate or there's no basis without more.

Keith J The next paragraph though again is about the distributorship agreement in issue wasn't it.

Whiteside Yes Sir. It's not uncommon for parties like these two in the commercial would to have a preliminary agreement about how they're going to investigate projects, what their respective roles are going to be, what their obligations are to each other. And it again comes back to the social utility point. These parties were well able to protect themselves and in essence my submission is that the respondent was not vulnerable.

Now the third case is the case we talked about this morning of Bristol and West Building Society v Mothew which is in the respondent's bundle, tab 1. And it's the passage that was cited by, it was the Court of Appeal's judgment, and by Justice Henry in the Privy Council is at page 18 of the report under tab 1.

The discussion by Lord Justice Miller begins at page 16. But at page 18 His Lordship says, this leaves those duties which are special, top of the page, which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.

So I do submit that that seems to be a general proposition.

Tipping J While we still have this book in front of us Mr Whiteside. I've just been reminding myself of what the Privy Council said about this subject in the New Zealand Netherlands Society case which is tab 12. (**NZ Netherlands Soc "Oranje" Inc v Kuys** [1973] 2 NZLR 163 (PC)). This is probably the most, or one of the leading authorities at least for New Zealand purposes. And at page 166 Lord Wilberforce I think it was, was it? Yes. Line 17 odd, says it, that's the fiduciary principle, applies in principle whether the case is one of a trust express or implied etc etc. Now that doesn't seem to me to fit very easily with your proposition that the undertaking must always be express.

Whiteside Well there hasn't been a finding of constructive trust in this case.

Tipping J No but fiduciary concepts are similar to trust concepts and His Lordship, and he was a strong Board, a very strong Board, seems to me to be indicating there for the Board that you don't have, you're not limiting it to cases where the trusteeship is express. It can be an implied. You could well find a constructive trust relationship here if a proprietary remedy had been sought.

Whiteside But it wasn't pleaded.

Tipping J No I know it wasn't.

Whiteside The case was never formulated.

Tipping J I'm talking conceptually, Mr Whiteside, I'm not really talking about this case. I'm saying that if the Privy Council have contemplated that the fiduciary relationship can be implied as well as express, I have difficulty seeing why the undertaking or the underpinning you see as essential, the undertaking, can't be implied also.

Whiteside Well I really have two answers to that. One his Lordship was talking, using the phrase implied in relation to the trust. And there can be no doubt of course that you can have an implied trust, that's well settled. But secondly Sir I am accepting of course an implied undertaking in the vertical relationship.

Tipping J And the tenor of what their Lordships were saying is further elaborated lower down that page by the reference to the High Court of Australia case of Birchall where the passage from Justice Dickson is set out in TL, so this was set in the context of a partnership but the principle must be of general application So I just thought it proper to give you an opportunity to say what you can on that.

Whiteside Well Justice Dickson is talking about determination being related to the character of the venture. And that's consistent with what I'm urging on behalf of the appellants here. That you've got to look at the character of the relationship or the venture.

Tipping J What I'm cavilling at Mr Whiteside is the proposition that equity cannot in this type of relationship impose an obligation of trust unless the party has in effect imposed it on himself.

Whiteside Yes. But the answer to that Sir is that this is a collaborative relationship with parties of equal standing.

Tipping J Yes.

Whiteside One not under a disability. Neither party under a disability. Where they are able to protect their positions by contract.

Tipping J Yes it has to come back to that doesn't it. That equity wont help a party who hasn't helped himself.

Whiteside And that's supported I suggest by that passage in Justice Dawson's judgment.

Tipping J Is there any more recent decision of the House of Lords or the Privy Council of which you are aware which helps to elucidate in a context reasonably analogous to the present where fiduciary relationships will be found and not found.

Whiteside No, not that I've found Sir.

Tipping J No. So the Netherlands case is about the last word. I have difficulty.

Whiteside There is of course the Goldcorp case.

Tipping J Yes.

Whiteside Which was an allegation of fiduciary obligation.

Gault J What are the leading authorities directed to joint ventures.

Whiteside Well there's nothing in England. The two leading cases really are.

Gault J Australian.

Whiteside The Australian ones and there's also the Canadian case of LAC Minerals (**International Corona Resources v LAC Minerals** (1987) 62 OR (2d) 1 (CA)).

Gault J Is that a joint venture.

Whiteside It was a case where they were negotiating towards a joint venture. It was a mineral.

Gault J I thought it really the decision finally was built on confidence.

Whiteside Yes at the end of the day.

Gault J Duties arising in confidence.

Whiteside Yes Your Honour's absolutely right. But in the lower Court they had found a breach of fiduciary duty. And that finding was reversed in the Supreme Court and Your Honour's right, the disappointed party who had originally had the mining rights or made the discovery.

Tipping J What about contemporary writings. Is there anything that you can draw our attention to, particularly in relation to this sort of commercial type of situation that might assist.

Whiteside There's Dr Bean's text which is 1995. This started lift as a PhD thesis at Cambridge University. At the time of writing the book, I'm not sure at the present, whereabouts he was a partner in Philips Fox in Melbourne. But it's a fairly comprehensive text.

Tipping J Yes.

Whiteside Dealing with this topic. There are the articles. Justice Finn of course has been a prolific writer in this area and I've included at least one of his articles in the bundle.

Elias CJ There must be some authority in England. It may be that they've been treated under partnership. Maybe we should look at Linley.

Whiteside Well there was the Khan and Mier case of course that we've already dealt with.

Elias CJ Yes.

Whiteside But I'm not aware of anything else.

Tipping J But Khan and Mier was the extra step from joint venture to partnership.

Keith J Sure.

Tipping J The way Lord Millett put it in Khan and Mier seemed to me to denote, without further research, that the concept of joint venture was known and understood in English jurisprudence. Because he talked of it as if it were a kind of term art. And the issue was whether it had gone beyond joint venture to partnership. And his Lordship's used the terminology as if everyone would know what he was talking about. Nothing much can be built out of that obviously.

Whiteside No Sir and of course there was undoubtedly certain steps clearly consistent with the agreement including the provision of funds.

Tipping J Mm.

Whiteside Had taken place. The other article which is useful is the article by Prof. Maxton which is at tab 5 in my bundle, that's 1997 (J K Maxton "Contract and Fiduciary Obligation" (1997) JCL 222) entitled Fiduciary Obligation. Perhaps I can just refer Your Honour's to that. At page 99 of the case book, left hand column page 224. The fiduciary concept has proved elusive. Judges have resisted providing a comprehensive stmt of the criteria by reference to which the existence of fiduciary relationship may be established and the criticisms of it's uncertain premises have multiplied. The Supreme Court of Canada for example expressed frustration with the concept in the LAC Minerals case.

Elias CJ But hold just a moment. Because in the preceding paragraph they're dealing with status based categories. And this difficulty arises, the fiduciary concept has proved elusive, is outside those categories isn't it. And in the status based categories are included joint ventures, joint venture's.

Whiteside Yes Ma'am. Well it comes back to the debate we've already had.

Elias CJ Yes.

Whiteside I submit that here, as the Court of Appeal found, there's no basis for saying these parties were in a joint venture.

Elias CJ I see. If this Court considers that the lower Courts were correct and there was a joint venture, then your whole argument on liability falls away does it.

Whiteside No Ma'am because I do submit that here this joint venture had not reached the point where fiduciary obligation arose. That it hadn't evolved to a point where a duty of loyalty was demanded.

Elias CJ I see.

Whiteside Given the absence of agreement over so many matters as set out in my submissions.

So at the bottom of p.224 of this article, in the absence of a universal touchstone of fiduciary liability, judicial attn is focused on two of the typical attributes of fiduciary relationships, power coupled with vulnerability and reliance. A significant difficulty with this approach is that these factors can occur in relationships which do not have any fiduciary context. Their presence in any given relationship may explain why the law may wish to supervise conduct within that relationship but does not explain why that supervision should entail the imposition of the fiduciary duty of loyalty. The answer to the latter question seems to lie in the purpose fiduciary liability seeks to achieve. Its object is to secure the paramouncy of one party's interest in a relationship or of the parties' joint interests. It does this by demanding loyalty. The point was well made by Justice Richardson in DHL International and Richmond when His Honour said the fiduciary duty arises where one party to the relationship, A, is reasonably entitled to expect of the other, B that B will act in the interests of A, not in the interests of B or a third party and not merely having regard to A's interests. Under the fiduciary standard, the fiduciary must act solely and selflessly in the interests of the beneficiary. Thus it's not generally the function of fiduciary law to mediate between the several interests of parties to a dealing.

Tipping J Well this passage is very similar to what the Court of Appeal says. They must have got it from here I suspect. Because it's uncannily different – that phrase we discussed earlier this morning.

Elias CJ Mediate.

Tipping J Yes that rather cryptic dictum that I was a little anxious about.

Whiteside Yes Sir.

Tipping J Well what Justice Richardson said in DHL, and I hesitate to mention it but it's mentioned here so I will, what I said in Estate Realties and

Wignall which is the universal touchstone phrase it's taken from which was essentially the same. But where one party is entitled to and does repose trust and confidence in the other. Now that's quite separate from any suggestion that you've got a necessity for an express undertaking entitled to repose trust and confidence and does repose trust and confidence.

Whiteside Well many of the cases talk about mutual trust. And that was certainly the approach of the Court of Appeal. And it's far too easy in my submission, in this type of relationship for a party like the respondent did in this case, to simply say I trusted the other party.

Tipping J Yes but the control comes from the reasonably entitled to. Justice Richardson added reasonably. I think in Estate Realties I simply said, entitled to. But I'd accept immediately reasonably entitled to and does. In other words, if the relationship is such that (a) a person is reasonably entitled to and (b) does repose trust and confidence, then the Court will exact fiduciary standards. The key question is whether someone is reasonably entitled to repose.

Whiteside Well my submission would be that if the Court doesn't accept the primary basis.

Tipping J Yes.

Whiteside That the fallback should be mutual trust. There should be in a collaborative relationship between parties, experienced businessmen, where there's no prima facie situation of disability, or vulnerability, that the touchstone should be mutual confidence.

Gault J I think it's important to bear in mind the timeframe. You seem to be focusing on a point of the formation of an arrangement where the parties are in equal terms. But if two parties then say, let's do this, we'll do it as an equal joint venture and get on with it. That's when the vulnerability arises. When they get on with it. Because one will do something in the interests of the joint venture. And the other thereby is rendered vulnerable. So there is a vulnerability even though at the outset they might be perfectly equal and contractually strong partners.

Whiteside But it's also relevant to assess, if the analysis is correct that there is vulnerability, how has it arisen. And has it arisen because one party, in my submission, has acted in breach of the undertaking or agreement.

Gault J Well you're vulnerable before that happens. The vulnerability is manifested I suppose when it happens. But you are at risk always in a joint venture if the participants are undertaking different activities.

Whiteside Well yes, but the issue then is, what is the basis on which equity will intervene.

Gault J Loyalty. That's the very basis. You will act loyally to the venture you have agreed to undertake.

Whiteside Well my answer to that is if you won't accept the first proposition, that you've still got to show that the relationship had developed to the point that equity demands loyalty.

Gault J Yes, well that there is a joint venture.

Whiteside Well that's what I don't accept.

Gault J Well you seem to see the various joint ventures. One which exists between commercial people but does not give rise to obligations, maturing into one that does give rise to equitable obligations, maturing into one that is put into a formal contract. So you've got three joint ventures. I don't know why you need all of that if you are considering equity's demand for loyalty.

Whiteside Well if Your Honour's right about that, with respect, all that's required is for two parties to have a serious discussion about investigating doing a development.

Gault J And proceeding.

Whiteside But in my submission it's not sufficient, well it should not be sufficient to require loyalty, the duty of loyalty and the sacrificing of one's own best interests, that some steps have been taken on an unspecified basis with so much left up in the air and so little discussed, and so little agreed.

Blanchard J Well it may be that the duty of loyalty is a relatively limited one and that the party who doesn't want to go on with it is in a position to withdraw by saying, I'm sorry I've decided I don't wish to pursue this with you. But the more that gets done the more there is the potential for the duty of loyalty to become more extended. And once you get a situation where one party has acquired an asset, the duty of loyalty may not allow a withdrawal in that same way.

Whiteside Well again, I see the force of what Your Honour says, but that introduces even more uncertainty, or introduces uncertainty because at what point in the process does the party who's deciding that he doesn't want to be under an obligation to loyalty or is he free to say I don't want to have anything to do with you. Because he may say that but equity may come along and say, well you've left it too late. We think on these particular facts, because this, this and this has happened, that you cant cast off the duty of loyalty by announcing that you don't want to be involved with the disappointed party. And that introduces even more uncertainty in an area where I submit there is too much uncertainty.

The onus I submit remains at all times in a situation like this with the respondent. There wasn't an onus. If the fiduciary obligation arise, then it wasn't open to the firstnamed appellant to cast it aside by saying well I've changed my mind, I don't want to have anything to do with you, I don't like you, you're not reliable, your not doing what your meant to do. That's the difficulty about the proposition that it's open to the fiduciary to say I'm now going to no longer have this duty of loyalty by telling you that that's the position.

So just referring to Professor Maxton's article finally over on the next page, at p.100 of the report, under the heading the content and consequences of fiduciary obligations, just midway through the first para. In other words there's a spectrum of fiduciary liability which varies in intensity from one situation to another. But where fiduciary liability exists it demands by way of the duty of loyalty, behaviour which abjures the pursuit of self interest when it conflicts with the beneficiary's interests. In consequence the content of the duty of loyalty which reflects this particular function of fiduciary law contrasts markedly with the individualism so characteristically evidenced in contractual norms. A fiduciary is required to be altruistic. He must avoid a conflict of duty and interest.

And just dealing with this issue about whether there was an undertaking on the part of the firstnamed appellant to act in the best interests of the proposed or evolving joint venture, can I refer the Court to an interrogatory which is of some significance in my submission. And that's at para 5.7 of my submissions, an interrogatory asked of the respondent. What was said or discussed at the meetings or telephone discussions which caused the plaintiff to believe that the first defendant had agreed the relationship should carry out the project. And the answer was nothing. In themselves the matters stated or discussed in those meetings or telephone discussions gave the plaintiff no cause to believe that the first defendant had agreed the relationship should carry out the project. A clear statement that there wasn't anything said in the meetings or the telephone discussions which indicated that there had been agreement this relationship should carry out this project.

Elias CJ That's a reference to the fact that they hadn't determined by what vehicle the development would take place.

Whiteside Well that's of course what's said by the respondent. But in my submission that's not the ordinary meaning on an interrogatory one would take from that answer.

Elias CJ Well Mr Whiteside I really don't know how far you can get building on the way the matters have been referred to in an interrogatory when you've got the findings of fact against you in the two Courts below.

Whiteside Well of course it's not only the interrogatory but it was also the evidence. There was nothing, there was no specific reference by the

respondent in his evidence to the fact that there was a discussion whereby it was agreed that this relationship should carry out this project.

Tipping J Ws there any finding of fact against you that you had expressly agreed to act as a fiduciary. Surely not. Because if that were so it would be the end of it.

Whiteside Yes sir.

Tipping J On your submission.

Whiteside Yes sir.

Tipping J So there's no finding against you is there that you did give an undertaking.

Whiteside That's right sir.

Tipping J Mm. So I don't know that we need develop this any further. If the test is as you've posited it, there was no evidence to satisfy. The problem is as to whether that is the correct test.

Whiteside Now I've set out at 5.14 various matters on which there was no agreement. The parties had not agreed on an appropriate joint venture vehicle. The parties had not agreed on the equity to participation and that each one of them would.

Elias CJ This is your summary isn't it. And as you say in 5.14 the trial Judge didn't use all of these.

Whiteside That's right Ma'am.

Elias CJ Yes.

Whiteside But he didn't equally find that there was agreement on the matters that are not listed in his judgment. The parties had not agreed to share expenses or arrange for mutual reimbursement of relevant expenses. The parties had not agreed between them who had authority to enter into contractual commitments on behalf of the alleged joint venture and who'd be liable under such commitments. There was no arrangement to correspond with one another or to copy correspondence to the other party. No agreement on division of responsibilities. And all the costs were borne by the firstnamed appellant and all the key contractual documents were entered into by the firstnamed appellant in his own right. And as I've mentioned there was the guarantee by southern realty ltd.

Elias CJ That's of course post breach on the respondent's interpretation of events.

Whiteside Well the contract was entered into in October 1999.

Elias CJ Yes but it was conditional.

Whiteside It was conditional but the guarantee is on that document, it's in that original agreement.

Elias CJ Yes.

Whiteside Now I've set out the factual steps that had to be taken to bring the project to fruition. And there were various concessions made by the respondent in his evidence about the fact that the joint venture would only proceed when the parties sat down and saw if they could reach agreement over the development and there were various other matters that were conceded by the respondent which I've set out at page 17 of the submission.

So if I can move onto s.6 of the submissions and deal with the issue of mutual trust and confidence. And it's my submission the relationship had not reached the point where it could be said obligations of mutual confidence arose.

Elias CJ Is it necessary for you to enlarge upon what's contained in your written submissions here given the discussion that we've already had Mr Whiteside.

Whiteside No Ma'am it's probably not. Can I just, there's one additional passage in terms of this mutual trust relationship. There's just one passage in the respondent's evidence that's not mentioned in my written material that I'd like to refer to and it's para 3.15 of the evidence in chief of the respondent. It's volume 2, the green volume at page 160.

Elias CJ Sorry, what's the page.

Whiteside 160.

Elias CJ 160.

Whiteside Yes Ma'am.

Elias CJ Oh.

Whiteside Volume 2, the green volume.

Elias CJ Oh sorry, volume 9 is also green.

Whiteside I'm sorry, the light green. Not the yukky green.

Tipping J Irish green.

Elias CJ Yes.

Whiteside Page 160, para 3.15. While I do not think it crossed my mind clearly at the time, I think in hindsight that there would have been no obligation on one of us to participate in any particular project just because the other wanted to. Now that in my submission's a rather strange joint venture that either one of them could.

Elias CJ But each had control. That's the point really Mr Whiteside. That the project couldn't have, no one could appropriate this joint venture to himself if it was a joint venture. It didn't mean to say that it would have, anyone could have been compelled to go ahead with it. But that's a different point.

Whiteside No, in my submission not. How can one have a relationship of mutual trust and confidence and that one's in a joint venture if it's open to either party to simply say, well I've changed my mind.

Gault J Isn't the nature of property development that you put together a development proposition but you haven't signed up anybody or made commitments to any particular contractual arrangement for disposition or for exploitation but still you're putting together the proposition and investigating opportunities that you will eventually agree upon. I don't see that it's any the less a joint venture.

Whiteside But all that's been done here by one party on an entirely unagreed basis, this investigation process, where in my submission it cannot be a relationship of mutual trust and confidence if one party has the right to opt out.

Elias CJ But you're talking about contract.

Keith J I thought in this passage he was talking about the general relationship that they had because he's been mentioning hasn't he the course of dealings and he's saying, sure there's that course of dealing but that doesn't mean we're already locked in to a situation in which when a new possibility comes up that new possibility must be taken up by the other party if one of them demands it. But the situation here is that the two parties did move ahead didn't they. I mean there's then a dispute about what they moved ahead into. But it's not a case where they exercised that freedom to say, no I'm not going to get involved in this.

Whiteside No I agree it's not a case where that happened. But here's the beneficiary claiming that it was part of the arrangement, it was a very loose arrangement, that I could opt out if.

Keith J Well not become involved I think.

Whiteside Well not become involved.

Keith J Yeah which is a.

Tipping J A decline to opt in.

Keith J That's way back at the beginning isn't it.

Blanchard J Mm, he's not talking about the basis on which he could withdraw. That would depend upon the stage that had been reached. He's not for example claiming that he could withdraw and take part of the benefit with him. In the next sentence, equally there'd been no reason to think that one of us would exclude the other from participating. I just don't see this helps you at all.

Keith J No.

Whiteside Well it depends how one reads it. But I.

Blanchard J Well I think it's pretty plain.

Whiteside I take it as a statement that where you get to the point where you're going to have to make a decision as to whether to proceed, that the project is a runner, it was open to either party to, or in particular open to, yeah, open to either party, not to proceed.

Blanchard J Well that might be right. But there's a huge difference between saying I've decided to have nothing to do with this project, I'm simply walking away and saying, I'm withdrawing from this project because I don't want to carry on with you and I'm taking with me the benefit of what's been done.

Whiteside Well it turns on the issue of mutual trust because if it's a relationship of mutual trust and confidence, then in my submission the arrangement must be that both parties are going to proceed. It's a joint venture.

Blanchard J Contract.

Whiteside Well.

Blanchard J Do you serve for specific performance.

Whiteside Well not according to the Chief Justice.

Blanchard J Is that an authority.

Elias CJ Absolutely.

Whiteside It's a loose arrangement that is in the nature of a joint venture and that's sufficient.

Keith J Well similarly I don't read it that way. I think he's just talking about the ongoing relationship isn't he.

Elias CJ Yes I think he is in context.

Whiteside Okay, well.

Keith J And the ongoing relationship doesn't involve an obligation to opt in every time.

Elias CJ Alright, well I think it's lunch time. We'll take the lunch adjournment. Mr Whiteside perhaps when you come back it seems to me looking through your submissions that in fact you have covered your entire argument but if there's anything that you feel you've left out or you want to emphasise, you can carry on at that stage. But it looks to me as if on this part of your argument you've really said everything that you want to. Thank you.

Whiteside Thank you.

Court adjourns 1.04 pm.
Court resumes 2.19 pm

Elias CJ Are counsel finding the temperature too cold?

Whiteside I never find it too cold.

Elias CJ No, you're on your feet so that's a big difference. There's a very cold draft on the back of my neck.

Tipping J Perhaps it's a signal from someone.

Elias CJ Yes Mr Whiteside.

Whiteside Just three short points if I may. I'm at section 8 and I do rely on the social utility argument. But I just want to refer you to two of the authorities in 8.7 I've referred to a passage in Meagher, Gummow and Lehane ((4th ed) *Equity Doctrines and Remedies* (2002) Butterworths Lexis Nexis, Australia, Ch 5) which is at tab 6 in my casebook. Page 113 of the casebook there's a section from the authors about fiduciaries in commercial relationships. And just after the first two sentences, more difficult question as to what extent will courts in a commercial context find fiduciary relationships to exist outside the accepted categories. Traditionally there's been considerable reluctance to do so. And there's a reference to a couple of Australian authorities. I just ask the Court to note the reference actually is wrong to Amalgamated TV services. That report in fact should be [1969] volume 2, not 1963. And then the authors refer to Hospital Products v US Surgical Corps.

And the other authority is another article that I didn't refer to before by Justice Finn. And I've referred to it at 8.9 of my submissions (P Finn *Fiduciary Law in the Modern Commercial World* E McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) Clarendon Press, Oxford, Ch 1). And it's tab 7, a collection of essays and the essay is entitled Fiduciary Law in the Modern World. And the pages I want to refer the Court to are at page 122 of the casebook. And this under the heading the exception, contractual negotiations. I wish to draw attention to three matters. And by reference to Lake Minerals, it's now well accepted that confidential information disclosed and for the purposes of contract negotiations will be protected from misuse or misappropriation.

And then secondly, and this para is of some importance, where parties are negotiating for a relationship which will itself be fiduciary, usually a partnership or a joint venture, it is now being accepted in both commonwealth and US jurisdictions that fiduciary duties can arise in advance of a binding agreement being reached and for the purposes of protecting the opportunity the subject of the negotiations from the pre-emptive strike of one of the parties. But given the staging that occurs in the courtship period, it's a matter of controversy as to when such duties will … arise. If a formal question asked by the Courts is whether notwithstanding the absence of a concluded agreement a relationship of mutual trust and confidence has developed, their preparedness to make an affirmative finding for the purpose of protecting an opportunity would seem to be influenced by (a) the extent to which the opportunity is specific to one of the parties. And in many of the cases under that heading it's a case where one party has had in fact the opportunity or the prior rights but there's been a hijacking by another party which is not this case of course. And (b) at page 19 of the article, the degree to which the subject matter of the proposed relationship has been particularised and (c) the point that has been reached in negotiation, especially in the parties' delineation of their proposed relationship. Given that parties necessarily are to be expected to consult self-interest both in negotiating and in committing themselves to an agreement, the best that can be said generally here is that the guiding factor in judicial decisions is likely to be whether the nature and course of negotiations has reasonably created such expectation of common purpose in relation to the opportunity in question as would made one party's appropriation of it unfair and unjust.

And the final point that I want to make really is in relation to the Chief Justice's reference to this being a joint venture. It's always been my case that if this was a joint venture there had to be an agreement. And there had to be defined terms. And the trial Judge really did not set out, he neither set out the defined terms or the basis of the agreement forming the joint venture, nor reached a finding as to when it had, when the agreement had been entered into.

And that's why in my submission at best what the Court of Appeal found must be correct that at best this was an evolving joint enterprise at an extremely embryonic stage but not in my submission justifying the imposition of a fiduciary obligation.

Gault J When you say there had to be an agreement, are you using agreement in the contractual sense.

Whiteside Yes, yes sir.

Gault J Thank you.

Whiteside A joint venture is a form of contract. Those are my submissions.

Elias CJ Yes thank you Mr Whiteside. Yes Mr McIntosh. I just wonder if you'd give me a moment to confer.

(Judges confer)

Elias CJ Yes Mr McIntosh, unless there's anything in particular you want to develop we don't feel the need to hear from you on liability and we'd invite you to pick up your submissions in support of the cross appeal.

McIntosh Thank you Ma'am.

Gault J Mr McIntosh was the small font and close typing designed to conceal the true length of these submissions. It's very hard on the eyes late at night.

McIntosh And I do apologise for that Your Honour. I did find myself in something of a difficulty with the length of the submissions and I do apologise to the Court. I asked the Registrar if I could have leave to file longer than usual submissions and he replied this was on notice Your Honour's that leave wasn't required. But I appreciate that's a slightly separate Your Honour.

Blanchard J He said what.

McIntosh That leave was not required.

Gault J The requirement's meaningless in other words.

McIntosh Well Your Honour I'm loath to put him in difficult but he's in correspondence saying that it was a guideline and that I did not require leave.

Blanchard J It's not exactly what he told me when I asked about it. But it's maybe a matter we need to talk to the Registrar about.

McIntosh If Your Honours please I don't think I could materially add to my written submissions in relation to the liability point. And in fact I understand there were two points really, that the legal proposition that Justice Tipping put to my friend several times and I think I have actually addressed that at para 5.4 and onwards in my submissions. And I'm not able to find either Your Honours any authority that would suggest that it had to be express. So I don't think I can really add to what I have already filed in the Court.

So if I could then turn Your Honours to the submissions as to relief. And as is apparent Your Honours, it is divided into sections because there are some quite discrete topics. And I'd like to begin if I could with an examination of the nature of the relief that was pleaded and sought and awarded. That analysis Your Honours is largely contained in part 2 or tab 2 of my written submissions.

But if I could ask Your Honours first of all to turn to the Case on Appeal volume 1, that's the white volume. And at page 15 of the white volume Your Honours is the second amended statement of claim of Mr Fay. I'd just very briefly like to go over a couple of key points from this document. The first Your Honours is at para 4. Which was that Mr Fay pleaded that the parties had entered into an unwritten open ended fiduciary relationship in the nature of a partnership and or joint venture. And we defined that as a relationship. And that was on the basis that it had begun in 1996 and covered a range of possibilities. And then there were particulars given in the following pages of investigations and activities carried out under that alleged relationship. Including a description of this project itself which arises at para 6.

Para 9, the relationship actively pursued the project as a business in common and/or joint venture with a view to profit from early 1999 until the end of August 2000. Including entering into a conditional agreement for sale and purchase. And then over the page at 5 we have a range of the particulars of that pursuit.

And then at para 10, the alternative pleading that if the relationship did not exist prior to the conception of the project that it had existed as from that point. And that they entered into a fiduciary relationship in the nature of an equal partnership and or joint venture for that purpose.

And then 11, in either case while the final form of the ownership vehicle which would purchase and develop the site had yet to be agreed, the parties in the first instance expected to fund the project in equal shares and to share equally in any profits resulting.

Tipping J Is the point about all this that it was equal. I'm just struggling to understand where this fits in with your argument on the remedies.

McIntosh Well sir, yes the relationship was essentially partnership as pleaded. And it's important then to look at the nature of the relief that was pleaded as a result of that pleading or prayed for as a result of that.

Tipping J Yes but so far the only thing that seems to have anything to do with remedies is this concept of equality, so far.

McIntosh Yes.

Tipping J Is that fair.

McIntosh Yes sir.

Tipping J Yes, right.

McIntosh And there's the claim for breach of fiduciary duty Your Honours. And at page 21 of the book we have the prayer for relief. An account of profits, direct or indirect made or anticipated in relation to the project whether by Chirnside or otherwise, an order that Chirnside pay over to Fay one half of such profits. Alternative equitable damages in that amount. And then (d) over the page Your Honours was exemplary damages.

And then there were the two alternative claims based directly under the Partnership Act to deal with the possibility that the relationship was found to be still on foot or to have dissolved.

And the over the page at p.23 of the casebook Your Honours will see the claim against Rattray Properties, the second appellant, knowing receipt of trust property. And a claim at 25 that Rattray accordingly holds all project related property on constructive trust for the relationship. And then a prayer for relief that follows from that.

Tipping J Where did you say that was.

McIntosh This is on 23 of the white casebook Your Honour.

Tipping J I don't know that it's going to be very important but my page 24 is almost blank, it just has (g) costs at the top of it.

McIntosh I'm sorry sir, 23.

Tipping J 23, oh.

McIntosh Now what I wanted to establish by taking Your Honours through that was the nature of Mr Fay's claim both in terms of the nature of the relationship he alleged and the relief he sought. And in my submission it's absolutely clear that what he was seeking was proprietary in its nature and not compensatory. Now I'll come back to this particular point Your Honours but it appears to have been infelicitous that

counsel pleading it, namely myself, has used the word in the alternative in the first prayer, alternatively equitable damages in that amount. Because, and as I say I'll come back to it Your Honours, I should have used the word equitable debt. But the point is.

Tipping J I'm sorry.

Elias CJ Equitable debt?

McIntosh Yes Your Honour.

Tipping J Is it inherent in what you've just said that you are categorising a claim for account of profits as proprietary.

McIntosh Essentially Your Honour yes. And that what was being sought was, in the first instance, an account of profits. And that that was directed directly to the joint venture property of the relationship and nothing more. By nothing more Your Honours, what I'm saying is that there was not a claim for equitable compensation for some other loss that has been suffered by Mr Fay in addition to or separate to the property itself. His claim was anchored very clearly in this development and the profits that were coming from it.

Elias CJ But by the relationship, the project related property, you mean the development.

McIntosh Yes Your Honour.

Elias CJ Yes, yes well I hadn't understood anything differently.

McIntosh Yes. Now the questions Your Honour was asking of me suggests that I'm being slightly obtuse and I don't mean to be. But Ma'am where I'm coming to as part of my section 2, and this really goes to the heart of the whole relief case, is the nature of the remedy that has been ordered for Mr Fay. And my case is that in fact he's been ordered, he's so far been awarded equitable compensation whereas in fact he never sought that.

And just to foreshadow where I'm going Ma'am, the Court of Appeal in adopting its loss of a chance approach has operated on the basis that it is equitable compensation, that's my submission.

Tipping J So you're drawing a distinction between equitable compensation and equitable damages.

Keith J Or debt.

McIntosh It's in fact debt Your Honour. And I'll come to that in a little bit more detail to see where I'm coming from.

Keith J So it's restitutionary then.

McIntosh Yes, not compensatory.

Gault J Disgorgement.

McIntosh That is exactly the word Your Honour. And although that is the one word which doesn't appear on the pleading, that in fact was the case that it was put as a disgorgement of a share of the profit which the relationship was going to make.

To the extent that there was any other element, compensatory or otherwise, that was included in the prayer for exemplary damages. Which as we know were not accepted or awarded by the trial Judge or the Court of Appeal.

Tipping J How could an element of compensation be included in exemplary damages.

McIntosh Well what I'm trying to say Your Honour is that to the extent that Mr Fay sought anything else beyond this particular, you know, by the partnership and breach of fiduciary claims he made, to the extent he sought anything else, it was only exemplary damages for the conduct.

Now as we know Your Honours, the trial just in his findings at 61 of the white case, at para 52 of the liability judgment, Mr Fay is entitled to relief being either damages or an account of profits. I'm also provisionally of the view he is entitled to relief against Rattray Properties. Then there were some comments made about how that relief would be set up.

Then Your Honours, if I could ask you to keep turning through and we get to the relief judgment. At page 64, para 9. There's a discussion there at 9 and 10 whether or not there was need to make a determination against Rattray Properties. And a comment by Mr Whiteside at the end of para 10, he was prepared to accept for the purpose of the assessment of the relief that Mr Fay should be regarded as having a claim to the entire Harvey Norman project, albeit via shares in RPL as opposed to the 75% in the project held by Mr Chirnside. Para 11, the Judge did not accept that as being appropriate. And then in 12, Mr Whiteside contended RPL not liable. He didn't advance any arguments on the face of it RPL is liable.

Now at 13 Your Honours, both counsel contended that an orthodox account of profits was not appropriate in the present case given that the development had not been sold and any gains made by Mr Chirnside or RPL associated with Mr Chirnside's breach of fiduciary duty are therefore unrealised.

And the Judge went on to explain why he has adopted this approach. And in the judgment at 14 and 15 he said he's not prepared to award a constructive trust because of the practical difficulties. And then he says, this is para 15, it is understandable the primary claim advanced on behalf of Mr Fay was for equitable damages. On his case, an award of equitable damages would be appropriate in lieu of an account of profits. If such, skipping, if such damages were awarded, they would reflect Mr Fay's loss associated with his wrongful exclusion but this loss would be closely associated with the gains made by RPL and Mr Chirnside relating to the development. As a matter of general principle no objection to award of damages or equitable compensation for breach. Aquaculture. Nor could it be seriously suggested I do not have authority to assess damages in lieu of an account. See for instance Fraser Edmonston.

Now Your Honours what's happening here is that Mr Fay has sought an account of profits by way of payment of damages in a half share of those profits. And that all the Judge has, well in my submission, all that has been put to the Judge and all he has said is yes, it's really of no moment which one is which.

If I could just hand up to Your Honours a brief authority on this point about the equitable debt. The point I just made. Meagher, Gummow and Lehane's authority Your Honours, *Equity Doctrines and Remedies*. And at the first page, para 5.245, an account of profits equitable debt. Fiduciary profits from breach of duty is liable to account for the profit made within the scope of and ambit of that duty. And there's a reference to the Warman case which I'll come back to (**Warman International Ltd v Dwyer** (1995) 182 CLR 554) or to repay it as an equitable debt.

And in my submission Your Honours that was, and I can say this, that was all Mr Fay intended as is clear from his pleading and the judgment and I suggest that is what the Judge had in mind by those comments, that it wasn't equitable compensation, it was an equitable debt in lieu of.

At para 18 of the judgment there's some more discussion about some of the practicalities that would be involved in a pure proprietary remedy. And then at para 19 the Judge said, in the circumstances I am of the view that principle and common sense require me to structure relief for Mr Fay around an award of equitable damages. Then he goes into that assessment at para 20. The starting point for quantification of equitable damages to which Mr Fay is entitled is the determination of what he has lost and then he's based it on a determination, sorry assessment of the extent to which the development has produced a net gain. Also requiring consideration is what, if any, allowance should be made.

What we have here Your Honours in my submission is essentially an account or damages set up based on an account. And that when we come through to the end, to para 76 at page 80, if the exercise before me had been an account of profits, I would therefore be inclined to allow a substantial sum to Mr Chirnside for the efforts he put up in the project and the figure I have in mind is 3,000. The exercise I am carrying out however is not an account of profits but rather an assessment of equitable damages and this assessment requires consideration of what Mr Fay lost as a result of his exclusion. So relevant to the current exercise, an assessment by me of the likely terms upon which Messrs Fay and Chirnside would have proceeded with the project.

Tipping J Are you coming back to 77. Because it seems to me there's a very arguable point in there. It seems to be implied that equitable damages are quasi tortuous rather than quasi contractual. In other words they're based on what you've lost rather than what you haven't gained. If you're coming back to it, leave it. But it seems to me that that's a highly debatable proposition.

Elias CJ Is your point that they're neither.

Tipping J They're a debt.

McIntosh Well my point is.

Elias CJ Or that what you were seeking was neither. You weren't into Day v Mead and cases like that which is.

McIntosh No, no.

Elias CJ Yes.

McIntosh Quite so. It was nothing more than a substitute or a surrogate.

Elias CJ For an account.

McIntosh For an account. And indeed Your Honour when we move through, just holding that page 81 open for a minute, if we take the balance of the judgment and the conclusion, the assessment of the relief, it's quite clear that the Judge has actually done an account. And here are his divisions of that. He's done an account of the profits of the development.

But just coming back to 81. This is quite an interesting assessment and I think this is the genesis of the Court of Appeal's approach although it's taken me a while to identify this as the genesis but I think it is. Because I think in doing this Justice Young did consider without stating it, a loss of a chance approach.

Elias CJ Sorry, is this 77.

McIntosh This is 77. Consideration of what he lost. And then we get into an assessment of the likely terms on which they would have proceeded with the venture had they not been excluded. Now this is important Your Honours because this is where the Court of Appeal took off from in a way. But what the trial Judge did was he said, and we can really see it in the end of 78, the last sentence. In any event the project has been completed and an equitable damage assessment must recognise that if it is to be a fair and appropriate surrogate for an account. So what the Judge did, with respect, is he did a loss of a chance on a theoretical basis and said, well there is no chance. Because this thing has gone ahead. And the only consideration he gave to terms not being reached is that they would have gone ahead in some form. So he didn't make any discounting for what the terms would have been. He just said it's either all or nothing. And it would have been something, therefore I can ignore chance.

But then of course he said, now I'm in that position, I can make allowance.

Tipping J You're not challenging the allowance per se or are you.

McIntosh I will come back to that in detail Sir but I can just tell you where I'm going on that. What my case will be is you can have an allowance or a share of profits. But in principle it's not appropriate in a case like this of an accounting to have both. There is an exception to that which is the Say-Dee case (**Say-Dee v Farah Constructions** [2005] NSWCA 309) which I'll come to shortly.

Tipping J But isn't it an exercise in defining what, between these parties in these circumstances, the profits should be regarded as being.

McIntosh Yes it is Your Honour. And also I completely accept any submission put to me that equity has the flexibility, that the appropriate remedy for these particular parties can and should be found. And it may be possible in fact that the trial Judge's approach is the one that's considered to be appropriate. And just to finish that Your Honours, we did not appeal on this approach. The reason we didn't appeal of course is because it was by way of an account. And he followed accounting principles in what he did so it was the equitable debt route rather than equitable compensation route.

The only appeal that was made against the quantum or the relief Your Honours was in relation to the value of the property itself. But the principle was fine.

Elias CJ Yes but you say technically he should have made the allowance in calculating the profit, is that what you were saying about that.

McIntosh Yes, he should have either given, well Mr Fay sought only 50% and that was because his case was one of partnership. So he couldn't argue other than because absent any partnership terms he couldn't say that you'd do anything else but default to equal shares. And that was his difficulty absent any partnership terms. Which is why he had to plead the alternative which was it was akin to a partnership and that is in fact what the trial Judge found. But that's why Ma'am, absent that case, he could have said, and I'll come to it almost immediately, he could have said this was a fiduciary relationship, there was a breach, as a result of the breach there was a profit made by the breaching party and I want an account of all of it and then the questions arise, should there be an apportionment of the profits or should there be no apportionment of profits but an allowance nevertheless for the efforts made. So you get two categories.

Now this really Your Honour takes me into part 3 of my submissions. But I just wanted to explain, perhaps I should finish this by saying this. In my submission the trial Judge did not need to go into his 77-78 and do this nominal loss of a chance. At this point, in my submission, he had departed in his own mind and was doing equitable compensation. Although he came back when he said it must recognise, if it's to be a fair and appropriate surrogate for an account. But he came to the same result so it was of no moment.

Tipping J If the Court of Appeal hadn't done what they did, your client wouldn't have been complaining with what Justice Young did. Is that, I'm just having a little bit of difficulty seeing where all this is sort of fitting in and heading.

McIntosh That's right Sir, that's right Sir. On the face of it there would be no complaint about that approach.

Gault J Approach as opposed to outcome.

McIntosh As opposed to numbers yes.

Tipping J Right. So no complaint about the approach of Justice Young, simply the outcome.

McIntosh Yes. And Your Honours that was our position initially in the Court of Appeal. Until after they issues their judgment on liability and then invited either the parties to negotiate or file submissions as to relief. And at that point Mr Fay challenged the Court of Appeal's decision and said, in effect, if this is going to go down an equitable compensation route and loss of a chance, then I'm going to now seek a full account. No ship's been found against me, sorry, for me. No partnership's been found. There is no equal sharing, and I'll come to it in a minute, but as a result, it should be a full account with an allowance made.

Tipping J Do you mean your client wants 100% of the profit but with an allowance to Mr Chirnside.

McIntosh Yes that's his first position.

Gault J Not attractive to me.

Elias CJ No.

Keith J What's happened to the 50 percent, equal division.

McIntosh Well I thought Your Honours might say that. But I do need to take you through it.

Keith J Sure.

McIntosh The reason being, there was no equal division found, there was no partnership found. It was also no finding that there were any terms as to what the profit sharing would be.

Gault J They're proceeding on an assumption that it could have been that Mr Fay would get all the profit from this joint venture.

Blanchard J Isn't this a dangerous argument to be advancing.

Keith J Mm, could be 100% the other way.

McIntosh Yes, Your Honours, could I take you.

Blanchard J It also risks losing the sympathy of the Court if you seem to be overreaching.

McIntosh I understand the point Your Honours but if I could take you through the authority of Warman and the principles that are involved, then I can explain why this is the appropriate relief.

Elias CJ Is it your contention that he becomes the object of the fiduciary obligations rather than the venture, the relationship.

McIntosh Essentially Ma'am.

Elias CJ Mm.

McIntosh But it's also one that's personal in the sense that all of the profit made by the first appellant was made in breach. It was sine qua non of how he's made all of his profit and it's not equitable, the basic disgorgement principle says it is not equitable that he hold any of it.

Elias CJ But you're really then contending that you're imposing a trust aren't you.

McIntosh I'm contending that a trust should be imposed.

Elias CJ Yes.

McIntosh Yes Ma'am on this particular property and project.

Tipping J This is a kind of confiscatory approach.

McIntosh Well.

Tipping J He was going to be entitled to at least 50%, call it 50%. Because he's been a naughty boy he's now going to lose it all and just be paid some sort of retainer.

McIntosh Well Your Honours there's been no finding that he was going to get 50%.

Tipping J Well.

McIntosh In fact the only finding is that they would have reached some terms, we don't know what they were.

Tipping J Well they couldn't have been better than 50-50 from your client's point of view could they.

McIntosh Well they might have been Your Honour because remember he was looking at financing because.

Tipping J Well if you want to present this argument we cannot stop you. But speaking for myself your client's going downhill in my estimation.

Elias CJ What does Warne, is it, that you're relying on.

McIntosh Warman.

Elias CJ Warman.

McIntosh It's a particularly important case Your Honours and if I can just take you through it you'll see exactly where I'm coming from. And I can make the points.

Elias CJ It's where you're going to that's bothering us.

McIntosh It's in my bundle of authorities and at the last tab, tab 16. Just before I get into it Your Honours. The case that Mr Fay presented was that the parties would put up equal capital and would share equally in the profit. What has happened as a result of the breach is that Mr Chirnside has put up no capital and has got 75% of the profit of this.

So there has been a departure, in fact entirely, from what was originally envisaged.

Tipping J But your client has not put up any capital. He was going to get 50% if he had put up capital but now he wants 100% having not put up the capital.

McIntosh In the course of doing that Your Honours there would have to be an appropriate accounting and he would have to pay the capital. And this is the important part of this particular.

Elias CJ This is a Magency(?) case. This is Warman.

McIntosh Yes Ma'am. But it's particularly important to the remedies of account that flow from a breach of fiduciary duty which is what we're talking about here.

Elias CJ I wish we'd stick to joint venture. Because then you're not left with a principal and an agent and one takes everything. You're left with the joint venture of which your client is only part. And I'm not sure how you get from this sort of abuse to substitute your client as the sole beneficiary whereas of course in the case of principal and agent it's quite different.

McIntosh Ma'am if I can go very quickly through it.

Elias CJ Yes, yes.

McIntosh And I do take the sentiments that are coming very clearly from the Court so I shall be as quick as I can to show you the argument I'm trying to advance. At page 557, halfway down that page below the quote from Consul Development. A fiduciary must account for a profit or a benefit if it was obtained either when there was a conflict or possible conflict between his fiduciary duty and his personal interests or 2. By reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from that. The stringent rule that a fiduciary cannot profit from his trust is said to have two purposes. Fiduciary must account for what has been acquired at the expense of the trust and 2. to ensure the fiduciaries generally conduct themselves at a level higher than that trodden by the crowd. And the objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest. And from accordingly misusing the fiduciary position. Thus it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably. And there's mention of the Regal Hastings case and Phipps v Boardman.

Equally Your Honours, just further down the page, after the para that begins, the assessment of profit. There's the sentence, what is

necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty. And then we have Your Honours the two approaches that were set out in Jarvis's case. One approach more favourable to the fiduciary, he should be held liable to account as constructive trustee not of the entire business but only of the particular benefits which flowed to him in breach of his duty. Another approach less favourable to the fiduciary, he should be held accountable for the entire business and its profits, due allowance being made for the time, energy, skill and financial contribution he has expended or made. In each case the form inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach.

And carrying on over the page. Ordinarily a fiduciary will be ordered to render an account of the profits made within the scope and ambit of his duty. Of course if the loss suffered by the plaintiff exceeds the profits made by the fiduciary the plaintiff may elect to have a compensatory remedy against the fiduciary, the election will bind the plaintiff. I just make the point, this is slightly out of the context but it is in the flow of the case, this is the point we were talking about before, that I want to make it absolutely clear that Mr Fay has not elected or sought to elect at any stage a compensatory remedy.

And then carrying on. Although an account like other equitable remedies is said to be discretionary, it is granted or withheld according to settled principles. It will be defeated by equitable defences such as estoppel, laches, acquiescence and delay.

Coming on below the quote, the conduct of the plaintiff may be such as to make it inequitable to order an account. Thus a plaintiff may not stand by and permit the defendant to make profits and then claim entitlement to those profits.

Over the page at 560. Below the quote, but the basic principle remains that principle who so elects is entitled to an account of profits subject to considerations of the kind already mentioned.

Tipping J But in this case the beneficiary owned the whole business and the agent appropriated that business didn't he or part of it.

McIntosh Yes.

Tipping J But in our present case what I'm having difficulty with is that Mr Fay didn't own the whole venture. He only owned, I would have thought, a half of it at most. So the only amount that was misappropriated was half the profit.

McIntosh Yes Sir although, I need to answer the point squarely and I acknowledge that. I'm coming to it as part of this case.

Tipping J Well there's got to be something very good in here to displace that fundamental thought in my mind, particularly in view of the passage you didn't read which is the para on page 559 starting it is necessary. To be fair you made the point earlier. But it's made very strongly here.

McIntosh Yes and I do not resile from it sir.

Tipping J No.

McIntosh Yes. On page 561 we have a discussion and I believe that's come through in the parties' submissions before the Court. And if I could just ask Your Honours if you come halfway down through that para below the quote, there's a sentence there that begins, then it may be said. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that liability of a fiduciary to account should be governed by the doctrine of unjust enrichment though that doctrine may have a useful part to play. It is simply to say the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, this is a particularly important point in my submission, the liability of the fiduciary should not be transformed into a vehicle for unjust enrichment.

Tipping J I'm sorry I'm not quite clear where you are.

McIntosh This is at the foot of page 561.

Tipping J Thank you.

McIntosh The next sentence. It is for the defendant to establish it's inequitable to order an account of the entire profits.

Gault J What duties of a fiduciary nature did Mr Chirnside owe to Mr Fay in respect of Mr Chirnside interest in the venture.

McIntosh He owed an obligation Your Honour not to hijack the venture.

Gault J Not to hijack the venture insofar as he had fiduciary obligations to Mr Fay in respect of Mr Fay's interest. But in the nature of a joint venture the parties have their interests. And I don't see that in respect of one's own interest one owes fiduciary obligations requiring disgorgement to the other party.

McIntosh Well Your Honours, in my submission, my point arises just over the page at 562. Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which depends on

the facts of a given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a Court will not apportion profits in the absence of an antecedent arrangement for profit sharing. But will make allowance for skill, expertise and other expenses.

Blanchard J But that's in relation to Mr Fay's share of the profits, not Mr Chirnside share of the profits.

McIntosh Well Your Honour that may be so.

Blanchard J Yeah, so this argument is really quite hopeless.

Tipping J You are reading this too literally. What their Honours meant by that first sentence, whether it is appropriate to allow an errant fiduciary a proportion of profits, understand gained by the breach of fiduciary duty. It's not the profits to which you were already entitled. This is, with great respect, a classic example of reading dicta divorced from the context which is here that this agent hijacked the whole business to which he wasn't entitled to anything at the start. Here, Chirnside was entitled to half. And the only amount he could hijack was the other side's half.

McIntosh Well Your Honours I'm going to depart from this argument very shortly because I hear.

Tipping J I thought you should have departed from it already quite honestly.

McIntosh No but the key points are Your Honour that there was no agreement for profit sharing. And there was no partnership found.

Tipping J Yeah but you've got to read this last three lines of this para again according to the context. You're reading this as though it was a sort of universal truth which applies irrespective of the facts.

McIntosh Well.

Tipping J I'm sorry if I sound a little terse Mr McIntosh but it really is.

McIntosh No sir, but.

Blanchard J Did you ever plead that you were entitled to 100% of the profits.

McIntosh No but this is my reason Sir for taking you through the pleading initially. Because it was a partnership claim, there was only ever a claim for 50%. But that hasn't been found. It's simply found that there was.

Blanchard J So it hasn't been found so it goes up to 100%. Come on Mr McIntosh.

McIntosh No but Sir what's happened is that there's been a departure. It's not just that Mr Chirnside has taken the 50% and paid the capital for it. By his breach he's paid no capital and gone to 75%.

Elias CJ That must be extraneous to the point of principle that we're grappling with here.

Tipping J I can have some sympathy for that point when it's looking at the as it were working out of the correct principle in this case. But I think the sooner we move on the better.

Elias CJ Well I'm grateful to be taken to Warman because I've formed the view that it's irrelevant. But it's got some interesting statements of principle which are not unhelpful. But that's the authority you're seeking to rely on is it for this argument.

McIntosh Well Your Honours there was the point that it was applied and followed in the Dickie v Torbay Pharmacy case. Which was a very.

Elias CJ In this sort of context or in.

McIntosh Dickie v Torbay Pharmacy was a joint venture for development of a property.

Elias CJ Well you'd better take us to that.

Tipping J Best take us to that.

McIntosh At tab.

Keith J Just back on your pleadings point Mr McIntosh. The knowing receipt one was not 50% was it because there you were making, there you're making an all or nothing claim.

McIntosh Yes Sir it was for.

Elias CJ Constructive trust.

McIntosh Constructive trust for the whole property.

Keith J Yes.

Tipping J Could never have succeeded.

McIntosh There was also a directed proprietary remedy offered to the Court at the end of the relief hearing is that the property be transferred to Mr Fay for the value that was being attributed to it in that hearing by the appellants. But that was unfortunately interpreted by the trial Judge as being an offer between the parties.

Elias CJ Oh didn't he think that your client was calling a bluff. Or had his bluff called.

McIntosh Yes.

Elias CJ Because he didn't come up with an agreement.

McIntosh Something went badly wrong there because that was actually a submission from me from the bar that this was an appropriate remedy at that cost and the appellants were given time to consider it. But in my submission Ma'am what was intended was not to consider it as an offer but to consider it as an appropriate remedy.

Elias CJ I see, a Court ordered.

McIntosh Exactly.

Elias CJ Yes, I see.

McIntosh Yes exactly. But as we found, Ma'am, I didn't communicate it very clearly because it wasn't taken that way. But I just raise the point that that's what Mr Fay was, it's another example of the propriety remedy he was seeking.

Elias CJ Where do we find Torbay, sorry.

McIntosh At tab 5 Ma'am of my bundle. (**Dickie v Torbay Pharmacy (1986) Ltd** [1995] 3 NZLR 429)

Tipping J And whereabouts does the Judge discuss and rely on Warman in this case.

McIntosh I beg your pardon.

Tipping J I'm having some difficulty finding any reference to Warman.

McIntosh No, no I'm sorry Your Honour. I've put you wrong on that. He didn't expressly apply Warman. But what he has done in this case is between joint ventures he's awarded or stripped the errant fiduciary of the property which they … and did not give them any share. All he did was compensated them for their costs.

Keith J And they got back their deposit did they.

McIntosh Yes sir, they were kept whole. But they got no benefit from the venture that they intended to be part of. Now this case was relied on heavily Sir in the High Court and also the Court of Appeal by Mr Fay as one might expect because it's so similar on its facts. It was a co-venture between the doctors and the developer but as Justice Hammond in the High Court said, the exact details of the venture had not been

finalised. B was the main spokesperson and negotiator for the co-ventures. So B in this case Your Honours was very similar in my submission to the first appellant because he was the one who was carrying out the negotiations, he was the one who brought in a third party without permission.

Gault J Was the development proceeded with prior to this or were we just arguing about title to the property on which the development would have proceeded.

McIntosh It was the title to the property Sir yes.

Blanchard J Wasn't the solution at the end of this really just a pragmatic one that B was only one of a number of people. There were several doctors and he was going to be completely outnumbered if a joint venture proceeded. There would have been a partition or sale ordered partition was not on so there would have been a sale ordered, so he would have lost his share. And the Judge really just jumped those fences and proceeded with that assumption in mind.

Gault J A pragmatic solution to this problem has to be found.

Blanchard J Mm. I mean he actually starts his discussion of this topic at page 438 by pressing Mr Judd for an authority that a beneficiary can be, a defaulting fiduciary who's also a beneficiary can be excluded from his beneficial interest. Mr Judd said he'd not been able to locate such. In response to some questions from me he did agree it might be harsh to deprive B of his interest etc. It's a classic case of equity tailoring an appropriate remedy for the particular circumstances.

McIntosh Yes Your Honours but in principle this man through his breach of fiduciary duty has lost out on his share of profits. He's received compensation for expenditure and time etc.

Gault J What profits were made.

McIntosh Well it would be the value of the development Your Honour. But obviously matters hadn't got to that point.

Keith J … said people left intact or whole or whatever the word was.

Elias CJ There was a loss wasn't there.

Blanchard J They could have got him out before they did the development.

McIntosh They could possibly have paid him out Your Honour yes.

Blanchard J Well they could have gone to Court under s.140 of the Property Law Act and got him out that way.

McIntosh Yes Sir I think they sought a constructive trust over the property in the hands of J, the nominee who was brought in. But the net result of the judgment was that B lost out his share in the joint venture.

Blanchard J Mm. But he would have lost it anyway.

McIntosh I'm not sure of that point Your Honour. Because he was to be a party in the joint venture.

Blanchard J Yeah but it was for a purchase of land.

McIntosh To develop into a medical centre.

Blanchard J Yeah, yeah. And at any time any one of the joint owners could have sought under s.140 of the PL Act a partition or sale. And that's obviously what would have happened. They would have not tolerated him proceeding with the development. That's what the Judge is on about here.

McIntosh Yes Sir I take the point. But.

Blanchard J So he would have been excluded on a bare land basis.

McIntosh I'm not sure if that was the reason why Justice Hammond excluded him.

Blanchard J Well that's what he says. Look at the bottom of page 440. Lines 40 to 45. He's recognising what would happen if s.140 was applied.

McIntosh Yes well Your Honours I wont, this matter was set out in the submissions at part 3 as a relief option A and the alternative was to continue with the account that was sought by Mr Fay which we called in our submissions Your Honours relief option B whereby he is awarded one-half share.

Gault J This is what you say the trial Judge decided subject to a calculation issue, is it?

McIntosh In principle Sir although he actually gave damages in lieu of that. So in order to give an accounting for a share of the profits rather than all of it.

Gault J It has to be monetary compensation in lieu because he was not inclined to order sale of the project. It's not monetary damages but it is compensation in lieu of the account of profits. It's a monetary equivalent.

McIntosh And Sir that is.

Gault J It's what you said he did.

McIntosh Yes.

Gault J But you'd say he did it wrong.

McIntosh As to the numbers Sir, but having done that the question then arises is if we simply give an account of profits and we don't do it by way of a formal accounting but we do it by way of damages assessed on the value, the question comes up as to the allowance. And if we go back to the principles that we looked at in Warman, do you look at profit sharing such that you would say well you know what should the profit shares actually be, should there be an adjustment from 50% or do you take a different approach where there's no antecedent arrangement for sharing of profits and you order an allowance for any extra work done.

Gault J As a matter of law do you say it would be impossible for the Judge to make an allowance in equity having regard to the way things panned out.

McIntosh No Sir I wouldn't say that for a minute. It is possible, it is entirely possible for the trial Judge and this Court and any Court to do the matter the way he did on his assessment of it.

Gault J Mm.

McIntosh Now Your Honours in the Say-Dee case which I mentioned briefly before which is in our relief submissions, at tab 13. This was a case Your Honours in which two women engaged a developer to assist them with a property development of a property essentially called number 11 on Adeane Street in Burwood. And it transpired that the property couldn't be developed given the size or the amount of the land. But it was possible to have a development if more land was added to it. Mr Elias, the property developer, knew that. He suggested to his fiduciaries, the two women, that they might be interested in buying those but he didn't tell them why that would be a good idea. They declined. They didn't want to proceed any further in that course and also they were finding they didn't have the financial capacity anyway. He went ahead and developed all the properties and they sued for a breach of fiduciary duty. And the judgment from the NSW Court of Appeal. The net effect of it Your Honours was that the Court held that the whole development, all three properties were held on constructive trust for the parties who were to be equal parties. The Court gave effect to the half share but made provision for an allowance, and that's at para 252 which is on the last page.

And the facts in finding of the case Your Honours show that the reason that the Court took this approach in my submission was that there was a profit sharing arrangement in place for half shares, the development as it turned out went well beyond what was originally envisaged and

that was because of the skill of or the entrepreneurialism of Mr Elias and that the two women themselves could not have bought that land, extra land, anyway.

Tipping J Where are we at at the moment Mr McIntosh. I have to confess and it's no doubt my fault, but I'm a little bit lost. Are we here supporting the trial Judge, attacking the Court of Appeal, attacking?

McIntosh Supporting the Court of Appeal. Sorry, in which case.

Tipping J No, no, where are we up to with the argument that you're presenting that's supported you say by this New South Wales case. What issue is this directed to.

McIntosh This is an example Your Honours of an accounting of profits given of a development in which they followed in a joint venture basis. This is an example of the option B in my submissions. So rather than a full account it's a partial account on a shared basis.

Tipping J This is, well it can't be an account of profit in strict sense can it because there is in fact no realised profit. So this is on the premise that it's money instead of an account of profit.

McIntosh Yes sir.

Tipping J And it's supporting the view that it was perfectly okay to give Mr Chirnside an allowance. Is that what's it doing.

McIntosh It's trying to distinguish that there were particular reasons in that case why as well as a half share of the profits there was an allowance given. It was for those particular factors. For example the fact that the original concept, the developed concept went far beyond what the parties originally envisaged.

Tipping J Yes but is it your submission that you're building up to that in this case Mr Fay shouldn't have had a proportion of the profits plus an allowance.

McIntosh Mr Chirnside.

Tipping J Sorry, Mr Chirnside, I beg your pardon.

McIntosh Essentially Sir yes.

Tipping J Right.

McIntosh And then Your Honours we have instead of an account which, as Justice Gault said, that wasn't ordered here and I infer from that that that's understandable given the actual, the physicality's of it: ownership, what have you. We have the option C which is what the

trial Judge ordered, which was damages in lieu of the account, damages of the unrealised profits. To do that Your Honours we still have to then decide what the shares will be. In my submission Mr Fay would never be entitled to less than 50% of the shares. Or the share of the profits.

And there would need to be a determination of whether an allowance is payable and if so how much above, or to compensate Mr Chirnside in addition. And the last step in it would be a valuation of the profits in a way Your Honours which would do justice to the parties. And that's foreshadowing the next part of the submissions which is the vacant space appeal.

Tipping J Well assuming this was the correct approach, what has to happen as a consequence procedurally. Does it have to go back to the Court of Appeal or back to a trial Judge or.

McIntosh Well there are a number of options Your Honour which we set out in the submissions.

Tipping J Yes.

McIntosh But essentially, and I'll come onto it as I come onto this part of the appeal, but if I can convince Your Honours that there is a legitimate question as to value, then the options will have to be investigated. And in my submission the appropriate course to remove all doubt is for the Court to order a sale of the building with an accounting for interim profits and payments made and that can swiftly remove any doubt as to value. Because we have an actual figure. But if the Court isn't minded to determine that then there are a number of other options to deal with the legitimate question of value if Your Honours accept. For example the appointment of an independent expert. This Court could determine the amount itself on the evidence. Or it could be directed back to the trial Judge to reconsider the matter in light of, and have further evidence called.

Elias CJ Or it could perhaps be referred to an Associate Judge.

McIntosh Yes Ma'am and that happens on many occasions in some of these cases that we put in the book. That's where the matter takes place. Because at that point it's really just a consideration of the dollars and cents in a way.

Tipping J But you'd want us to say that he cant, Mr Chirnside that is, cant have both whatever the share of profits that's ascribed for the purposes of the money calculation plus this allowance. Is that the essential thrust of the attack on the allowance.

McIntosh Yes. Yes Sir in a nutshell. That if Mr Chirnside.

Tipping J Well I like nutshells because I can sort of at least have some hope. To be honest I'm finding it very difficult to follow and I'll have to be candid about that. It's no doubt my fault.

Elias CJ I understood that you'd flagged that argument in the Court of Appeal. That you had, I might be wrong about this, that you had conceded that some allowance should be made to Mr Chirnside. Or maybe it's in the evidence I've read that.

McIntosh Mr Fay.

Elias CJ Mr Fay.

McIntosh Mr Fay said that at the time they entered into it and the terms they reached, Mr Chirnside efforts over and above Mr Fay's efforts which were considerable, would have been allowed for as they did in the CRT project. But we never got to that position. But in the High Court and Court of Appeal Mr Fay's position was he has disentitled himself for any extra allowance for the work he did because what he did was essentially to put him in a position where he could breach and exclude me.

Tipping J I thought the argument in the Court of Appeal was focused on the quantum of the allowance rather than the principle of the allowance but am I wrong.

McIntosh Both Your Honour.

Tipping J Both.

McIntosh But most certainly it was started from the premise that there should be no allowance.

Tipping J I see.

McIntosh That's been Mr Fay's case throughout. That having had the breach, there shouldn't be an allowance because it has the effect of really, there's no sanction whatsoever for his conduct. He's only got, he's got everything that he was always going to get.

Tipping J So your client wanted a penal element in it essentially and the penalty was going to go to him.

McIntosh No the penalty Your Honour would go back into the joint venture and be shared equally. But it wasn't a penalty, it was a disentitling function.

Keith J Well a sanction sounds like a penalty doesn't it.

Tipping J I mean I can understand Mr Chirnside getting no more than what he ought to have been entitled to. But the idea that he should get less than what he would otherwise have been entitled to, so disgorgement of your share plus a bit for the insult which just happens to end up in Mr Fay's camp to some extent, one would need to have quite a bit of authority to suggest that equity actually exerts some penalty in these circumstances. It's restitutionary in the sense that it's getting into Mr Fay's hands what he would have got if the thing had followed its proper course. Why would one actually deny Mr Chirnside what he would have got if it had taken its proper course.

McIntosh By his conduct.

Tipping J So it is penal, it is a sanction for having breached the fiduciary duty. It's a fine in other words.

McIntosh No Sir because I would say that the exemplary damages would be penal. I say that he is simply disentitled himself to anything extra for his extra efforts.

Gault J What's the basis for that disentitlement. I too am struggling with this. The arrangement was that he would do the sort of things he did in carrying out this project. It was acknowledged by your client that in all probability there would have been an arrangement for him to be reimbursed for that extra effort. He did carry it out. The only thing he didn't do was account to his joint venture. Now he must do so. Why must there be this element of in effect sanction.

McIntosh Well I have addressed this Sir in my part 5 of my submissions. Could I come back to it very briefly then.

Gault J Yes.

McIntosh But when I get to it in order. But I do take the question and I will endeavour to answer it at that point.

Elias CJ Well is the point that there is no entitlement because they didn't get to the stage of agreeing on some recovery.

McIntosh Well exactly Ma'am. There was actually no agreement on exactly what the profit sharing arrangements would be.

Keith J That's a different point though isn't it.

McIntosh Correct Sir but.

Keith J It's got nothing to do with penalising or sanctioning.

Elias CJ No.

McIntosh No but equally there wasn't any agreement as to any extra compensation. So that we simply don't know. And all that's happening is that the net effect of giving a default half share and an allowance for the extra work that one did, has the net effect of keeping him entirely whole. He took no risk in his breach. He's got exactly what he would have got. There's no risk in what he did. In fact it's encouraging him.

Elias CJ That's the punitive approach.

Keith J It's the bad man theory of contract against you though isn't.

McIntosh Well it's equity.

Keith J I know this is not a contract case.

McIntosh Yes.

Keith J But … said all those years ago that someone who didn't want to comply with their contract had the choice between compliance or paying damages. That's it isn't it.

McIntosh Well Sir and as we saw from the dicta in the Warman case, where there has been dishonesty, a party may disentitle himself from that. And I will come back to that. But it's not. In my submission you can understand why that might be. Because otherwise we're encouraging people just to take the risk. Try and cut them out. If you get away with it, you're fine. If you don't get away with it, you get everything you would have had. So it's worth your risk.

Gault J That's still penal, that philosophy.

Blanchard J Mm.

McIntosh Yes well.

Gault J The question of disgorging to Mr Fay what Mr Fay would have obtained had the joint venture been carried out. It was carried out. It's a matter of assessment what he would have obtained. He says himself he probably would have gone along with an allowance.

McIntosh But we don't know what share they would have had.

Elias CJ Well yes you do.

Gault J The maximum you could push for is 50% having regard to the way you pleaded.

McIntosh No it is now Your Honour.

Blanchard J Isn't the disincentive going to be that the Court won't be very generous in relation to remunerating the wrongdoer for the work, the extra work that he may have done.

McIntosh Yes sir, that is one way of doing it. But we're simply talking about a scale really, a matter of extent. But you look at all the facts.

Blanchard J But you're saying, well don't give him any expense allowance.

McIntosh But we have to go back to the facts of the case. And I think we've all agreed that the equity has to be, the equity applied has to be as best a fit as it can be. And in the circumstances the trial Judge found that Mr Chirnside kept a lot of these matters to himself deliberately so that he could put himself in a position to exclude Mr Fay the way he did.

Blanchard J But he did do an awful lot of work.

McIntosh There's no question but he would have had to do that anyway. And if he's excluded Mr Fay from doing it, why should he be compensated for that. Now there's been a lot of submission written and oral.

Blanchard J Is there any real suggestion that Mr Fay would have done a lot of that work.

McIntosh Mr Fay's evidence in chief was that sir. Moreover, as I say, there's been a lot of submission critical of his skills. As it happens, and in the green case we have Sir his evidence in chief.

Gault J An also a finding that he was given to exaggeration.

McIntosh Well Your Honour he is in sales. But in his evidence in chief at page 156 of the green case he set out his own property developments that he'd been involved with and he summarised them at his para 2.9. He was not cross examined on any of his own developments or his skills. Mr Chirnside in cross examination grudgingly accepted that Mr Fay could have tried to do this one. He certainly did not say that this was beyond Mr Fay. And that's the case that's now being put in submissions, that Mr Fay couldn't do it. And Mr Fay's evidence was that he was available and would have been more involved if he could have been. But in my submission if the course of conduct of the first appellant as the Judge found was set up deliberately so he kept things in his own name and kept negotiations to himself, and there's several findings in that regard, then he cant then say, and I also should be compensated for this because of my extra work when that was part of his modis operandi for this particular situation.

Elias CJ He was paid a fee by Rattray wasn't he.

McIntosh Afterwards Ma'am, yes, from the point that the project became viable, he was paid a management fee yes.

Elias CJ Well when was that. From the time when the tenant committed.

McIntosh Yes, essentially. From the date of the partnership agreement or the shareholding agreement. From that time it was a viable project which he managed and was paid a fee.

Elias CJ Yes.

McIntosh So this is an allowance for the initial work getting to that point.

Elias CJ Yes.

McIntosh But just to summarise Ma'am, if you do it for a particular purpose, which is essentially in breach, then it's inappropriate that you can claim an allowance for it. You would have to show that Mr Fay, you invited him to do so and he refused. And that wasn't shown. Or that he was incapable of doing it and that wasn't shown either. The reason Your Honours that I wanted to focus as I have this afternoon on the relief sought and explain why it was proprietary in its basis and intent and to go through the different options was to show what the main complaint is about Mr Fay's complaint about the Court of Appeal's judgment, which was the loss of a chance approach to damages.

Tipping J That's actually your first point. I'm just looking at your client's summary at 1.4 of the submissions. We seem to have been spending a vast amount of time Mr McIntosh before we've got onto this loss of a chance. because as I understand it from reading this in advance, there are these four aspects that loss of a chance was wrong in principle, that if it was correct in principle, the calculation was wrong, and then we go to vacant space and the allowance. We seem to have been sort of moving all over the place.

McIntosh No sir.

Tipping J Before we get to the loss of a chance point.

McIntosh No but Sir hopefully by now it's clear why if we look at the loss of a chance matters, this is my 3.1(a), why the appropriate relief here is a disgorgement.

Tipping J I see yes.

McIntosh And if it is a disgorgement then it can't be loss of a chance, they're mutually exclusive. And that's why I wanted to show what the appropriate remedy was so that then when we saw the inappropriate remedy we had something to measure it against.

Tipping J I follow. But I don't see anything here in this about penalties or 100%'s or anything like that. But forgive me, I'm starting to get a bit

more on track now I think. But this is just a warm up for the proposition that the Court of Appeal's loss of a chance was erroneous.

Elias CJ No, no it's a separate argument developed in 3.7 and 3.8 isn't it in terms of the allowance.

Tipping J There are four dimensions to Mr Fay's complaints about remedy. They're in 1.4 of the submissions and they are called Court of Appeal adopted erroneous approach by adopting loss of a chance. That's, if they were right, the calculation of the chance was wrong. And then there's vacant space. And then fourthly there's this allowance business. And I've been struggling to see where we were getting to and I now understand that some of this anyway, not the allowance, but some of this is to do with the erroneous approach on loss of a chance.

McIntosh Yes sir.

Tipping J I just assumed we were talking about the first part of this. And that's why I've been struggling, I couldn't see where.

McIntosh Well Your Honours I started with part 2 where it was important that I explained the litigation and the relief and what the Court of Appeal had missed if you like and then to look at the different relief options.

Tipping J But you're saying that there was no chance involved at all. It's all defined itself in effect.

McIntosh Yes, yes sir. I had to show you the remedy that was actually sought to show why loss of a chance was completely inappropriate. But that's only one of the arguments that needs to be raised about loss of a chance.

Elias CJ Well in that connection, you're about to go onto that are you.

McIntosh I am Ma'am, yes.

Elias CJ In that connection, I wonder whether you might be invited to develop the loss of chance argument if it's necessary for you to do that in reply. Because we've read your submissions on that argument and unless there's anything that you particularly want to develop there, we think we understand your argument.

McIntosh Thank you for the invitation Ma'am. I understand. No there's nothing in particular then I'd like to add to that.

Tipping J Well I just want to make sure before I finally concur in that. I know I've informally concurred. I just want to make sure I understand the essential thrust of what you're saying when you say the Court of Appeal was wrong to go at it on a loss of a chance basis. And that as I

understand it is it can be put very simply, that there was no chance element involved because it all realised itself.

McIntosh Your Honour.

Tipping J But the chance I thought the Court of Appeal was talking about was the chance that your client would actually be involved in the joint venture at all formally. But you say, well he was in there. He was in there and the very fact that he is found to have been the subject of fiduciary duty suggests that he was entitled to what the profit was or some equivalent and the issue of chance has got nothing to do with it.

Blanchard J Mm, mm.

McIntosh That is absolutely the point sir.

Tipping J Well there's a huge amount of stuff there to make a.

Keith J Well it's there in bold under 3.1 but then there's another 30 pages.

McIntosh Well Justice Keith, Your Honour's referred to 3.1. That is the argument about the loss of a chance matter. And as I said, the reason loss of a chance is wrong is because there is one that is right. And I wanted to go through that to make sure there's absolutely no doubt that. Because with respect to the Court of Appeal, it has appeared as a cogent argument and it's been quite hard to understand quite where it's come from. But if we anchor it back in the relief that was, in the pleading and the Court of Appeal, the High Court's approach, then we can, there's no issue there. If the Court accepts that, and in fact I've been through these matters under 3 onwards, then in fact we can move to 3.1(b) although I take the Chief Justice's invitation that I can't actually add to my submissions as to why there is no chance here.

Keith J In some ways your word inappropriate too weak isn't it. It's just loss of a chance is just not in play because there's no chance.

McIntosh I'm very happy to put it that way Your Honour, yes. Therefore I don't need to address (b), (c) and (d). Because you have very fulsome submissions from me on the point.

Elias CJ So that leaves the vacant space appeal and anything further you want to tell us about the allowance does it.

McIntosh Yes Ma'am. That's what it leaves.

Tipping J And there's still the calculation of chance appeal. But of course that doesn't arise if you're right on the first premise and that could perhaps be left to reply too.

McIntosh Well, the nutshell of that one Sir is that it leads you to the same result if you apply it properly, which is what the trial Judge did. That you apply loss of a chance but there's no chance so it leads you back to where you were.

Blanchard J Mm.

Keith J But just on.

Tipping J Well there was no chance to calculate.

McIntosh Quite. It's a zero chance. So it leads you straight back to the same result as the accounting.

Keith J Just so I can mention it in case it's relevant later in the hearing. One thing that puzzled me about the Court of Appeal's judgment on the facts, not on your point of principle, is that in para 40, which is page 118, they say, like the trial Judge with his advantages and so on, we think these men would likely have come to an agreement and so on.

McIntosh Yes.

Keith J And then in para 52.

McIntosh Yes at that point.

Keith J They say at that point I thought the chance issue's disappeared.

McIntosh Yes exactly right.

Keith J And then it suddenly comes back in 55.

McIntosh And suddenly it comes back.

Keith J And in 55 it's lumped together with the profit share.

McIntosh Yes.

Keith J You know, being less than 50. So that 25% figure is a combination I take it of the loss of a chance element and the likely.

McIntosh Yes.

Keith J The likely deal. So somehow or other there's been a.

McIntosh Yes.

Keith J Piece of implied arithmetic.

McIntosh Well essentially Sir, and as I set out in the submissions, the Court of Appeal seems to have moved away from it being an equal controlling relationship that neither party can hijack it.

Keith J Yes, yes.

McIntosh You've only got a negative control, you can only not go ahead.

Keith J Yes.

McIntosh But you can't go ahead to the exclusion of the other.

Tipping J But they've discounted it in effect twice but without telling us what the discount was on each occasion.

Keith J Yes, yes.

McIntosh And I've very fulsomely Your Honours said why a discounting in this situation is inappropriate because, well I've been through it.

Keith J Yes, yes.

McIntosh Your Honour's the vacant space appeal is, I'd be guided by how Your Honours think I should approach it before you. The actual issue is very simple. And I have gone to great lengths to explain in detail but I can describe it very very simply. And the concern is the Court of Appeal didn't grapple with it. These points, exactly these points were put to the Court of Appeal. Somehow they've said it's not an exact science. This is about the figure and then we apply our discounting. And it is an important point to Mr Fay Your Honours because to the extent that there is potential extra value in this development, if it is inadequately allowed for then it's going to have an in balancing effect. That's the nub of it. And.

Blanchard J I think in order to deal with the vacant space appeal if we're going to get into the facts, you're going to have to somehow, possibly with the use of diagrams, give us a picture of what it is you're talking about. Because at the moment I don't really pretend to understand what we're talking about here.

McIntosh Yes Sir I can do that. And that's something that I could pick up in the morning and show the Court quite quickly. That said Your Honour, one doesn't actually, in my submission, we don't actually need to know the detail because it's the principle involved. And if I can just explain very quickly what I mean by that. There is some vacant space in this building. The valuers valued it. One valued it on a storage basis and one valued it on a retail basis. And that has flow-on effects for the different value.

Blanchard J Well I don't even know what the building looks like.

McIntosh Yes Sir well I can produce diagrams which may assist in that.

Blanchard J So my ignorance is total.

Gault J Is this going to be a case of which valuer's assessment of the space is to be preferred.

McIntosh No sir, no that's not my case and I don't think it would be appropriate for it to be.

Tipping J Does it ultimately result in something to do with the amount of the notional profit.

McIntosh Yes, it has major impact on the notional profit sir. Now perhaps if I could just leave today on some points of principle. Mr Fay has two concerns about this. That care needs to be taken, real care needs to be taken. Because any undervaluation will profit the errant fiduciary. Which is why you bypass that if you just sell the building.

Because then you get hard figures for value. And if you are going to do it on a notional or a valued basis then you have to be scrupulous in the approach. So that in my submission if there is a legitimate concern the appropriate step is to just review it, remit to back to the trial Judge. If he, as we'll see tomorrow, has legitimate concerns about the value, those concerns can be answered by further evidence or by an independent expert or by a sale. But it is my submission, it could result in a major injustice which I'll explain as well if there's a concern raised but it's just left.

Tipping J What proportion of the building.

Gault J In these cases usually each side has the opportunity to adduce evidence and that evidence is assessed and a determination made. There has to be some very good reason to go back and say, more evidence is to be gathered unless there is some major problem. Now.

McIntosh Yes and that is.

Gault J Now you will have to show us what the major problem is.

McIntosh Yes Sir, yes. Sir that is my challenge which I can take up. But the second point of principle, apart from taking care is that the appellants are in possession of the property. And that is important because a result of being in possession they are able to manipulate its presentation or its appearance for a theoretical valuation.

Gault J Valuers can see past that. Valuers value on the basis of best use, not what somebody's trying to pull over their eyes.

McIntosh Yes Sir but if, well, you are in a position to take steps or not take steps to improve, to maximise the potential of your property. And if you don't take any steps you can say well it's only got this value. Whereas if you do take some steps you could expose the value that the parties intended.

Gault J That's not my understanding of how valuers work I'm afraid.

Tipping J It's a hypothetical best use. What proportion of the total is vacant. Are we talking about a major part of it.

McIntosh Yes we're talking about a floor space Your Honours of 2 and a half thousand square metres.

Tipping J As against a total floor space of how much.

McIntosh The Harvey Norman space down below Your Honour is slightly bigger than that.

Tipping J Oh right.

Elias CJ What did the, I can't remember now, what did the trial Judge do, did he treat it as storage space.

McIntosh Yes he recognised the space.

Elias CJ Yes. But if he wasn't convinced by the evidence you put up that it had retail potential, why should we be concerned on second appeal with that.

McIntosh Well.

Elias CJ Because you are the plaintiff, you have the onus of proof.

McIntosh I understand, yes I understand Ma'am, I understand exactly. It's really Justice Gault's concern as well. There'd better be something here. The point is Ma'am that the trial Judge found every constituent he needed to give it that particular value. But, and the value was given in re-examination and he didn't think that was sufficient. Now there was nothing else really, and I'll go through this tomorrow but there was nothing else that needed to be done or could be done but that is not the end of the story. The end of the story is this. Immediately after the Court of Appeal's judgment was delivered, setting damages for loss of a chance, the appellant started to advertise the space again for retail letting. So they knew exactly what was going on and they were in a position. Because by that time they were free, they were going to be free of any impact in the rental flow because damages were only being assessed on loss of a chance in light of the figure the Court of Appeal had already assigned for total profits. So they were then free to go off and let this, take steps which they hadn't done for the past three years

and exploit that value. And that was the additional evidence that Your Honours may recall from the reading that was introduced into the Court of Appeal. Where the appellants started to readvertise this as retail. Now that is the point Ma'am. That is the new thing. That is the real thing. If we find that there is new evidence to suggest that the trial Judge's assessment was wrong to all tie it in together, Mr Fay says that is a major cause for concern.

Elias CJ I see.

Tipping J Is this all discussed at paras 44 through to 47 of the relief judgment of the trial Judge where he talks about Mr Dick and Mr Sellers and how much per square metre Mr Dick had put on it and what the cross examination was and then he comes to a figure of whatever it was for the rental stream likely for this vacant space and then applies this capitalisation rate and then gives final rental stream. So is that where all that is to be found. And the sole issue is what additional to the Harvey Norman rental stream you are going to get from this vacant space. Essentially.

McIntosh Essentially Sir yes.

Tipping J So you put X per square metre on it or Y.

McIntosh That's essentially it.

Tipping J The Judge has put X for the reasons he's given here. You are saying that we now know more accurately post the trial what they're actually going to use it for.

McIntosh Yes because the appellant said it was X as well. And that was their evidence which he accepted. But as soon as the trial finished they're advertising it as Y. And.

Tipping J Well it's analogous to, no I won't pursue that thought.

McIntosh But Sir the point was raised before that. And so if we take a back bearing on it in my submission we will, well I've set it out very clearly.

Tipping J Could I just interrupt you again, what in a nutshell did the Court of Appeal say about this when you put this to them. Just remind us would you.

McIntosh They said it's something of an imprecise exercise. And.

Tipping J Tough, tough from Mr Fay's point of view.

McIntosh Tough. But Your Honours they didn't engage on it and they said that, and I think Sir it was because they were pursuing damages.

Gault J Yes it may have something to do with the approach to relief generally.

McIntosh The comments suggested that this was not an exact science and that has caused difficulty because the valuation of a building is certainly a science and quite an exact one. So that seemed to be create the impression that they hadn't dealt with it because they weren't doing it on an account basis.

Tipping J But before you even start applying discounts and so on, you've got to have a fairly accurate starting account.

McIntosh Sir that was exactly our submission that you have to be careful. Particularly, 1 if you're giving a notional account of profits or in lieu of and 2, if you have the errant fiduciary in possession of the building.

Tipping J Well more the former I would have thought. But you've got to start with as accurate as you can account, even if you're doing it on an analogous basis.

McIntosh Yes.

Tipping J Alright thank you, I now fully understand what it is in principle, this point. You're really asking us to look at it on the basis of in effect further evidence. That had there not been this dimension of the advertising it as retail, you'd have nothing to go on would you. You might have something to go on that they were a bit cavalier when they said it was an imprecise science but you wouldn't have got anywhere anyway because we wouldn't be going to review a trial Judge's decision that he preferred Mr Dick's to Mr Seller's. So your trump card is this new evidence is it. Or so-called new evidence.

McIntosh Sir can I just put the two together because they're really important. And this is the absolute nutshell of the primary complaint. Mr Fay's evidence valued the vacant space 2,600 square metres in a building, if you'll allow me in this part of the building, and in fact he should have done it in this part of the building. It was the same building. It was the same space. And all the other features remained the same. And he put a value on this space, the market value for retail, and that's all accepted in evidence as to what that would be. And then this configuration was shown not to be viable. So he was asked, well what would the valuation of that one be in re-examination and he said, well what are you talking about, it's the same. Just because you happened to have moved the space, it's the same amount of space in the same building in the same place doing the same things. Why would I change my valuation. It's 100 per square metre. Now in those circumstances Sir Mr Fay was understandably concerned that the trial Judge said this is inadequate because in fact it really makes no difference whatsoever. But that's the first part. The second part of it is as you said Sir, the trump card, when you put the two together, you say, look what the appellants are actually intending by this anyway.

Elias CJ Alright, well I think we'll have to take the evening adjournment now. I'm a little bit anxious about progress. Because I understand it on counsel's intimation, we allowed two days for this and we have another case starting on Wednesday. Do you expect to finish comfortably tomorrow.

McIntosh Oh definitely Ma'am, most definitely.

Elias CJ All counsel Mr Whiteside.

Whiteside Yes Ma'am.

Elias CJ Yes because otherwise we'd start earlier if there was any risk of that. You think we should get through it if we start at 10.

McIntosh Well I'm not sure how much longer my learned friend's going to be but I would anticipate that I'm going to be less in length than what I was on liability. So I wouldn't need more than a couple of hours I would have thought.

Elias CJ Yes, alright then we'll start again at 10 tomorrow. Thank you.

Court adjourns 4.10 pm

Tuesday 15 November 2005

Court resumes 10.03 am

Elias CJ Yes Mr McIntosh.

McIntosh May it please Your Honours, yesterday Your Honours my submissions focused largely on the nature of the relief that was being sought or was put in issue in this proceeding. And really on one issue was left hanging from that which was the matter of the allowance which had been awarded by the Court of Appeal. And which was still in contention between the parties. And I would just like to briefly address that Your Honours before moving to the other matter for today which is the vacant space appeal.

First Your Honours, both Justices Tipping and Gault yesterday asked counsel to be absolutely clear as to the relief that had been sought and awarded by the trial Judge. And my response I hope was emphatic on both occasions that there is no complaint with the approach that was taken by the trial Judge in principle as to awarding an account of profits by way of damages in a half share. And to put that another way, were this Court to uphold that approach, Mr Fay most certainly would have no complaint.

What happened yesterday Your Honours was that Mr Fay was concerned that when the matter had gone to the Court of Appeal and there had been a departure into loss of a chance, it appeared that his relief had been completely recharacterised as way of equitable compensation. And his instructions were to look to all options therefore if it was all in the round again, then look at all options to show A what the Court is able to do in equity and B to show why in light of his pleading and the case in the High Court, why there was no chance element. To the extent that it appears that all those options, or certainly the loss of a chance, isn't in play for those reasons then the Court and certainly Mr Fay doesn't need to look to all other options. And so that leaves Your Honours just the matter of the allowance or if you like the details of the approach taken by the trial Judge.

Elias CJ So you're not pursuing the argument that we didn't much fancy yesterday.

McIntosh Not in its own right Ma'am, no.

Elias CJ No.

McIntosh It was only to be in context.

Elias CJ Yes.

McIntosh But equally I don't want to be disingenuous about the position taken.

Elias CJ Yes.

McIntosh It was if loss of the chance is in gain, then the submission was well everything is.

Elias CJ I see.

McIntosh And also, as I say, the demonstration of the various options of account and why they go that way shows why it isn't the chance matter.

Tipping J So just the 100% approach, if I can call it that, is only in play if we uphold the loss of chance approach.

McIntosh As being an available approach.

Tipping J Yes.

McIntosh Yes Sir, yes. In relation to that matter and in particular to the allowance which is the last issue there, just for completeness there was a case which I should have brought to Your Honours' attention yesterday which my submissions relied on and is in my casebook. And that is the case at tab 8 of Mr Fay's authorities as to relief. I beg your pardon Your Honours Tab 6. It's the case of **Edmonds v Donovan**,

(heard together with **Distronics v Kingston Links Country Club** [2005] VSCA 27). And Distronics v Kingston Links which if I may I'll just refer to it as the Kingston links case which is the way I've referred to it in my submissions. This does he, this is pertinent Your Honours although I wont spend long on it. And I'm referring to it primarily in relation to the alliance point.

As Your Honours will see the judgment was delivered earlier this year. It's a decision from the Court of Appeal of Victoria. And it has the advantage of being a joint venture case. In very brief Your Honours, there were 6 partners involved in a joint venture to develop a golf course. They fell into dispute and two of the parties determined that the others had been in breach or in repudiation of their agreement. And so they appropriated or arrogated I think is the word that's used, the whole venture to themselves and went off and developed it. Although they developed it further than had originally been contemplated. The proceedings were then brought and of relevance to this discussion is the relief that was sought by way of constructive trust for the profits of the project. The trial Judge determined that it was more appropriate to order equitable compensation. And I submit Your Honours it's for much the same reasons I think as applied in this case, that that was actually the most expedient way to go about the matter.

But just of relevance if I may, if we pick up at page 40 and 41 of the report. At the top of page 40, halfway down the quote from the trial Judge's judgment, there is the statement. I am also satisfied that Emonds and Cahill who were the errant fiduciaries, should be treated for all intents and purposes as if they were each a one-sixth member of a joint venture as originally agreed and despite their breaches as I have found, I do not consider that the conduct of Edmonds and Cahill warrants forfeiture of their interests.

And then as we go diagonally across the page downwards Your Honours, to there's another quote from the trial Judge's judgment. Again half way through that, I am satisfied it would be necessary for an assessment to be made for an account of equitable compensation to be paid to the plaintiffs etc etc, after the deduction of debts including adjustments. And here it is here, an amount equivalent to four-sixths of the value of the golf course and after ascertainment of profits an amount equivalent to four-sixths of the profit derived from the golf course. This component of the compensation is not to be taken into account in the strict sense. Rather an assessment of the opportunity the plaintiff's lost.

That's what the trial Judge found. Then over the page, the Court of Appeal addresses the issue at para 70. The respondents contend that the division of profit four-sixths and two-sixths between the respondents and appellants be taken as error. The proper remedy they say was for an account of all the profit made in the venture without deduction for any share at all for the appellants whether the two-sixths

or otherwise. At first I thought the respondents were seeking to distinguish between the remedy of account and that of equitable compensation. But now I'm not sure. An account of profit may mean that all profit must be delivered up as the respondents were seeking, though with due allowance for such things as the accounting parties' further investment, effort or skill if to do otherwise would be unfair. And due allowance may even include a share of profit. Equity is not to be used as a tool of oppression and the plaintiff in such case is not to be unjustly enriched. One can see how an order for account may not be very different in result from an order for equitable compensation if much the same considerations are to be weighed.

And then in 71 at the top of page 43, an order for equitable compensation appealed to Her Honour as being the more suitable remedy and I'm not persuaded the result would have been very different if an account had been ordered with suitable allowance to the appellants. In the end however I do not think it was the form of the remedy that the respondents criticised so much as the result whereby the appellants were to be allowed two-sixths.

So what we have in this case Your Honours is if you like to take Justice Tipping's point, the 100 percent account argument was put forward by the respondents. And from 72 onwards Mr Scarey QC then put the argument and the basis for it and contending essentially that the joint venture had come to an end by virtue of the breach, that's at 72. And at 73, referring to the fact that they've stolen it. Now that approach, that argument wasn't attractive to the Court. And at 75 over the page Justice Phillips who's delivering the judgment, says obviously the Judge faced a difficult task. On the face of it the appellants had indeed arrogated to themselves the commercial opportunity which was the subject of the AGMs. Nonetheless it appears to me simplistic to suggest the appellants were liable to account to the respondents for all profit made from the subsequent exploitation. Of course allowance had to be made for proper expenses and the like but even so, to regard the resultant profit as attributable only to the so-called theft and therefore to order an account simplicitor would have been to disregard too much of the circumstances.

And then what Justice Phillips did Your Honours was go through and do an assessment of why that is appropriate in this particular case. And he talks among other things about the delay on the part of the other members of the syndicate or the joint venture in taking any action. And then he picks up the decision of the Court in Warman which we looked at yesterday. And it comes to a head Your Honours at the top of page 47. And the first sentence that starts on the top of page 47, the real burden of the respondents' case was the appellants were granted by the trial Judge the same share in the joint venture as that to which they would have been entitled had the AGMs not be abrogated.

And then he goes through a number of reasons why that is not, why the trial Judge's assessment of reinstating them to their share was appropriate in that case. And in para 79 he points out that there was a difference in the nature of the business, they'd taken it further. And then relevantly at para 80 he said, secondly the concept that profit should be shared in the proportions directed by the trial Judge stemmed directly from the agreement. The significance of an antecedent arrangement for profit sharing was recognised by the High Court in Warman and the conclusion reached by the trial Judge that this was a case in which it was appropriate to allow that.

And then Your Honours at 81 Justice Phillips I think put squarely the argument that Justice Gault or the correct position that Justice Gault put to me yesterday which was that in the middle of 81, if it is correct to characterise what happened as the theft of the commercial opportunity which was the subject matter of the agreement, what Edmonds and Cahill arrogated to themselves was not the whole of the venture but the four-sixths of which the respondents were entitled. Mr Scarey's argument was that in walking away they forsook voluntarily all profit sharing arrangements. But it seems to me that in the particular circumstances that was all of a piece with the breach of duty while it was wrapped up in another.

Now the relevance of that Your Honour is just simply to show that this approach was considered by the Court of Appeal of Victoria earlier this year. Significantly what the trial Judge did and the Court of Appeal did was order compensation which had the effect of simply reinstating the parties to the original joint venture. But no further allowance was awarded for any of the efforts by the parties who took the venture and then developed it.

Now to address the point that then arose in relation to the allowance issue. My essential submission yesterday was that Mr Chirnside had disentitled himself by his conduct and the Court was concerned that that was semantic because it was inherently punitive or penal and that there was a concern about equity's use in that regard and certainly that is a matter that's fraught. I said that there was authority for equity acting in this way. And Justice Tipping encouraged me to find something substantive to support my position on that. And I have three authorities on which I would briefly like to mention for the court.

Tipping J This is in support of an argument that he should have no allowance, not back in support of this 100 percent argument.

McIntosh No, no, only on the allowance Your Honour.

Tipping J Yes.

McIntosh I just wanted to discuss the Kingston Links case because it's so contemporaneous. It's a joint venture and the whole position was considered.

Tipping J But the essential problem I see if I can put it before you raise the authorities because you may be able to deal with it in doing so, is that it seems to have been part of the joint venture that Chirnside would get something out before the profit was struck. So it's not, you're really seeking not just to disentitle him from an allowance but to deprive him of something that was integral to the joint venture.

McIntosh Yes, no I see the point Your Honour. Yes, so it's factually different.

Tipping J Yes.

McIntosh Yes. The answer is this. I accept that had the parties agreed a figure, let us say they have agreed $300,000 or half a million dollars for the extra work. If I was to stand before you and say, well he's lost his right to that. That would I accept appear punitive or penal because there had been an agreement, that's what he was going to get for the work, he did do the work. The factual difference that we have here Your Honour is that all we had was a statement from Mr Fay that had things gone the way that they were intended, he would have allowed Mr Chirnside extra. And it would have been by way of an allowance as happened in the CRT project. It's a payment for work done. But there was no agreement as to that between the parties. In fact it's the appellants' case there was no agreement on anything. So all we have Sir is that had matters proceeded properly, that would have been taken into account but we have no idea as to quantum.

Tipping J But isn't equity capable of and shouldn't it attempt some kind of quantum merit.

McIntosh Yes it should.

Tipping J Which is really what Justice Young was doing and the Court of Appeal thought he'd been too generous.

McIntosh Yes, yes. No look Your Honours I absolutely accept that you could do that. But that's where my argument comes in. You only have to do that taking everything into account. And did his conduct, doing that work as I said Mr Fay's case as was supported by the Judge, he kept much of that work to himself to put himself in a position to execute the breach, has that disentitled him.

Tipping J Well I can understand an argument that he couldn't, shouldn't be compensated for work done to as it were effect the breach. That seems entirely sound. But are you saying that, I'm not quite clear, are you saying that in principle, because of his conduct, he should get nothing. Or are you saying that in effect on the facts he did nothing.

McIntosh No, it's the former Sir.

Tipping J The former. In principle he should get nothing.

McIntosh In principle, yes.

Tipping J Rather than.

McIntosh In principle nothing was agreed and given what happened, he should get nothing. The value of what he did was done in essence to effect the breach.

Gault J Well there may be two aspects. One might have to consider what he would have done anyway, just in furthering the joint venture without necessarily claiming it was a disproportionate contribution which should be compensated. And then there's the element of that which he did to further his breach. But all of those just should be factors taken into account shouldn't they.

McIntosh Yes Sir, that, yes I can have no argument with that.

Elias CJ What, are you going to be taking us to the evidence on this in terms of quantification. Because haven't gone to it.

McIntosh I've set it out in full Ma'am in my submissions under part 6.

Elias CJ Yes.

McIntosh I don't think I need to take Your Honour through it.

Elias CJ No.

McIntosh These issues were canvassed as a matter of principle and as a matter of fact before the trial Judge and then again before the Court of Appeal. And the Court of Appeal essentially adopted the approach that various members of this Court have already indicated as might be the more, or possibly the more appropriate way to look at it which is in the amount that's ordered. And the Court of Appeal seems to have had some discomfort with the 300,000 that was awarded and they've reduced it to 100,000. And that would be consistent with Justice Blanchard's comment yesterday that maybe it's really best dealt with in the amount that is awarded.

Gault J Well where are you now. Because you indicated a few minutes ago that you were arguing that in principle he should get nothing. Because he's disentitled himself. Are you pursuing that point or are we just talking about another.

Elias CJ I'm sorry, that was an answer I think to a question that I raised.

McIntosh My primary submission Sir is in principle he should have nothing. And I have three basic authorities for it. And the first is the dicta of Lord Denning as the Master of the Rolls in the Boardman v Phipps case which is in my submissions at page 62. And I'll just quickly read the comment. If the defendant has done valuable work in making the profit then the Court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith or surreptitious dealing, he might not be allowed any remuneration or …

Now to come back to Justice Tipping's point, do we have an agreement that there would be something. In my submission Your Honours, no we don't, we had no agreement. We just had an assertion by Mr Fay that had things gone that way, that's how the extra work would have been compensated.

Tipping J And he wants to resile from that on the premise that he was saying that in the context of everything going appropriately whereas now that it's all turned to custard he says he shouldn't be bound by that. Is that really.

McIntosh Essential Sir that's the nutshell of it.

Tipping J Yes.

McIntosh And I've referred earlier to back over the page on 61, to the estate realties case. To Your Honour's judgment where the same point is made and then half way through, the Court does not however have to make an allowance. It is a matter of discretion. The object being to do justice while not whittling down the salutary rule.

And the last point Your Honours.

Tipping J Well, just while you're mentioning estate realties. What intrigued me was that the Court of Appeal went down the loss of a chance approach without, of course they weren't bound by estate realties, I wouldn't suggest anything, but there was a fairly comprehensive discussion there of the principles and so on. But there was no suggestion that in a situation of this kind that the starting point at least wasn't account. And I find it a little odd to see, I'm not asking you to go back into a loss of a chance, but I'm just as a matter of fact, was there any reference to this review of the authorities in the Court of Appeal in the remedies area.

McIntosh No, no Your Honour. And I regret that might have been a useful place to be.

Tipping J No, no, it's alright.

McIntosh The last authority was a statement in Butler which was a brief statement and I do have a copy of it here. Butler at 14.6.3 where the authors make a comment as to allowance for efforts expended. But the authors' position is that permitting an allowance undermines the prophylactic and deterrent aspects of fiduciary law. But beyond that Your Honours I don't think the text refers to estate realties and to the Guinness v Saunders case, both of which, well Guinness and Saunders Your Honour was certainly a part of your judgment in estate realties. I'm not sure this text takes it any further than we've got.

Tipping J Well they say I was wrong. And they rely primarily on the Guinness distillers case for that proposition. But the reasoning is not developed.

McIntosh Yes Sir.

Tipping J But you're in effect saying that in principle. You're not really saying in principle are you, because in principle everyone agrees you can make an allowance. You're saying really that on the facts of this case he didn't deserve an allowance.

McIntosh Yes, yes.

Tipping J I really think we've got to be very clear about this. It's not really a matter, all the cases you're referring to acknowledge the capacity to do it. Your case is that it shouldn't be done here.

McIntosh Yes. And essentially Your Honour for two reasons. One because of the bad dealings.

Tipping J Yes.

McIntosh And two, because there was no firm agreement.

Tipping J Yes.

McIntosh Such that anyone can say that he is being stripped of anything. And the rest of the argument Sir I have actually set out in my submissions and I won't go over them again. But equity, if we are trying to tailor it to fit the situation, as I said yesterday, we have the net result with a full allowance that Mr Chirnside incurs no risk by making the attempt to breach the fiduciary duty. He is kept utterly whole as if everything had gone the way it was to go.

Elias CJ One of the circumstances that it would be proper surely to take into account is the effort that was put in. That's really why I asked about how the allowance was arrived at, about quantification of it. Was the figure of 500 hours which the Judge used in coming to his $300,000 allowance, was that challenged? Was that accepted?

McIntosh Ma'am, in short the 500 was the result of challenge.

Elias CJ Yes, that was a decision.

McIntosh Because higher figure was put out. And then of that Mr Fay's submission was well automatically you must reduce that by half because that was what you were going to do anyway. So you did Mr Fay's half of the work which was 250 hours. If you see what I mean.

Elias CJ Well that would depend on the nature of the venture which hadn't been sorted out presumably.

McIntosh Yes.

Elias CJ Because it's entirely possible that in this venture Mr Fay was simply providing finance and intro to clients or tenants.

McIntosh Yes and that creates a difficulty Ma'am.

Elias CJ Yes.

McIntosh Because if in fact in a five minute conversation you can get the head tenant interested such that that then pursues, that five minutes could have been extremely valuable to the overall project. And if you just rank it on an hourly basis, obviously the 5 minutes pales. But actually, without the tenant you couldn't have done the 500 hours. So it is a difficult process. But if it came down to an analysis of the extra hours, that was the case Mr Fay ran, that if there is going to be an allowance, it should be based on approximately 250 hours. And it should be at a fair rate. And the calculations that were presented showed that the hourly rate that was being put forward for that appeared to be extremely high.

Blanchard J What $400.00 per hour?

McIntosh Yes.

Blanchard J I won't ask you about lawyers' chargeout fees.

McIntosh No Sir and perhaps a polite way of dealing with that might be that a property developer might have lower overhead.

Elias CJ Well higher expectation of profit anyway at the end of the venture.

McIntosh Well exactly Ma'am.

Elias CJ Yes.

McIntosh And I think what happened then was both Courts then realised that actually this was somewhat inexact. Because how do you measure it

properly, an hourly rate. And Mr Fay's complaint was, well how do you measure his own input.

Tipping J But Mr McIntosh, let's assume we get into the interstices of this. It's very much a matter of assessment. Can you say that the Court of Appeal erred in some point of principle as to the way to go about it or clearly erred in some part of the calculation.

McIntosh No.

Tipping J Because frankly I wouldn't want to get into this unless there's some clear error on the Court of Appeal's part.

McIntosh No, no, Sir that is exactly my case. My case is simply there shouldn't be an allowance. If there is to be an allowance, no complaint is made with the Court of Appeal's assessment.

Tipping J Right, okay. Well that's very helpful.

McIntosh I think that's.

Tipping J So it's out but if it's in, it's 100,000.

McIntosh That's it Your Honour thank you. And Your Honours I don't need to say anything more about that aspect of it unless you have any further questions on it.

That brings me Your Honours to really the remainder of my submissions on the relief appeals. And that is the vacant space which I sought to intro to you yesterday. If I could just set the stage very quickly but importantly. Where we've got to Your Honours in terms of the case that I've put is we have three limbs to the accounting or to the equitable debt award. First is the value of the property concerned – its market value. Second is the costs that are associated with achieving it. And third is the apportionment. And Mr Fay has no complaint as to it being assessed on that basis.

Now to discount or to eliminate anything else around that or parts of those Your Honours, as to the costs of this development, there's no complaint taken by either party to the High Court's determination and no appeal was pursued in the Court of Appeal as to costs. So that part of the triangle is sorted.

As to the other part of the triangle, the apportionment's, that's what we've just been talking about. And that's what this Court will determine and in the event that the Court determines that the apportionment should be 50% shares with or without an allowance, then that part of the triangle is also accounted for.

So we're back to the third one or the one I said first, which is the overall value of this property. Now the upshot is Your Honours neither party's happy with that part of the triangle, with the value. Mr Fay has two complaints. First he said that the capitalisation rate that was used and applied by the High Court was too high. And the High Court applied a rate of 10.15 percent. And I'll come to it later but as the schedule to my submissions shows, the amount of that rate, the level of that rate has a massive impact on your overall value of the property.

Tipping J What did you say the capitalisation rate was applied. 10.15?

McIntosh That was the one that the trial Judge used Your Honours yes.

Tipping J Yes.

McIntosh And Mr Fay's evidence at trial was that 10% should be used and that was conservative because the market was trending down at that point. And in the schedule there are various scenarios that show the effect of just adjusting the capitalisation rate.

Equally, or perhaps more primarily his complaint was that the vacant space in the building which was acknowledged by all parties and the trial Judge was valued at only $25 per square metre on a storage basis when in fact all the evidence pointed to the fact that it could be valued in the order of $100 per square metre plus, Mr Fay's case was that that was alive, that was an important issue as to the value which was left open on the face of the record and as I said yesterday, his concern then crystallised when the property was then advertised after the Court of Appeal's judgment for loss of a chance.

Now the point is Your Honours, you know, why is Mr Fay appealing on these points. It's because they have a very significant effect on that part of the triangle. And they go directly to the amount of the profits. So for example the vacant space issue alone, the amount of money per square metre for the vacant space has in Mr Fay's submission the net effect of adding value of 1.3 million net. Net, net. Net of costs. So if everything else remains equal in the triangle that I just explained, then there's another 1.3 million to be shared between them. And Your Honours will be aware of the.

Tipping J Is that the capitalised value of the difference between the 25 and 100 per square metre.

McIntosh Yes Sir. Now that has a dramatic effect.

Tipping J Yes.

McIntosh That if the profit has been assessed roughly of a million and you add another 1.3 million on it, then Mr Fay's, the payment that is awarded to him, it has a massive impact. He can't walk away from that as a point.

And I'll come back to his appeal on that just in one minute Sir. But on the appellants' side, they're not happy with this aspect of it either. In the Court of Appeal they took issue with the floor area of the vacant space. They said it had been wrongly measured and that it was actually less. And so even the trial Judge's assessment at $25 a square metre was wrong, not because of the 25 but because the metres involved in the per square metre was too high. That evidence wasn't allowed in because it was after the event. The floor space was the floor space before and after trial. And the Court of Appeal said, well you could have measured it beforehand if you wanted. But that evidence has come back into the case on appeal in this Court. And also the appellants are unhappy because the trial Judge didn't appear to allow for necessary development or usage costs to use the vacant space at all and that is in a sense or in effect agreed between the parties at 452,000. So my friend's case about this is that this calculation is wrong because you've got to deduct 450,000 costs even to get the 25 per square metre. So the short point Your Honour is that both parties are unhappy with this aspect of it.

So, what do we do. We could just leave it. We could just leave it on the basis that a trial has been had and if it's unsatisfactory, so be it. However, Your Honours, in my submission that would be an unsatisfactory state given the exercise that is sought to be achieved here, an accounting of the profit. Secondly, we could try to resolve it. And we could do it in a number of ways. This Court could attempt to make the adjustment. And in my submission there is evidence before the Court that it could do it but it's an unattractive exercise and I'll come back to that very briefly. Or it could be referred back to the trial Judge. Or an independent expert could be appointed by this Court or by the trial Judge of the High Court to give an opinion on the outstanding complaints between the parties. And the third option we have Your Honours which I've put in my submissions and I've already averted to, is the sale option. Were the Court to order a sale, then all the complaints go away because everything is realised by the market.

Now just observations about the situation we're in. First as Your Honours I've said, it makes a huge difference. And if we see the schedule, I've really alluded to the 1.3 million.

Tipping J Is it just a coincidence that that's just the same figure as the 1.29 that the trial Judge fixed as the profit. I mean it's in effect doubling.

McIntosh No, total coincidence.

Tipping J Total coincidence.

McIntosh It's just the effect of adding an extra, increasing the rental level.

Tipping J It's just a coincidence.

McIntosh Just a coincidence, and then capitalising it.

Tipping J I thought they would have.

McIntosh The second observation Your Honours is the question is, is this a matter of precision or is it not. And we alluded to that briefly. I have set out in my submissions, in part 5 of my submissions about this in some detail. But just to take the point in principle, in the hospital products case there was dicta to the effect that the attempt should be made to determine as accurately as possible what the profit was. And yesterday Justice Tipping also made the comment that if we are going to do an account we need to work from as precise a base as we can.

Tipping J But don't be misled by that. I have very much in mind Mr McIntosh the fact that the trial Judge has heard evidence about all this. He's come to a view which your client doesn't find very appealing. Apart from the issue of further evidence, I would have thought that was it. There's no big high level principle involved here. Unless you can show that the Court of Appeal have erred in significant principle in dealing with what or addressing the challenge to the trial Judge's assessment, what should or can we do about it.

McIntosh Yes Sir, that raises my third observation which is I stand before you today in effect, and undesirably, as the Court of first appeal of this issue about the trial Judge's treatment of it. Because the Court of Appeal did not address it.

Tipping J Well I thought they did but in what you would wish to submit was a rather cavalier fashion. Or am I wrong in thinking that they addressed it at all.

McIntosh Well Your Honour I was left in confusion about whether they had or they hadn't. Because in the court's liability judgment, which is the white case at para 76.

Blanchard J Sorry I missed the para number.

McIntosh Para 76.

Tipping J 76 in the liability judgment.

McIntosh In the liability judgment.

Elias CJ What page is it in the case. Is that 107, no.

Keith J 76.

Elias CJ Is it. What page of the case is it.

Keith J Page 76,

Elias CJ Oh page 76, I thought it was para 76.

Tipping J We're talking about the Court of Appeal's liability judgment are we?

McIntosh Yes.

Blanchard J Page 107.

Tipping J 107.

McIntosh As they state, in the figure adopted by the trial Judge of a profit to be had in this venture of something over $1 million appears to us to be sound enough. A figure of that kind can never be a scientific or arithmetical figure. Your Honours that obviously caused Mr Fay concern because he had put in very detailed submissions, as have been repeated in the written submissions in this Court, about his concern with the treatment of the evidence and there is just no mention of it. And then secondly, and perhaps to put the point even more acutely, when we come to the relief judgment which is at 120, 119/120.

Tipping J Well at para 50 there they recite your table with item 2 being the suggested inclusion for vacant space at $125 a square metre.

McIntosh Yes.

Tipping J So they've recorded it.

McIntosh Yes they've recorded it.

Tipping J Yeah.

McIntosh And then at 51 they note a significant difference. Mr Fay's suggested increase. And then they say at 52, it will be apparent from what we have said we have distinctly… we have confidence they would have come to an agreement then on what the ultimate profit would have been and how it would have been divided. And then there's the critical one.

Elias CJ I'm sorry, I'm lost.

McIntosh Page 120 Ma'am.

Elias CJ Oh thank you. Yes.

Tipping J Well of course they've got themselves all tied up with this chance element throughout all this.

McIntosh That's the point Your Honours.

Tipping J Yes.

McIntosh Well the final shape it was hard to predict and its precisely in relation to the additional space it is most problematic. The least speculative course and in the circumstances the fairer one, is to recognise that the trail Judge was broadly correct, subject to the adjustment for the additional work, the available profits should be assumed to have been perhaps 1.25 million. Now what they've done there Your Honours is they haven't dealt with any of the submissions that were put. What's more, oddly, they have actually then rounded down the profit figure of 1.29 million to 1.25 with no calculation or assessment or anything. So that can give Mr Fay Your Honours no confidence that his appeal where he went through in some detail why his evidence was sound enough as to $100 over $25 was considered at all.

And that's why, I mean, that's why I'm in the difficult position of standing before Your Honours, as I say, in effect as the Court of first appeal on these particular points. And I have to say Your Honours I'm loath to go through the evidence and attempt the exercise which. Well let me put it another way. The trial Judge hears the evidence in the normal way. A party has a right of appeal from that. He or she may not succeed on that appeal in showing that there's been any problem arising on the face of the judgment but they have that right. And that's all that Mr Fay asked for. And as I say it's unfortunate that he's in effect having to do that exercise here when he asked to be able to do it in the Court of Appeal.

Tipping J Well the point of principle you're invoking is that the Court of Appeal hasn't done justice to your client's argument.

McIntosh Exactly Sir.

Tipping J Can it be put other than that.

McIntosh Absolutely it can Sir. That's all he wanted, that he could have confidence that.

Tipping J And if you invite us to remedy it by some means or another.

McIntosh By some means. And that's, one of the points was that it should be referred back to the trial Judge for clarification or review.

Tipping J Did the Court of Appeal discuss anywhere in here this question of the further evidence.

McIntosh No, which was another concern for Mr Fay because that seemed to me, to Mr Fay to be seminal to the matter. Because it closed the loop on his concerns.

Tipping J Did they admit it or refuse to admit it or what did they do with it.

McIntosh It was allowed in by consent. It was referred to heavily in the submissions on relief and they haven't referred to it.

Tipping J Well that is a worry isn't it. You say it was allowed in by consent.

McIntosh Yes.

Tipping J So it was undoubtedly before them.

McIntosh Undoubtedly.

Tipping J And the real kernel of the new evidence was that the Chirnside interests, if I can call them that, were advertising this space that we're arguing about at $100 a metre.

McIntosh That's the kernel Sir. There's a small detail in it that they didn't put their figure on it. But apart from that, if we could just turn to it Your Honour.

Tipping J Yes.

McIntosh Because I think it's a good time to turn to it. It's at the mauve bundle.

Gault J I take it we don't know whether they had any takers.

McIntosh No we don't know Sir and we've had no further evidence that they've continued once the matter was put before the Court.

Blanchard J It would have been a little unwise perhaps.

McIntosh Well it does feed into my concern Your Honours which I raised yesterday that they were in a position to act when they think they're in the clear and not act when they're not. In my submission Your Honours I can't take it much further than that. The facts speak for themselves in this case. And Mr Fay has set out in his submissions.

Tipping J Have the parties discussed, or is there any thought to having an inquiry directed by an agreed valuer.

McIntosh That would be a totally acceptable outcome for Mr Fay Your Honours directed by this Court or between the parties. However, the parties are distinctly at odds on every point and.

Tipping J Well I mean the High Court, and I'm sure we have the power, I'm not suggesting, I'm just thinking aloud Mr McIntosh that if an inquiry were directed by this Court by a valuer either agreed by the parties or appointed by the Court, then the true proper highest and best use value of this vacant space could presumably be identified with very little difficulty.

McIntosh That's exactly the point Your Honour. That's all Mr Fay would ask. And he would take his risk on that that it might go down as well as up.

Tipping J Well it's unlikely to go down much from storage space I wouldn't have thought. But anyway, fair enough, he takes his risk.

Gault J The difficulty I have about it is presumably the valuers that gave evidence at the trial did give their opinion on the is space.

McIntosh Yes Sir and.

Gault J Now it's a question of assessing that evidence.

McIntosh Yes Sir.

Gault J Not going off and doing the exercise all over again surely.

McIntosh No and Your Honour that in principle must be right. But the valuers did assess this space but Mr Sellers for Mr Fay addressed it in cross examination, sorry in re-examination.

Gault J I picked up that yesterday but that's a matter of assessment of evidence. It's not a matter of going back and starting again or opening it up again. And litigation has to be reasonably final. The parties had their chance. They put forward valuers' evidence and it is before the courts. And it's a matter of assessment of that. I would be very resistant to going back and giving everyone an opportunity to start again.

McIntosh Sir I completely understand that. What I have to be able therefore to show you is that a legitimate question arises on the face of the evidence.

Gault J Yes.

McIntosh That's the point of principle. But to do that I have to then take the Court through all the evidence which is the exercise that.

Gault J Well it's unpalatable but if that's what you must do, that's what you must do.

McIntosh And I'm prepared to do that Your Honour. Yes. But I said some moments ago Your Honour that we do have that option. We have all options open to us. We can go through the evidence and see if we can resolve it or at the very least illustrate it's a question. But if I can.

Elias CJ Well if you're addressing us as the first Court of appeal, that is what you'd have to have done with the Court of Appeal.

McIntosh Yes, yes. And I'm happy to address that. I've done it in great detail in my written submissions Ma'am. I could do nothing more than read them. But I'm happy to do that because I think they do show exactly what the concern is. And they're at.

Gault J You were going to just take us to this further evidence.

Elias CJ Yes.

Gault J Could we have a look at that.

McIntosh Oh yes, I'm sorry Your Honour.

Gault J Thank you.

McIntosh It's in the mauve bundle or book.

Elias CJ What number is that.

McIntosh Volume 10.

Elias CJ Oh yes.

McIntosh And at page 132 we have an affidavit of Mr Fay in the Court of Appeal. In July he visited the offices of DTZ and obtained two advertising flyers that had obviously been prepared on behalf of the appellants. One of the flyers advertises the vacant space for retail letting while the other advertises it for potential office space. And then he said I believe this demonstrates the main point of my cross-appeal, namely the valuation of the High Court didn't take into account the value of the vacant space on either of the above bases. Yet the appellants are now obviously advertising that space for those purposes. Now if we just turn to them briefly we see Your Honours at exhibit A, retail premises for lease. Stage 3 of the Harvey Norman Centre. They're advertising the same floor plate that the trial Judge found. They say it's a high profile next to Harvey Norman and The Warehouse. Opportunity for excellent signage etc. And then over the page we have the same space is being advertised as office as an alternative. And in this case Your Honours it's an exciting opportunity in stage 3 of this significant development. So it's quite clear what they intend for this space.

Gault J Ws there any response to this affidavit.

McIntosh No Your Honour.

Gault J Thank you.

McIntosh But in terms of the chronology, the Court of Appeal's judgment putting damages at something, sorry profits at about a million dollars and then

awarding a loss of a chance remedy, was on the 29th of June of that year. So Your Honours that's the first part of the double equation if you like or the two parts that Mr Fay appeals on. But there is an issue, a live issue as to this value which does have a significant impact on quantum.

Gault J Is there any indication, I'm sorry to keep interrupting you, but we were told that there was a significant development expenditure to render this space useful. Is there any indication from these flyers whether or not that had been done.

McIntosh No Sir and my understanding from my friend's submissions is that it has not been done. But we know the cost of what it would be.

Gault J Yes, thank you.

McIntosh Yes.

Keith J There was no further valuation done. I notice Mr Fay in the last sentence of his affidavit refers to his belief that there should be a further valuation.

McIntosh No, no Sir. And that's really Your Honour all he would like to be able to do, is to simply have the matter reconsidered.

Keith J But he didn't.

McIntosh He wasn't in a position Your Honour to file the further valuation evidence because that, well he did ask the Court to refer the matter back. The Court declined and he sought leave from this Court to appeal that point.

Keith J Yes, mm, mm.

McIntosh And that was deemed to be an interlocutory matter, which it obviously was.

Gault J But there was evidence wasn't there of the value if this were retail space.

McIntosh Yes Your Honour, that is exactly the point. There was evidence from a range of parties. And that it was entirely open to the trial Judge to adopt it. Or at the very least to have the matter reopened. But that has not been allowed to Mr Fay and if we were talking about a de minimus matter, then obviously he shouldn't and I suggest he wouldn't worry. But something that can have such a significant impact as this. Now it's not speculative Your Honours because this extra space was part of what was called the Spotlight proposal which Mr Fay was involved with with Mr Chirnside way back in May 2000 before the joint venture collapsed. So that it was part of it that this space would be developed.

To go back to the nutshell, this is the icing on the cake of this development. If you can let this bit, the whole thing's viable. If you can let this bit, this is just a pure profit.

Tipping J Yeah, this is the top end.

McIntosh This is the top end Your Honour.

Tipping J But there's a problem I think Mr McIntosh. I think I have to trouble you with this. I've just been reminding myself of what the trial Judge said about all this from paras 30 to 47 of his judgment pages 70 to 73 of the case, 74 of the case. He goes into it in considerable detail. He factors in to his decision not to go with any uplift for potential retail use from storage for several reasons. One of them was he says at 41, arising out of all these issues there is also a question of fairness. Mr McIntosh's attempt, he shouldn't have said that, he should have said Mr Fay's attempt, to factor into the valuation a rental assessment for the proposed new retailing space is a late starter, signalled really only in the re-examination of Mr Sellers. In a context where Mr Chirnside and RPL have not had a fair opportunity to respond it would be unfair to them not to be cautious about the arguments which Mr McIntosh has now sought to advance. And he's also said there should have been valuation evidence called on the point. Now unless you can demonstrate that there's something seriously wrong with this reasoning, if it was sitting as a first instance appeal Judge, I'd be very disinclined to interfere.

McIntosh I understand the point exactly Sir. Exactly. Which is why.

Tipping J And this is nothing to do with new evidence.

McIntosh I understand.

Tipping J You've had your chance.

McIntosh I understand, I understand. Now I addressed that point Your Honour in my submissions at para 5.56, which is tab 5. 5.56 page 54. And I've set out the various reasons why in fact there was no unfairness. This was included in the Spotlight proposal. It was then included in the first valuation done by the appellant without Mr Fay in August 2000 by Macphersons. They factored in a retail rental for the space. In fact Your Honours this is so important that I need to show you please.

Tipping J Where are we starting from, on page 54?

McIntosh This is page 54.

Tipping J At para, at the top of the page.

McIntosh 5.56 Your Honour.

Tipping J 5.56. Not a late starter, I see.

McIntosh Now Your Honours, if I can just take a minute to find that. It's in the lime case Your Honours which is volume 9. And it's the first document in volume 9 which is valuation assessment prepared by Macpherson Valuation. This was for the appellants before the litigation started. Just over the page, at page 1011 we have their summarisation of statement of value at 11,650 which I note was higher than the trial Judge's figure by some 250,000 but that's by the by. But this is significant and it was some three years earlier. But if we flick over please to 1044. And there's a heading which says, rental analysis and budget. On page 45 we detail rental analyses with accommodation of Harvey Norman and the Lion Nathan car parks. We've also applied a rental to the vacant retail area known as unit 2. And if we turn over to their page 45 which is also 1045, Your Honours can see on that spreadsheet we have Harvey Norman, Rebel Sports and then vacant. And we have a figure on the estimated net area, 2,790 and Your Honours see the rental figure in the next column of $115.00. So way back in 2000 a valuer for the appellants identified this area and put a market rental on it for valuation purposes.

So that's what I meant Your Honours at my 5.56. It was included in Macpherson 1. There was nothing new or caught by surprise about this aspect of it.

Tipping J And you say this was in a document prepared for the Chirnside interests.

McIntosh Yes Sir before the litigation.

Tipping J Yes.

McIntosh After exclusion of Fay but before the litigation.

Tipping J Because it talks about for Rattrays. That's the same.

McIntosh That's the second appellant Sir.

Tipping J Yes.

McIntosh So here we have it in headlights. So there's nothing late about it. It's right there. Now I've said in my 5.56B it was included in principle, Mr Seller's valuation. I'll explain this in a minute. But this is my point yesterday. He valued the same amount of space in a slightly different part of the same building. And in re-examination he said, well if that other space is found to have problems, what value would you put on the existing vacant space. And he said, well what's the difference. From my assessment there's no difference. Now the Judge said that's

unsatisfactory. It's a late starter. But in the context there was nothing late about it.

Gault J Could you just explain the different parts of the building. How did this mix-up occur between the evidence directed to different parts.

McIntosh That's a fault of Mr Fay and his counsel Sir.

Gault J Well I'm not concerned about fault but what were the different parts.

McIntosh In short, what happened was before the trial Mr Fay asked an engineer to go and assess the vacant space. To assess its viability as you would. And the engineer came up with an assessment that wasn't appreciated at the time was he'd actually reconfigured it to come up with what he thought was a better idea. So far as Mr Fay was concerned, he well exceeded his brief. But that issue wasn't properly noticed and then it was given to Mr Sellers to do his valuation on it. So Mr Sellers did his valuation on it. And when that was shown to be inappropriate because it took over some space of Harvey Norman and Contact, so it wasn't viable, clearly his whole evidence collapsed because it's simply done on the wrong premise.

Blanchard J So this only emerged in cross examination of Sellers.

McIntosh Yes. And so I re-examined Your Honour and I said well, if you'll allow me Sir, you've been shot on that. What would you say about this Spotlight proposal which was put together two years ago and he said, well really there's no difference. And I've set it out here and I've taken Your Honours to it, he said it should be the same rental. It's the same building, it's the same amount of space, we know what the market is, I would give it a slightly lower rate of $100 per square metre rather than the market of 125 and I'd also allow a vacancy allowance. So all other things Your Honour were equal. And that's why Mr Fay is concerned that sure his evidence collapsed, but in fact it was rehabilitated and in a way which really wasn't subject to challenge so that the trial Judge's comments, while he was entitled to make the comments, obviously Your Honour we are left with the position of wondering whether or not this is the right outcome.

Blanchard J Was there an opportunity given for further cross examination after that re-examination.

McIntosh No opportunity was sought Sir. No objection was taken to the point. It was an obvious point and no objection was taken at the trial.

Gault J I suppose it reasonably arose out of cross examination.

Tipping J I just missed what happened in cross examination that led to this. I'm very sorry.

McIntosh Well in cross examination Mr Sellers was shown that the configuration that he'd done his valuation on at 100 per square metre was not viable.

Tipping J I see.

McIntosh Because it intruded on existing tenants.

Tipping J I follow.

Blanchard J All on the same floor.

McIntosh On the same level Your Honour.

Blanchard J Yes.

Tipping J But it was just the configuration, it wasn't really anything to do with the value of the.

McIntosh Nothing to do with value.

Tipping J The rental value of the area.

McIntosh Which is why he was able in the stand to think about it for a minute and say well hang on, there's no difference from me, you'd need to talk to someone else if you want, it's not a valuation problem.

Tipping J Yes.

McIntosh That was the concern. And my point D, against that there was no evidence adduced by the appellants.

Blanchard J Well just before you go to that, are you going to give us the references to the evidence.

McIntosh Oh yes, absolutely Sir. It's in the orange volume at page 74, 714 beg your pardon, orange volume 714.

Gault J What volume number sorry.

McIntosh I beg your pardon, it's volume 6 Your Honour.

Gault J Thank you.

McIntosh And at line 5 he was asked the question, if we're not to adopt Mr Marsh's plan, and this was the other configuration, as is, that would leave in additional to the L shape the cool room which is part of the left hand rectangle. I can take Your Honours to the detail of this in a minute but yes, which has the high stud allowing for principle for two or an additional floor within it. Would you attribute a value to that space. I would attempt to, yes. Are you able to estimate the combined

area. There was an objection about that in that it was taken from the plans. And down the page, what Mr Sellers did was referred back at line 30 to a DTZ valuation which I'm going to take Your Honours to in minute actually because that's another valuation prepared for the appellants prior to the hearing, which also is relevant in this equation. He said it was around 2,700 square metres. And here's the question. If your options were potential light retail, potential light storage or car parking for all or most of that 2,600 space, what square metre value would you allow. Then he says, for the retail component I would be adopting around 100 per square metre as I had assessed in my previous scenario. That's it right there. For light storage, depending on configuration and access, it would be between 40 and 60 a square metre.

Now while I'm here Your Honours, there was another complaint made as a secondary argument that if we are to do storage only, then the evidence actually was that 40 to 60 was in the ring and that $25 a square metre was not fair. But anyway, Your Honour asked if I could take you to the evidence. That is the evidence where the existing space was put to him and that's what he said.

Gault J Is the questioning by the Court and the end of re-examination relevant. There's line 30 on page 715, does that confirm that space being referred to as the same as that referred to by Macphersons.

McIntosh And DTZ and Rattray.

Gault J And DTZ?

McIntosh Yes Sir, that's it.

Gault J Thank you.

McIntosh Do Your Honours see the line 28, the question, and it's got a building level schematic at the top left corner. Now is as good a time as any Your Honours just to show you that and this is just perhaps to answer Justice Blanchard's point yesterday. If I could ask Your Honours to turn briefly in the yellow volume 5, page 553 in the yellow volume 5. Your Honours see in that, which is a plan, an architectural drawing, in the top left corner there is a schematic. Building level schematic. And what we're talking about is the top level and you see the note there, future unit 2.

Now Your Honour I was dealing with the fairness point about it and I think this is absolutely relevant. I said at my 556 D in my submissions, no evidence as to light or vacant space could not be let for retail was adduced. And I said this was deliberate. And then over the page I've set out the evidence of the valuer who was called for the appellants. And it can be read either from the orange volume or my submissions on page 5, page 55.

Now midway through that section of cross examination of Mr Dick who was the valuer for the appellants, I put to him the Macpherson valuation that was done by Mr Fletcher. Because Mr Dick was also from Macphersons valuers, giving evidence or giving a valuation some years later. And at line 26, actually if Your Honours, I do apologise, it is easier to go in the orange volume 6, page 718. It's orange volume 6, page 718, line 28. So you accept don't you that Mr Fletcher attributed potential development value to the upper floor area in both cases. Yes. And you are aware of the valuation prepared by DTZ. Yes.

Blanchard J This is the one you haven't taken us to yet.

McIntosh That's right Sir yes. Would you prefer me to go to that now or should I finish this.

Blanchard J No do it in the sequence you wish.

McIntosh And then 36. And they have taken account haven't they of the potential development of the upper floor. As I understand. Would you accept Mr Dick that if you had attributed potential development to the upper floor area as Mr Fletcher, DTZ and Mr Sellers have done, you would have given a higher value as a consequence. Well as a result of higher rental achieved in that space, yes. You would accept that it's standard valuation practice to investigate all reasonable avenues of value and potential value. Yes. Now what investigations in relation to the upper floor area did you carry out. To the extent I'm aware that it has been vacant since the complex has been developed and that I'm aware efforts have been made to lease that space but have to date been unsuccessful. And how were you aware of those efforts. Through Rattray properties. Who at Rattray properties. Mr Winston Chirnside and Mr Grant Chirnside. Were you provided with any written material about that. No. So you carried out no other investigations in relation to development potential. No. You didn't inquire of Mr Fletcher. No. Is it your view that no allowance should be made for future development potential of that area because it hasn't been able to be let. In this case, yes.

So the submission was made in the High Court and the Court of Appeal was that all the other valuers had recognised the space and said that a value should be attributed to it for its potential. But Mr Dick hadn't. And Mr Dick hadn't because he had been told orally that it wasn't available for letting.

Gault J Well what do you mean wasn't available to him.

McIntosh Sorry it wasn't.

Gault J It hadn't been let.

McIntosh I hadn't been let. And he hadn't been given any info about that. Now in the second of Mr Fay's affidavits that were put into the Court of Appeal in the mauve bundle, he set out how requests had been made for discovery of any attempts to let. That's volume 10 Your Honours, last document. And at page 1140 there's a letter from Mr Fay's lawyers seeking further discovery. 17 April '03. This is, if we look at 2(a), (b) and (c), that Mr Fay was trying to focus on the valuation matter and that relevantly, they're all relevant actually, but (c) is the one. Please may we have discovery of all documents relating to efforts by Rattray properties by defendants to let the vacant space in the premises. And the response came some three weeks later from Mr Fay's lawyers, ah Mr Chirnside's lawyers, in the second or third para, we are obtaining instructions from our client regarding documents over leasing the vacant space. No discovery was given Your Honours. So if I can just put this together briefly. We have a situation where the parties advertised the space together with the Spotlight proposal. We have a valuation by Macphersons in August 2000 after Mr Fay's been cut out which recognises the value. We come round to the trial.

Blanchard J Well you're skipping the DTZ valuation.

McIntosh I'll go to that Your Honour. That Your Honour is in the blue volume, volume 8 at page 971. Now this is a report that was commissioned by the appellants. As you can see Your Honours at page 971, blue volume. So DTZ, another valuer, in December 02. Now by this time Your Honours we've had, we haven't had, let me start again. By this time Your Honours we've had a trial on liability but no judgment. The judgment came out a few days later than this report. But this was for the purpose that the defendants, the appellants were looking to sell the property as alluded to in the correspondence we just saw in the mauve report. However, significantly at para 1 on page 974 we see here, in accordance with instructions received, we inspected the abovementioned property on 17 December to assess its market value for mortgage security purposes. And that's a relevant, very relevant point Your Honours. And then over at 978, I beg your pardon 977, we have once again identification of the vacant space. The vacant area. That's at the foot of the page, 977. The vacant area yet to be redeveloped is essentially in two parts. One with an area of 1,800 which could reasonably be converted to office, retail type use. Further glazing would be required, some costings have been obtained. Currently has access on Rattray Street. The secondary area of 822 and adjoining and is a high studded large volume area. And this is the point Your Honours, there is potential to suspend a new floor to the same level which creates the continuous area of 2,600 square metres. There will of course be some costs attached to such redevelopment but the potential is there when a suitable tenant is found. For the purposes of this valuation this latter area has been taken as a low cost alternative of car parking to the primary area and a nominal notional rental applied to the second area.

Now if I could ask Your Honours to turn to 986, still within the same report. At the foot of the page we have the para 5.4, market capitalisation, sorry market valuation direct capitalisation. We comment further as follows. We believe this basis does not adequately account for the potential rental growth allowed for in the Harvey Norman CPI increase in the rentals. Nor does it adequately allow for increased revenue in the currently vacant space. And then they have a current market value of 11,500.

And finally on this report Your Honours, on 988. The valuation conclusion. The evidence shows the rental levels within the complex are at a very reasonable level and we believe there is room for rental movement in the future. In additional there is good prospect for further development and therefore increasing the rental flow of the undeveloped area within the building.

Now Your Honours those are the constituents. And just to pull it together again. We had the Spotlight proposal for this vacant space put together by the parties in May 2000 suggesting a rental of 90 per square metre. Then we have the Macpherson valuation putting it at 115 per square metre and including it in their valuation.

For completeness Your Honours, it's relevant to point out that the Macpherson valuation was followed up several months later with a valuation that didn't have a rental attached to it which is in the lime volume, volume 9. In my submission nothing turns on this Your Honours but I do want to be scrupulously fair. So the lime volume 1067. And here's a follow-up valuation from Macphersons, 13 September. Further to our valuation appraisal of 14 August, you've requested clarification on two matters. And the second matter provide indicative reassessment of value on the basis of the retail unit 2, an office amenity area being essentially left as is. And that's over the page at 1068 they then proceed to do that.

Tipping J Well that's got a useful figure in it, well not that I'm suggesting we'd act on it, but it's the estimate of cost for the doing what's required.

McIntosh Yes Sir.

Tipping J I was wondering what that would be. 650.

McIntosh 650. I think the parties have settled for these purposes on 452. But it is what it is I think. There wouldn't be a final figure 'til the job was done. So we have, the situation that Mr Fay faced coming into the trial. There'd been the Spotlight, there'd been the Macpherson 1 and 2, then there'd been DTZ. All of which clearly recognised the vacant space as having retail potential and people putting different figures on it. He then sought discovery to say, well what efforts have been made to rent the space. And the response was we're taking instructions and no discovery was given. And then at trial, at the relief trial, we had Mr

Dick's evidence to say I've been told that it's not lettable or hasn't been let. And so I've valued it on that basis. So all the other valuers had recognised its potential value either by putting a dollar figure or saying you'd need to watch out for this because there is more value here. But Mr Dick hadn't because he had been given instructions that it hadn't been let.

Tipping J Well that's a very odd thing for a valuer to do. I mean the fact it hasn't been let isn't anything to do with its potential.

McIntosh Your Honour that is exactly the point. That is exactly the point. That this was, that in terms of fairness, Mr Fay is saying, well just a minute, what is the case that you're advancing. And in my submission Sir the appellants were very careful in this matter. They didn't adduce evidence to say it couldn't be let. They just put up a valuer who said, well it hasn't been let. And then we go round another year and we have the Court of Appeal's decision. Effectively cementing profits in place around about a million. Awarding loss of a chance. Discounting Mr Fay's damages and then out come the flyers, the advertising flyers to say, look at this exciting new opportunity. Now in my submission Your Honours and to answer Justice Gault's point, I had to show you something. And in my submission there was a fair question left open here as to whether there's fair value given to it. Now I accept the points in principle the Court has made. I absolutely accept them. Mr Fay had his trial. If he made a mistake he made a mistake and that's it. But the reality is, in the first appeal, in the right of first appeal, an appellate Court will not let an injustice or a potential miscarriage of justice take place. And given the potential for increase in value, in my submission we do have a situation like this where there is a real prospect of an injustice taking place on the account of profits.

And the conduct of the appellants throughout this by taking a very cautious equivocal approach to the space and being in control of it throughout really seals it or closes the loop that there is an issue there. And I can leave the point Your Honours by taking it forward. If we just play it forward and see what happens. It would be open to Your Honours to say, this is difficult, we would rather leave it. We're not the trial Judge, we'd rather leave it. And then subsequently, within a month's time or in 6 months time or whatever, that is leased to a retail tenant. Exactly the concern Mr Fay has would be borne out and he would have no further remedy. And that is the vacant space appeal Your Honours. And I can't really take it any further than that. The detail is in the written submissions but that is the essence of it.

Gault J Just thinking through the point you make in 5.6 about there being in fact a disincentive to do the development and let it. If a tenant were found it would have still been economically more sensible to have let it than face the risk of yielding a proportion to Mr Fay than not do it I would have thought.

McIntosh That's a fair point Sir but if you don't know exactly what Mr Fay might be awarded, and if you just hung on tight and waited till the judgment came out, you might be able to get the whole lot.

Gault J Well I understand your point. I don't know how strong it is.

Elias CJ Well Mr McIntosh shall we take the adjournment now. You've nearly finished have you.

McIntosh Very nearly Ma'am, yes, yes.

Elias CJ Yes. Do you want to carry on or.

McIntosh One moment Your Honour please. (Counsel confer). My junior Ma'am has just reminded me of the obvious point that were there to be an order for sale, as one of the potential ways of dealt with this issue, everyone's cards would be called. The market would speak as to the value of that vacant space. That's the point. The rest of the submissions Ma'am go on to look at the capitalisation rate that was used and the evidence about storage. But I think I can't add to the written submissions there and you have the thrust of the case on the vacant space appeal. So those Your Honour would be my submissions on relief.

Elias CJ Well thank you Mr McIntosh. We'll confer over the adjournment to see whether there are any further questions for you. Thank you.

McIntosh Thank you.

Court adjourns 11.35 am.
Court resumes 11.54 am

Elias CJ Yes thank you Mr McIntosh. We don't have any further questions for you at this stage.

McIntosh Ma'am.

Elias CJ Yes Mr Whiteside.

Whiteside Yes thank you. I want to start by addressing my submissions in section 4 at page 6 and submit that the Court of Appeal adopted a correct approach to the assessment of equitable compensation in this case on a loss of chance basis. I should indicate that my learned junior Mr Ormsby is going to advance the submissions in relation to the allowance. That's section 7 of these submissions. So he'll deal with that and I will deal with everything else. Now it's my submission that it's not every claim for breach of fiduciary duty which results in the appropriate remedy being disgorgement of profits. The remedy must flow from the obligation found to have been breached. Now if here the relationship between these two parties was such that Mr Chirnside was

under an obligation not to profit then I accept the appropriate remedy is disgorgement of profits. But I do submit that to award disgorgement of profits is to treat these parties as if they were in partnership. Now it's my submission it's not appropriate to award Mr Fay profits as if he was in a partnership with Mr Chirnside.

And I make that submission because Mr Fay contributed very little to the project. And he took no risk. Disgorgement of profits is appropriate in a partnership situation because the partners have normally taken equal risks, provided capital, and committed themselves equally and fully to the partnership business.

Importantly in this case the trial Judge did not make a finding that the fiduciary obligation here was not to profit. In the first judgment at page 61 para 52 the finding of the Trial Judge that Mr Chirnside was not entitled to exclude Mr Fay from the venture when he did. And then in the second judgment.

Tipping J Sorry whereabouts are you referring to in the first judgment.

Whiteside Page 61.

Tipping J Page 61 I'm sorry.

Whiteside Para 52.

Tipping J Para 52.

Whiteside His finding as to what the breach was.

Tipping J The breach was exclusion.

Whiteside The breach was exclusion. And in the second judgment at page 66 para 15 the Judge in the first sentence importantly and correctly records that the primary claim advanced on behalf of Mr Fay was for equitable damages and the Judge said an award would be appropriate in lieu of an account or the imposition of constructive trust. And if such damages they were awarded, they would reflect Mr Fay's loss associated with his wrongful exclusion at the hands of Mr Chirnside. So wrongful exclusion is the fiduciary obligation defaulted.

Tipping J That way of putting it if I can seek help is adopt both to include past expenditure, the sort of reliance approach, and the prospective approach of what he's lost in the sense of what he hasn't gained. I don't see the Judge there are committing himself clearly just to a reliance type of approach.

Whiteside Well it may be a little equivocal but.

Tipping J Because he couldn't have gone on and done the exercise which he did if he had been so minded.

Whiteside Well he treated it as a claim for equitable compensation and he was satisfied in his view that it was appropriate to treat it as akin to a claim for profits. But the basis of the fiduciary obligation or the basis of the duty which he held to have been breached was what's commonly referred to as the duty of loyalty and as he put it the wrongful exclusion from this joint enterprise.

Tipping J Yes.

Whiteside And those are his findings on this issue. And he doesn't it put it any other way.

Tipping J But he goes on in the very next sentence or phrase, but this loss would be closely associated with the gains made by Rattrays and Mr Chirnside.

Whiteside Yes he does Sir. And of course even the Court of Appeal when they came to assess what the equitable compensation approach should be, used as the starting point the profit, well the value if you like of the project. Which is essentially sale price less debt.

Tipping J Yes, yes thank you.

Whiteside Now I've set out various references at page 6 and 7. I've referred to Justice Gummows essay in the series of essays edited by Yowoulden that breach of fiduciary duty brings into play a range of remedies. And Dr Bean in his text is to the same effect. And you can find that in my friend's bundle of authorities as to liability, tab 6.

The very last page of the authorities just before tab 7. Page 66 of the text. The para starting on page 66. Arguments about the appropriateness of the remedies for breaches of fiduciary duties, the appropriateness of invalidating agreements or recognising property rights are relevant. The remedy for breach of a fiduciary duty is often a constructive trust which recognises property rights. Which may defeat claims of unsecured creditors on the insolvency. The issue should be divided in two stages. One, is there a fiduciary duty. And two, what is the appropriate remedy. If a proprietary remedy is not considered desirable for policy reasons, then this issue should be considered at stage 2. It's not appropriate to consider it at stage one in order to deny a fiduciary relationship. Not every type of relationship justifies every type of interference. And it may be that the remedy of a constructive trust may be inappropriate in some circumstances. And there's a reference to an article by Chief Justice Mason in one of Finn's texts where that Judge considered that the search for wide ranging principles for fiduciary duties has been inhibited by the fear of the constructive trust as the consequential remedy. And that concentration should be on

deciding when equitable compensation or an account of profits is a better fiduciary remedy than a constructive trust. And expecting complete certainty in contract law is unrealistic. The use of equitable doctrines with restraint and discretion especially with regard to remedies should not lead to substantial uncertainty. The law should enforce cannons of good business behaviour while not attempting to prescribe too widely or absolutely. While there may be no all-purpose test for fiduciary duties, businessmen, and there's a reference to another article by Austin, businessmen can at least be reassured that the fiduciary duties will not normally apply to their transactions and can be told the sorts of special factors which will attract fiduciary duties.

And then just before I come to Meagher's text can I just refer the Court to my submission at 4.6. The respondent in his evidence always accepted that once all the investigations had been completed as to whether the project was feasible, then the parties would sit down to negotiate as to whether they wished to proceed together with a joint venture. And I've given one reference to the evidence but there are other similar passages in Mr Fay's evidence at pages in the same volume obviously, pages 293, 294 and 303. So in my submission the Court of Appeal were right in the findings that they made in their first judgment at page 103, paras 58 and 59. Namely that there was a duty of loyalty between these two men. The chief incident 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 follows 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 and that of course was effectively what Mr Fay's complaint was.

And similarly in the second judgment, para 8 on page 111, after repeating what they said in the first judgment, para 8, we further indicate 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. Now in my submission that was an appropriate finding given Mr Fay's own evidence.

Now then if I can go back to the authorities and refer just to two more, there's Meagher's text which is referred to in para 4.7 of my submissions.

Tipping J Just before you move on Mr Whiteside, sorry but I'd just like help. Is it inherent in the statements that you've just read to us from the Court of Appeal that they really didn't think there was any sort of joint venture at all.

Whiteside Well their finding was that this was an evolving joint enterprise. They struggled, as my submissions to this Court urge this Court to find, that there were, there was no agreement here.

Tipping J But there has to be something for there to be a breach, for there to be any discussion about remedies at all.

Whiteside Yes Sir.

Tipping J And there seems to be an inconsistency if you like in having found that there's a breach of a fiduciary duty imminent in the relationship. There's now a finding that all that's been lost is a chance of entering into a more formal fiduciary relationship.

Whiteside No, the duty is one of loyalty. And the duty here, so in effect in my submission the trial Judge held and so certainly the Court of Appeal found, would to negotiate in good faith as contemplated by the parties.

Tipping J It wasn't a breach of a joint venture at all. It was a breach of some obligation to negotiate in good faith in your submission.

Whiteside Yes Sir. A breach of the obligation of loyalty.

Gault J How did that arise.

Whiteside That arose out of the circumstances and what Your Honour referred to yesterday as the actions of the parties.

Gault J Obligations don't normally arise out of circumstances unless there is a relationship that the law recognises. Was there a relationship of confidence, yes. That gives rise to certain obligations. But obligations don't exist in a vacuum. They must rest on some relationship one would have thought. Well what is the relationship if it's not a joint venture.

Whiteside The relationship is what in my submission can be no higher than an embryonic, evolving.

Gault J Well that's a nothing.

Whiteside Well I don't want to repeat.

Gault J It's not a relationship, it's a potential relationship. You don't give rise to obligations out of a potential relationship, except perhaps confidence.

Whiteside Well that of course was my submission yesterday.

Gault J But you're accepting an obligation of loyalty.

Whiteside Well I am for these.

Gault J Loyalty in relation to what.

Whiteside A duty of loyalty in relation, arising out of the circumstances that had developed between these two potential parties.

Gault J Well I'd accept that if you'd substituted relationship for circumstances.

Whiteside Well it's probably, I see the force of what Your Honour says. Yes. I accept that.

Blanchard J Mr Whiteside, it seems to me that matters had gone further than that. Once your man acquired the right to buy the land he was acquiring it on behalf of both of them. He couldn't just turn around and say, well sorry Mr Fay, we'll have a little negotiation. But I'm going to end up with the land.

Whiteside Well that's effectively saying there was an agency arrangement between Chirnside and the relationship, the evolving joint venture. But in my submission, well again we go round in circles, for such an agency relationship to arise, there would have to be agreement.

Blanchard J Well you go back to your liability argument.

Whiteside Yes Sir.

Elias CJ I think it really does go round in that circle.

Blanchard J Once liability's found, it seems to me it has to be taken that Fay had an interest in the land.

Whiteside Well that's of course, no Court so far has found that. The trial Judge didn't make such a finding.

Elias CJ Well it's implicit though isn't it. Because the joint venture entailed ownership and development of the land.

Gault J There must have been a finding of an equitable interest.

Tipping J He bought it. The capacity in which he bought it seems to me to give rise because of the fiduciary connotation that's ex hypothesis to the discretion we're having, he bought it on an implied trust for the two of them as Lord Wilberforce used the phrase in the Netherlands case, implied trust. The trust was implied from the relationship which gave rise to fiduciary obligations.

Whiteside Well that of course was never the case, never the basis of the case that was argued or pleaded on behalf of the.

Tipping J Well we are not bound by the way the parties choose to formulate their legal propositions Mr Whiteside.

Whiteside No Sir.

Tipping J But the essential problem here is once you've found a breach of a fiduciary duty, it seems difficult to get away from concepts of trusteeship. At least as a good starting point. Now there may be features of this case where you can say, well that shouldn't be the way you should look at it. But most of those features derive from arguments that ex hypothesis have already been rejected on the liability side of things.

Whiteside Yes but it's still, this Court must still strive to do justice between these parties.

Tipping J Mm.

Whiteside And it's not hide bound by a particular remedy. And so in my submission the sort of factors that I've urged on the Court on liability will also become relevant in assessing what is the appropriate remedy.

Blanchard J If your client has effectively hijacked the land, what other course is there but to proceed on the basis that it was in part and it has to be assumed equal part, the land of Mr Fay as well.

Whiteside Well that comes back in my submission, I've got to rely pretty heavily here and I do rely on Mr Fay's own evidence that there had to be a negotiation before this.

Blanchard J Yeah but that was assuming a situation in which there hadn't been a hijacking. Once your man breaches his fiduciary duty, all the assumptions are made against him. He can't take advantage of having hijacked the matter.

Whiteside Well in my submission this Court in assessing the appropriate remedy cannot ignore the fact that it was accepted between these parties that there had to be a concluded agreement, there had to be a negotiation.

Blanchard J You're back to the liability argument.

Whiteside But in my submission it's also relevant in assessing the appropriate relief because equity doesn't act in a straight jacket. It's a matter of achieving fairness on these facts. And it is appropriate in my submission.

Blanchard J What's unfair about saying it's 50-50.

Whiteside Well what's unfair is all sorts of things. The fact that the respondent's not put up any money to this project.

Blanchard J Wasn't asked to.

Whiteside He's undertaken no risk.

Blanchard J Again he wasn't asked to.

Elias CJ Well on one view also he has risked. And the risk has come about. He's trusted and the property of the joint venture has been hijacked.

Whiteside Well he hasn't risked with respondent ma'am in the sense that he's put up any capital.

Blanchard J But he wasn't asked to.

Whiteside But he, well again, it's probably the same point.

Blanchard J Your man hijacked the property on the assumption we're now making.

Whiteside Yes.

Blanchard J Of liability. He deprived Fay of the opportunity of coming in with the financing or making himself liable to the vendor etc.

Whiteside Or I would.

Blanchard J Your man chose to do that.

Whiteside Well yes I don't accept that Sir because Mr Fay stood by, Mr Fay had ample opportunity to negotiate on these matters over this period of well over a year. And then it.

Blanchard J When was he given the opportunity.

Whiteside Well he could have rung Mr, he could have picked up the telephone at any time. As the telephone records showed, he frequently was in telephone contact with Chirnside and say look, we've got to sort out the basis on which all this investigation work's being done and on whose behalf and who's involved in this and whether I'm liable. And the terms on which we're going to do this deal. And what the figures have to be to stack up. So that it's fundamental in my submission in assessing what's the appropriate fair approach to the remedy to take the starting point as a breach of the duty of loyalty leading to the obligation to negotiate in good faith. And the fact that.

Blanchard J And how would the bargaining chip of the title to the property have come into that.

Whiteside Well it's one of the factors of course. Far more important was the other property, the.

Blanchard J Yeah but he's deprived himself of the opportunity of denying that that would have gone into the joint venture because he's proceeded to put it into a joint venture. We know what the price was.

Whiteside Yes Sir but we never, there was never any concluded agreement about that between these parties.

Blanchard J Because your man didn't give the opportunity.

Whiteside But.

Blanchard J So it has to be assumed that he would have done the same deal with Fay assuming Fay was able to come up with the money as he did with Rattray.

Gault J Indeed your man had agreed to a figure higher than that at which it was transferred as I understand it.

Whiteside No, I think Mr Fay in one of the feasibility studies he put in, had put in a higher figure.

Gault J Yes.

Whiteside But that was on the basis that payment was deferred until the project was completed which in view of the fact the bank held security over the property was simply not a runner. And again it shows there was opportunity for these parties to come to terms about that. It's no good just putting a feasibility study on a piece of paper and sending it off and then leaving matters in the air in my submission.

Now in Meagher's text there's the passage that I've referred to at 23-020 but there is also an earlier passage at 5-235, chapter 5-235 page 200 of the text. And this is under the heading the fiduciary relationship. And the heading remedies.

Elias CJ Sorry were you looking at a casebook.

Whiteside No I'm sorry this is.

Elias CJ Oh that's alright.

Whiteside I've got the, it's not in the casebook Ma'am.

Elias CJ No, that's right, you're going to read it to us.

Whiteside Yes I'm sorry.

Elias CJ So let me just get the reference, it's chapter 5.

Whiteside Dash 235 remedies.

Elias CJ Yes.

Whiteside It's a reference to the passage that came up in the Warman case that Justice Tipping referred to yesterday in the judgment of Lord Justice Fletcher Malten in Re Coomber. Which not only makes clear how widely different the scope and intensity of different fiduciary relationships may be, from the most intimate and confidential relations which can possibly exist to the relationship between the errand boy and the person whose change he's bound to return. It also stresses that different relationships and different facts may call for the administration of any of a wide variety of remedies. And that of course passage was adopted by the High Court of Australia in Warman.

Tipping J The problem I think in part Mr Whiteside is that the Court of Appeal didn't select what it thought was an appropriate remedy to the circumstances. They said at para 59 of their primary judgment I think which seems to have set the whole course for what followed, it necessarily follows in our view that what Mr Fay lost. They didn't say, this is para 59, case 103, they didn't say well as a matter of discussion this is the best way to do it. They seemed to think that this was the inexorable consequence of the analysis which had preceded that point. Now it may be that it is discretionarily the right way of going about it but that doesn't seem to be the Court of Appeal's approach.

Whiteside Well they start from the basis that there's a duty of loyalty and the duty is one to act in good faith and I submit that's right when you have regard to the evidence and what happened here.

Tipping J Well isn't the duty, it's all very well these sprinklings of words like loyalty and good faith. But isn't the equitable approach more accurately the duty was to hold the opportunity created and then specifically the property that was acquired, on behalf of the joint venture.

Whiteside Well I mean that's the trust issue. And in my submission, going round in circles, I don't accept that.

Tipping J Mm.

Whiteside On these facts. Because they chose not to reach an agreement.

Tipping J Alright well I'll keep quite about that.

Elias CJ The difficulty really is that it's not it seems to me black and white on your argument as to liability. You say if there is liability, it's not on

the basis of a joint venture. It's a special facts fiduciary relationship which doesn't have the consequence of, what, loyalty.

Whiteside It has the consequence of loyalty and it doesn't have the consequence of creating an implied trust in relation to the property.

Elias CJ But doesn't loyalty, isn't it the loyalty that gives rise to the implied trust.

Whiteside Well not in my submission. It's the loyalty which gives rise to the obligation to negotiate in good faith as found by the Court of Appeal. And as I submit is supported by those passages in the two judgments of the trial Judge. And that really is the critical point.

Elias CJ Loyalty to negotiate. Are you able to point us to any authorities which identify such an equitable obligation.

Whiteside Well this approach about awarding equitable compensation is frequently urged by the academic writers in relation to commercial relationships. The text I just want to refer you to now is Finn which is in the bundle in my casebook on liability. Under tab 7. Commercial aspects, sorry the essay is entitled Fiduciary Law in the Modern Commercial World. And at page 123 of the casebook under the heading damages, the learned Judge says, Knockton and Ashburton was a … decision. Yet its message was lost for more than half a century. Whatever the unfortunate ravages that the earlier fraud case Dairy and Peak inflicted on equity jurisprudence, Knockton at least kept intact the jurisdiction to award compensation or damages for breach of fiduciary duty. For understandable reasons, attention on remedy in the fiduciary context tended to focus on the powerful profit stripping remedies that could be unleashed against a delinquent fiduciary. The damages remedy languished apparently unnoticed and unwanted but no longer. In Australia, New Zealand and Canada it's been embraced by the Courts with the fervour of fresh converts. In England in contrast, the response remains muted outside the now well accepted case of breach of confidence actions. As far as England is concerned, a particularly potent fiduciary based surrogate tort awaits in the wings and it is one having the advantages of those presumptions, reversals in the onus of proof etc that fiduciary law confers. My purpose here is to make the point that any consideration of fiduciary law's possible impact in commerce must take this dimension of it into account. And then he goes on to discuss aspects of equitable compensation.

Now fundamentally it's my submission that the profit stripping remedy should not be unleashed against the appellants. And that it is appropriate to look at compensation, look at equitable compensation as indeed the trial Judge did. And in my submission follow the approach adopted by the Court of Appeal of looking at the fundamental duty of one of loyalty and assessing this on a loss of chance basis.

Blanchard J So you say that your man could have come into this negotiation on the basis that he was the entire owner of the purchaser's equitable interest in the property.

Whiteside Yes Sir. In the absence of any agreement. Or discussion.

Elias CJ What negotiation would then have taken place.

Whiteside Well the negotiation would have been one in which there was a duty to negotiate as the Court of Appeal found in good faith. About the basis on which a joint venture could be entered into. Bringing into play all the constituent elements required to achieve finality of this development.

Tipping J Is there any significance in the fact that as I understand it was the Court of Appeal who thought of this loss of a chance approach and it hadn't occurred to either side.

Whiteside Well the stain, the concrete was set really by the trial Judge's initial decision. He made a decision as to the basis on which compensation should be assessed.

Tipping J But he did that on a surrogate damages didn't he. Essentially damages calculated as for profit.

Whiteside Yes Sir.

Tipping J But when it went to the Court of Appeal I may have misunderstood this but it wasn't your client's case was it that that was wholly erroneous. It was the Court of Appeal's inspiration to take it on the loss of a chance basis.

Whiteside That's right Sir.

Tipping J And then they thought it necessary quite properly to ask for submissions on that approach.

Whiteside Yes Sir because the submissions that had been presented, there were certainly oral submissions given on the day. Because the written submissions did not address that.

Tipping J No. Well that doesn't necessarily mean it's wrong but it's not a very promising start for your client. He wasn't espousing this proposition either before the trial Judge or the Court of Appeal.

Whiteside Well as I say, the trial Judge made a finding which I didn't feel I could depart from in the first judgment as to the basis on which damages should be assessed. Certainly I accept it was open to me to argue a loss

of chance basis in the Court of Appeal. Frankly it didn't occur to me. But.

Tipping J Well I'm not surprised Mr Whiteside with great respect.

Whiteside But in the Court of Appeal, of course there were full submissions following the first hearing.

Tipping J Oh yes I understand. But my point is simply that this idea emanated from the Court of Appeal.

Whiteside Yes Sir.

Tipping J It wasn't part of your case or Mr Fay's case.

Whiteside That's right Sir.

Elias CJ What remedy were you suggesting should be adopted in your written submissions. What had you put forward there.

Whiteside In the Court of Appeal?

Elias CJ Yes.

Whiteside That the appropriate approach was equitable compensation.

Elias CJ Yes.

Whiteside But that the damages should be significantly reduced because the allowance was insufficient and there had been no taking into account the costs of developing the undeveloped space for storage purposes, for putting in the extra floor.

Elias CJ So you weren't really disagreeing with the approach adopted by the trial Judge.

Whiteside No Ma'am.

Elias CJ No.

Whiteside But I certainly adopted in the course of the argument the approach that was taken by the Court.

Elias CJ Yes.

Tipping J Is there any text or case that you're aware of where following a fiduciary breach the presumptive account approach has been supplanted by a loss of chance approach.

Whiteside Well the nearest case is the case that's in my casebook but it's not.

Tipping J That's Sellers.

Whiteside Yes it's not a fiduciary duty case.

Elias CJ No.

Blanchard J No.

Tipping J No.

Whiteside But it's.

Blanchard J It's Fair Trading Act isn't it.

Whiteside It's fair trading but it's based on unethical commercial conduct. And I've set out the factual circumstances at.

Blanchard J But it's got nothing to do with breach of fiduciary duty.

Whiteside No Sir it's not a case on breach of fiduciary duty. It is a case where the loss, there was a loss of opportunity of obtaining a commercial advantage. And it was unconscionable conduct. But the frame, you're right Sir, the claim was not framed in fiduciary duty.

Elias CJ If you're right in the submissions you're making to us and what was lost was the chance to negotiate in good faith and Chirnside owned the property, does that mean that in assessing the chance lost, there would be no attribution of or there would be no access to the value in the property acquired by Chirnside.

Whiteside No Ma'am, I support the Court of Appeal's approach that the starting point is to look at the value of this project. Which must include the, well both properties.

Elias CJ So that there would have been an obligation on your client to permit participation in the venture on reasonable terms.

Whiteside Yes that would be part of the negotiation. That would be part of the hypothetical negotiation that should have taken place.

Elias CJ I'm just trying to understand what you say the obligation, the equitable obligation is.

Whiteside The equitable obligation is the obligation found by the Court of Appeal in the two judgments, to go to the bargaining table as contemplated by Mr Fay in several passages in his evidence and negotiate in good faith. And then.

Blanchard J How would that be enforced.

Whiteside Well it's enforced if it didn't happen, as it didn't happen, by the remedy of equitable compensation.

Blanchard J For what.

Whiteside For the loss of the chance.

Blanchard J So the Court has to step in and say, well we think that if they'd negotiated in good faith on both sides the deal would have been X.

Whiteside That's right. And you then assess as the Court of Appeal did the chance of the deal being completed with the participation of both parties.

Blanchard J And why wouldn't it have been completed.

Whiteside Well the Court of Appeal held it would have been. The Court of Appeal held there was a 25% chance it would have been completed with.

Blanchard J Well why was there a 75% chance that it wouldn't have been.

Whiteside Because of the various factors they set out in their judgment and which I urge this Court also to accept. Namely, the Tefcorp Holdings property, the.

Blanchard J So is the Court not to assume that it would have been available since there is evidence that it was available to the joint venture which has occurred with Rattray.

Whiteside Yes Sir because that was a negotiation conducted with different parties where the dynamics were different. And the strengths and contributions that could be made to the project were different. So that there could be no presumption that the sale from Tefcorp would have taken place on exactly the same terms.

Tipping J This idea of negotiating in good faith. There's been a lot of discussion about it in the contract field in recent times. Differences of view have been expressed as to its enforceability in contractual terms. I take it there's no case that you can draw to our attention or no academic writing that suggests that the position is that much the easier or that much the more attractive in equitable terms.

Whiteside No Sir but of course equity's much more flexible in arriving at what is an appropriate and fair remedy taking into account all the circumstances. But the most relevant cases are those that are cited in the Court of Appeal's judgment.

Tipping J Yes, yes.

Whiteside But I certainly haven't found a case similar to the present. But equally none of the cases relied on by my friend are similar to the present. The one that he cited this morning, the Kingston case, Kingston Links was one where there was a written joint venture in place. Where the contractual basis on which the parties were to proceed were all determined. Fully enforceable written contract. Which is not this case. And it's an important point of distinction. So that none of the cases really are similar to the present where you've got what could be described as an embryonic or evolving joint enterprise. Where so much was left to be resolved down the track.

Tipping J I suppose it's possible to have a situation where in contract, at least according to current New Zealand law, if there's no enforceable obligation to negotiate in good faith but there is such in equity.

Whiteside Well that would be my submission.

Tipping J Because of the.

Whiteside Duty of loyalty.

Tipping J Different, it does raise all sorts of.

Elias CJ Where there's a special relationship. But here it's not like employment for example.

Whiteside But liability must be predicated on the basis there is a special relationship here.

Tipping J There must be an equitable relationship before you could incorporate a duty to negotiate in good faith as an element of it.

Whiteside Yes Sir.

Tipping J True but anyway that's the way the Court of Appeal approached it and that's the way you're asking us to look at it, thank you.

Gault J It seems to me that the Court of Appeal, like the trial Judge, accepted that these parties would have come to an arrangement and their 25% discount was because of the likelihood that Mr Fay would have had less than a 50% interest as a result of those negotiations. Is that accurate.

Whiteside Yes Sir.

Gault J So it wasn't an assessment of the likelihood of them reaching a deal. It was the likelihood that his deal would be less than 50%.

Whiteside That's the primary basis on which they made their finding.

Keith J Para 55 of the second judgment on 121, lumps them together doesn't it.

Gault J Yes it's all very briefly dealt with. But they do say earlier on that like the trial Judge, we think the men likely would have come to an agreement.

Keith J Mm, sure.

Gault J And that's a clear finding. And that's at para 40.

Elias CJ Mm.

Keith J Mm.

Whiteside The Court of Appeal were particularly influenced of course by what they called the bargaining card that Mr Chirnside had in relation to Taunton Mews and the.

Gault J Yeah, I find that very little of significance personally. That the project they were foreshadowing knowing the view of Harvey Norman by them inevitably required that to come in.

Whiteside Yes but there still had to be a negotiation as to the basis on which it came in and it may well be that they wouldn't have been able to reach agreement.

Blanchard J Why.

Gault J He was going to get his return out of the price agreed to bring that property in.

Whiteside He may take the view that Mr Chirnside's being unreasonable in not agreeing to deferral for instance. That was what he was urging should happen. He could have been put off by a refusal to allow that to happen.

Gault J There's no suggestion it didn't come in when it did and at proper market value. So he presumably derived the benefit of that and now it is said he wants this consideration all over again.

Whiteside Well with respect I don't accept that because what we're talking about is what is equitable compensation for the breach of the duty of loyalty. It's not a contractual situation.

Gault J But you're saying there was a likelihood that he would have sought to get the benefit of the introduction of this property at two levels.

Whiteside Well no Sir, there was an ordinary commercial dealing between Rattray properties and Tefcorp. Willing buyer, willing seller. That property

was critical to the development and there had to be an agreement reached between, in this hypothetical negotiation, between Fay and Chirnside as to the basis on which that property came in.

Gault J You're suggesting that it should come in such that he would derive a benefit from bringing it in and would derive a further benefit by driving down his coventurer's share. Now that seems to me to be having it twice.

Whiteside No, in my submission the assessment that the Court of Appeal made was having regard to the fact that they'd been unable to reach agreement on the basis, and that Mr Fay was pushing for a deferral of the settlement price until the development was complete, there was a prospect that they would not have been able to reach agreement. And in my submission it was a perfectly legitimate and proper finding.

Blanchard J How much negotiation went on over that.

Whiteside Between Fay and Chirnside.

Blanchard J Yeah.

Whiteside There was discussion and then there was the spreadsheet. The only spreadsheet that Mr Fay prepared which raised for the first time the issue of deferral.

Blanchard J So Mr Fay was trying to get deferral. If the negotiation had ever got into full flower, isn't it quite likely that he would have dropped that. After all we have to assume that Mr Fay would have negotiated in good faith too.

Whiteside Well he certainly at trial, and he cross examined about this, continued to press for the proposition that he thought it was entirely reasonable that payment should be deferred by the vendor of that property.

Gault J It was just a liquidity funding timing issue wasn't it.

Whiteside Well it was more than that because the bank had a security over the property. It had to be.

Gault J Well that's still just a funding issue. Timing of where you secure the funding. It just didn't seem to me to be an issue as to the likelihood of this man bringing the property in. That was an inevitability. He wasn't going anywhere without that property.

Blanchard J Your man was perfectly happy in reality to sell the property into a joint venture.

Whiteside Yes where he.

Blanchard J He just didn't want to sell it to Fay.

Whiteside Well he had partners who he trusted who were able to provide all the equity without any further borrowing against the properties. Something of course that Mr Fay couldn't provide as the banker's notes make it clear, that the bank hadn't made any decision that they were going to provide funding and that that would be deferred until a proper proposal was put to them.

Blanchard J They hadn't turned him down.

Whiteside They hadn't turned him down but equally of course they hadn't made a commitment. And they had been told a number of untruths about the project which had it emerged might have altered the bank's approach to lending. There were the banker's notes about how Forsyth Barr had been commissioned to sell off the project and various things of that kind.

So it's my submission that the appropriate approach here is to award damages to restore the respondent to the position he enjoyed prior to the breach of fiduciary duty. I.e. having the right to sit down and negotiate to reach agreement on the terms of the joint venture.

Now I've made a number of short points in relation to my friend's submissions. Section 4.12. I do submit importantly at (b) that it would be unjust enrichment if the respondent now obtained an order for the transfer of the property despite never having pleaded such relief in the High Court and not contributing a cent to the development. But equally an order for the sale of the Speights site was not sought in the pleadings or at the hearing as recorded of course in the trial Judge's judgment. So that in my submission it's not appropriate at this late stage for the Court to order, as has been urged today, a sale of the property.

Gault J Well if contrary to your submissions we were persuaded that this was a case which called for disgorgement and the state of the quantification evidence in all the circumstances was such that we didn't feel that we could do justice between the parties, would it be open to us to order a sale.

Whiteside Well with respect no. In my submission the state of the evidence is not as my friend has put it to you this morning. There must be an end of litigation. The plaintiff has had.

Gault J Well that would bring an end to it, an order for sale.

Whiteside The plaintiff's had his day in Court, produced evidence, didn't seek a sale in the High Court. Could have sought an order for sale at that point. But chose not to. Then put up this.

Gault J Well an account of profits was sought and I would have thought if the Court were of the view that the only way properly to provide an account of profits was through an order for sale, it would be open to do so.

Whiteside Well in my submission that would be unfair to the appellants at this late stage in this proceeding. Because it wasn't sought in the High Court and evidence was presented for an assessment to assess the profits, to assess the basis on which equitable compensation should be paid. And that assessment in my submission was correct for the reasons that I'll develop. And therefore in my submission it's not appropriate at this stage for, on a second appeal, this Court to say well despite what's happened in the lower Courts, the appropriate remedy now is at the request of the respondent to order a sale. It's too late in the day in my submission. And as for the suggestion that, well it may be that next month there might be a further letting. An analogy I guess is the relationship property case where say a farmer has a farm and valuation evidence is led as to the value of the property. The wife's paid out on the basis of the valuation evidence. And then two or three months later the market moves and the farmer walks off with the additional value after the Court's found that the appropriate compensation is based on valuation evidence. There can be of course a difference. And here.

Gault J Well we may need to renew this discussion after we've heard you on this question of this usable or unusable space.

Whiteside Right Sir.

Elias CJ Which Mr Ormsby's going to develop is he.

Whiteside No he isn't.

Elias CJ Oh you're going to, I see.

Whiteside He's dealing with the allowance.

Elias CJ Yes thank you.

Whiteside Well just, it's probably next that I turn to section. Because these submissions support the proposition that the Court of Appeal's approach to the loss of chance approach was correct. And there are really four factors that I rely on at page 25 para 8.1. Identification of the contingencies or factors, requiring agreement between the parties, assessment of the probability of the two parties reaching agreement on the contingencies while they are negotiated in good faith, … assessment of the percentile increase … would have achieved and bringing into account an adjustment for the additional work and labour performed by the firstnamed appellant and then quantification of the loss of chance and the assessment of interest.

Now I deal again with Taunton … and perhaps I can just add to the written submissions, the reference to Mr Fay's evidence in chief where he pointed out that he had an issue with the acquisition price and the timing which touches on the issue of the likelihood of agreement being reached. And that's at para 4.83 of his evidence in chief volume 2 at page 171.

Now at 8.3.4 I develop the submission that the expectation outlined by Mr Fay in his evidence in chief and held onto by him in cross examination was unrealistic. And the points that I've set out there in my submission support the proposition that the disgorgement of profits approach was not appropriate for this relationship.

The next factor is the lack of confidence that Mr Chirnside had in Mr Fay. And there's been some very unusual conduct by Mr Fay in the course of this litigation and I've set some of that out at 8.4.2. There was first of all the offer at the end of the relief hearing. And my friend yesterday tried to convey this as a misunderstanding. If you read the judgment of the trial Judge you can see patently this wasn't a case of a misunderstanding. Because the matter was deferred while the appellants considered the offer that had been made. The Judge clearly understood that that was what was being proposed by Mr Fay. He didn't understand and he rightly didn't understand that what was being suggested that the appropriate relief here was an order for sale which was what my friend Mr McIntosh suggested was the approach.

Tipping J Where does this fit in Mr Whiteside. This is lack of confidence that derives during the course of the litigation.

Whiteside Well.

Tipping J That's quite understandable. But shouldn't.

Whiteside These matters that are set out here and then the one we've heard about this morning about Mr Marsh completely going off track in relation to the development indicate, are indicative of the type of man Mr Fay is.

Blanchard J Why do you say that in relation to Mr Marsh's mistake which Mr Fay didn't pick up.

Whiteside Well the sequence there of course that Mr Marsh prepared his report, full access was provided to the respondent and his advisers to the property to produce whatever evidence they wanted to produce at the relief hearing.

Blanchard J Have you any basis for saying it was anything other than a mistake, a misunderstanding of what Marsh had done.

Whiteside Well Mr Marsh got his instructions from Mr Fay. There would have been consultation between, as there usually is in a case like this, after all Mr Fay was a land agent, about what the property concerned, and what the nature of the discussions were that had occurred in relation to the development. And the sequence of events there was that Mr Marsh gave his evidence first. He produced a brief of evidence setting out this what the Judge held was fundamentally unsound proposal, using a whole lot of the areas that are already leased. Then that was presented by Mr Fay to Mr Sellers as the basis for which Mr Sellers should carry out his rental assessment as the expert witness that was going to give evidence as to value for Mr Fay. And the sequence of events was that Mr, and after Mr Marsh had produced his evidence there was evidence in reply from the engineer who had been engaged in the project, Mr McKnight, and evidence produced in advance of the hearing which is at volume 5, yellow volume, at page 646.

Gault J What incentive could Mr Fay have had to deliberately give misleading instructions.

Whiteside He was trying to maximise the value. He was trying to maximise the value by further increasing the rental stream by coming up with a theory as to increasing the area that was in this unlet space. But the point is in relation to this issue of fairness and the sequence of events, that before the hearing Mr McKnight's evidence was supplied which was at page 647 and 648 making comments on the feasibility report carried out by Mr Marsh. And setting out why it was not practical. At the hearing then evidence was given by Mr Marsh first before Mr Sellers. And based of course on what Mr McKnight had said, Mr Marsh had to concede in cross examination, this is volume 6 at pages 665 to 671, that it simply was not practical. But when Mr Sellers comes to give his evidence, he doesn't in chief say well I now know what's happened in relation to the Marsh proposal and therefore I'm amending my brief and now accept that that's not feasible but this is a proper basis on which to assess the rental. Again, he's led through his evidence on the basis that the Marsh proposal is sound. But then again when Mr Sellers is cross examined, in re-examination a series of propositions are put to him as to what if Marsh is not accepted. And as Your Honour Justice Gault said, of course it was hardly open for me to object because clearly those matters did arise out of the cross examination.

Gault J Well when you get to the stage we're at now it's not so much how the evidence came to be given or how it was formulated or just what evidence was given. And the situation now is that as a result of that re-examination there was evidence given that provided an opinion by Mr Sellers as to value of the relevant space. Which doesn't seem to have figured in the judgment.

Whiteside Oh yes it does Sir. It's fully canvassed in the trial judgment.

Elias CJ Well perhaps Mr Whiteside we'll take the luncheon adjournment now and you can take us to that. I rather think though Justice Gault was referring to the Court of Appeal judgment. So perhaps you can answer him after lunch. We'll take the adjournment 'til 2.15.

Court adjourns 1.05 pm
Court resumes 2.16 pm

Elias CJ Thank you. Yes Mr Whiteside.

Whiteside Yes I need to deal with Justice Gault's question about whether the Court of Appeal dealt with the issue about Mr Sellers' evidence and the vacant space. Of course there was full argument at the first hearing in relation to this issue. There was a cross-appeal by the respondent against the quantum award in the second judgment. And at para 76 in the first judgment at page 107 the Court made some observations. And the first is that the figure adopted by the trial Judge of a profit to be had in this venture of something over a million dollars appears to us to be sound enough. A figure of that kind can never be a scientific or arithmetic figure. It can only be a fair estimate. Now that in my submission amounts to an observation that based on the case that had been argued at the first hearing, the Court was satisfied that the trial Judge was right. That they were not satisfied that on the facts it had been demonstrated that the trial Judge having heard the evidence had got it wrong and that his assessment of the profit was sound.

Gault J When was this further evidence admitted. Before the first judgment.

Whiteside No.

Gault J After that.

Whiteside Yeah, it was submitted after that. You'll see the position from the minutes that are actually in the casebook Sir of the Court of Appeal. The first one is at page 123 of volume 1. And the second one and perhaps more importantly and significantly in this context is at 125 at para 4. The affidavit had already been filed but the Court said it didn't constitute the evidence already before the Court which was how it had been referred to in a written memo that had been filed by Mr McIntosh. And that a formal application was required. So the formal application and the affidavit which had been sworn back in August was filed. And was before the Court at the time of the second round of submissions. And in the second judgment, in relation to the second judgment, there were three sets of submissions filed. There was a first set filed by my learned friend Mr McIntosh for the respondent. Then there were submissions in reply on behalf of the appellants. And the third set of submissions in reply filed by Mr McIntosh. And this issue again as to the vacant space was fully canvassed in those submissions. And reliance was placed on the affidavit of Mr Fay and I addressed that affidavit also in the submissions that I filed.

And the finding of the Court of Appeal in relation to that is found at para 53, page 120. The final shape of the project is very hard to predict and indeed it's precisely in relation to this additional space that it is the most problematic. The less speculative course, and in the circumstances the fairer one is to recognise that the trial Judge was broadly correct. So having reached a preliminary view are the first hearing with full submissions and having had three further sets of submissions filed before the second judgment dealing with the issue of the proper assessment of damages and having this affidavit about the two flyers in front of it, the Court again reached the view that the trial Judge on the facts was correct.

Elias CJ But they don't give any reasons.

Whiteside In my submission where they're simply agreeing with the trial Judge's approach, they don't need to.

Elias CJ But they'd had additional argument and additional material. So they weren't able simply to say that they accepted the Judge's approach without dealing with the argument that they'd heard.

Whiteside Well the argument that they heard was a repetition of the argument that the trial Judge had heard coupled with the fact that there'd been two flyers. But those flyers added nothing. It had always been hoped optimistically that the space could be let for retail purposes. That was always contemplated.

Elias CJ Well I had understood that the submissions they heard drew on the additional valuation evidence not referred to or the background valuations not referred to by the trial Judge.

Whiteside Oh well, no, that's not right Ma'am. And those background valuations were all in front of the trial Judge and are referred to by him in his judgment. That's at para 23 on page 68 of his judgment.

Elias CJ Sorry, paragraph?

Whiteside 23, page 68. All the valuations that my learned friend took you through this morning were in front of the trial Judge. And he refers to them at para 23, it's been valued a number of times. In August and September 2000 it was valued by Macphersons for mortgage finance purposes. And those were the two valuations that my friend Mr McIntosh took you to this morning. The valuer who carried out the valuation was Mr John Fletcher. In December last year it was valued by a second valuation firm, DTNZ who incidentally in the valuation didn't place any reliance on, didn't fix any value for the unlet space in the detailed assessment that they made. And it has been more recently valued for the purposes of this litigation by Mr Sellers of Fright Albury and by Mr Dick of Macphersons. And then he deals with the

capitalisation of earnings approach and says that he proposes to adopt that approach. And accordingly in this section of my judgment I will identify the rental stream to be capitalised. The capitalisation rate which I see as appropriate, an issue of course which is still live in this Court but which in my submission is clearly primarily a matter of fact for assessment by a trial Judge on the evidence that he hears. The fact of course, and there's a great deal of this in the submissions from my learned friend, that the rates may have changed or moved in the meantime is not an issue in my submission that should be taken into account by this Court some years later. And then the Judges says he's going to take into account the further adjustments which are necessary to arrive at the value of the project.

And then there's detailed reasoning which the Judge sets out at length before the view that he reached. He refers to Mr Sellers' assessment. He refers to Mr Dick's assessment. He refers to Mr Sellers' assessment including a rent, an annual rent of $264,000 potentially achievable if additional rental space were created within the complex and Mr Dick's assessment, the contrary evidence matched side by side rent of $69,750.00 for a different though partly overlapping utilised are within the complex. They both had the capacity to provide approximately 2,600 square metres of space. And I ask the Court to note here of course that in the flyers that my friend has taken you through, the area of space said to be available in either basis is 2,400 square metres. Mr Sellers' assessment of the rent was plainly based on mistaken assumptions as to the practicality of the development of the space which he had in mind. This became apparent in the course of the hearing and in his closing submissions Mr McIntosh in effect abandoned the argument in relation to that area of the complex. It was vacant undeveloped space. Part of the space consists of approximately 1800 square metres on the upper level of the old bottling hall.

If the Court is still troubled about the area, in the evidence from Mr Mcknight which we looked at this morning, in volume 5 at pages 649 and 652 there are a series of coloured diagrams which were produced. And unfortunately are not coloured in your casebook. That's the yellow volume 5, 649 to 652. And it might be helpful if I handed that up to the Court. I'm afraid I've only got one coloured version.

Elias CJ Yes thank you.

Whiteside But you'll see at 651, particularly in the coloured version the bottling area or as it's called on this page, the vacant cool room area's clearly colour coded. And in the top part of the page the cool room is shown at the bottom where the new floor area times 2 is shown on the diagram. So that the vacant space that we're talking about is shown on that appendix C. And consists of what was called the old ABC area and this cool room area, part of the bottom floor of which was occupied and leased to Harvey Norman because they had their heating and ventilation and air conditioning units on the floor of that area. So

as the Judge says, part of the space consists of approximately 1800 square metres, at para 30 on page 70, on the upper level of the old bottling hall. This is adjacent to what is known as the tank room, another building which formed part of the brewery complex. But as to existing floor in the tank room which is not at the same level as the area which I've just mentioned, counsel gave two different areas. For ease of reference I'll treat it as being 800 square metres. Mr Dick's assessment of $69,750.00 for the unutilised area related to these two spaces and his view that they could be rented for storage purposes. It would be possible to build a new floor in the tank room which would be level with the existing upper level of the old bottling hall and in this way create a total space of approximately 2,600 square metres. Such a space would on the face of it be suitable for bulk retailing purposes. I'll refer to it as the proposed new retailing space. Indeed before Messrs Chirnside and Fay fell out, they sought but without success to arrange a new tenant for this area. This was spotlight. Rental for the proposed new retailing space was also factored into the first of the Macpherson's valuations in 2000. So the Judge was very much alive to that issue. But at the hearing before me, no serious attempt was made on behalf of Mr Fay to place a value on the specific proposal. As I've indicated, the primary focus of Mr Fay's case was initially on the development proposal advanced by Mr Marsh. In re-examination Mr McIntosh sought to plug this gap in the case by obtaining from Mr Sellers and off the cuff valuation of the proposed new retailing space. Unsurprisingly the results of this exercise were unconvincing. Given the arguments which have been advanced to me, I should say a little more about the proposal made to Spotlight and its response. The carparking proposed by Mr Chirnside in his proposal to Spotlight was to be provided beneath the proposed new retailing space on a mezzanine floor of the old bottling hall. As I understand his suggestion, he suggested a rent of $90 per square metre. The response from Spotlight to his proposal was in these terms. We fell that your current proposal is not conducive for a retail business. We believe your current concept with regards to the space you speak of Spotlight taking is exactly what you initially set it up to be which is a secondary area suitable for warehousing or carparking. However, having said this we feel the site could work for us if you were to get your architects to revisit the design. We need to have a prominent entrance at the front of the building where our customers can have an easy walkthrough and not lift from The Warehouse and Harvey Norman. We realise any solution could be relatively expensive.

Now this is important. After the hearing concluded I issued a minute in which I invited the parties to comment on inter alia a number of arithmetic issues. And also to confirm my understanding of the nature of the undeveloped space within the complex. Both parties took the opportunity to make submissions which went rather beyond what I had anticipated and they included on behalf of Mr McIntosh again contending that this space should be assessed on a rental basis, on a retail basis.

Elias CJ Mr Whiteside, thank you for drawing this back to our attention. We have read it. And I assume that you're really relying on the whole of this down to, well really down to 47.

Whiteside 40 is extremely important.

Elias CJ Yes.

Whiteside Because some attentions been focused on para 41 and the issue of fairness. But at para 40 the … fairness, the Judge sets out fully his reasons for reaching the view that Mr Dick's approach was entirely correct and represented the best market rental assessment for this unlet space.

So I submit that the trial Judge fully considered the matter. He had all the valuations in front of him. He had evidence. He had cross-examined, he had extensive submissions. As to the Court of Appeal, and the Court of Appeal like the trial Judge were satisfied that the trial Judge's approach was correct and that Mr Dick's valuation on this area was to be preferred.

Perhaps even though we started on this tack when I was looking at my reasons for supporting the Court of Appeal's approach, the loss of chance, I should complete all that I want to say on the vacant space area and whether the valuation approach adopted by the trial Judge and in terms of whether this cross-appeal should be considered. In my submission it's not demonstrated on the evidence that the approach the trial Judge was incorrect. The flyers only established that in July 2004 the appellants were still trying to find retail or office tenants. The trial Judge knew that the appellants had attempted to let the space as retail space and he dealt with of course the Spotlight proposal at some length in the passage I've just referred to.

There was also evidence at trial about the unsuccessful approach to another retailer for this area, Freedom Furniture. And in my submission all that the flyers establish is that a year after the relief hearing in the High Court, the space was still unlet and the appellants were still optimistically seeking a retail or office tenant.

Mr Sellers, the respondent's valuer, recognised that letting the area as retail space could provide difficult due to its position. It was an unattractive site, being at a higher level with poor street prominence. And his evidence, that's in his report, is at page 533. That's volume 5. It's probably not necessary to go to that unless. So in my submission Mr Dick's rate reflected the quality, location and the access issues relating to this space.

There were issues about traffic access and traffic circulation areas. And these are covered in Mr Mcknights evidence. Again I wont take

you to the passage but it's para 7 of his evidence. That's the engineer, the engineer for the project, at pages 647 and 648.

The District Plan prohibited vehicles reversing in and out of the proposed tenancy. And there was no possibility, if it was being used for storage space, of any large truck access as a sizeable portion of the letable area was required to provide for the ability to turn a truck around inside the premises.

Next it's contended by my friend that what's happened here is that the appellants have deliberately prevaricated in relation to the project. Well the Contact Energy lease which was the second lease that was put in place, the agreement to lease was completed in February 2002, some months after this proceeding had commenced. So with respect the facts establish that this development has not been on hold.

So that's all I need to say in relation to that vacant space issue. I don't propose to go through the submissions I've made in s.5 of my submissions.

So if I can just briefly return to the issue of the loss of chance assessment. At para 8.4.3 on page 29 I refer to para 16 of the trial Judge's judgment, that's at page 45 and 46. And I don't need to take the Court through that but I simply make the point that the trial Judge found that Mr Chirnside had not gone cold on Mr Fay for simply capricious reasons. And he set out the reasons which he was satisfied led Mr Chirnside to come to the view that he did.

There are then the additional factors which I've set out at pages 31 through to 33 of the submissions on which I rely.

Now the remaining matter that I do want to deal with and I accept of course that perhaps the same criticism can be made of this point on the second appeal as I've made and indeed some of Your Honours have made about my friend's appeal. The trial Judge does seem to have overlooked the fact that it was necessary to put in a flaw in the tank room or the cool room to make this space available to be let for storage.

Tipping J Is this back to the vacant space issue.

Whiteside No Sir this is para 6 of my submissions. This is really part of the cross-appeal by the appellants against the second judgment of the Court of Appeal.

Tipping J I see.

Whiteside In assessing the value of this or the profits from this project.

Tipping J I see.

Whiteside The basis of the trial Judge finding that he wouldn't make any allowance for the cost of putting in the floor in the tank room to match the floor level in the major space available for, the major unlet space available for storage was that Mr Dick did not refer to it in his valuation report. The short answer to that is that Mr Dick of course was not assessing the profitability of this development. He was simply assessing a market value for the property. So he didn't make any assessment in his report of the cost that had been incurred to reach the market value of the project.

Blanchard J This is money that has been spent.

Whiteside No it hasn't Sir because the property remains unlet and it's.

Blanchard J But does this relate to the vacant space.

Whiteside This relates to the vacant space, yes, perhaps, yes I'm sorry.

Gault J You've got me really confused now I'm afraid. Are there two different areas, one storage which needs a floor and the other the potential retail space which I gather also needed a floor or are they one and the same.

Whiteside They're one and the same Sir.

Gault J Thank you.

Whiteside One and the same and whether you use it for retail or whether you use it for storage you have to make the floor levels contiguous because otherwise you cant have access to the lower floor level in the tank room. There's no.

Tipping J Whatever the use, you need the new floor.

Whiteside Yes Sir.

Tipping J What evidence was there of the cost of doing this other than the absence if you like of reference to it by Mr Dick if you'll forgive the rather odd way I've just put that.

Whiteside If you look Sir at volume 9, page 1052. This is a feasibility study produced by Mr Chirnside in September of 2000. And you'll see under redevelopment costs half way down the page or a third of the way down the page, the fifth and 6th items, recycle ABC store into retail, recycle cool room area into retail including new floor. Two items of $217,200.00 and $196,000.00. And those two items coupled with the 10 percent contingency allowance you find just over halfway down the page there's a subtotal of 4.07 million, there's a 10 percent allowance, represented the agreed figure between the parties of $454,200.00 that's

set out at para 6.8 of my submissions and has been referred to my Mr McIntosh in his submissions.

Gault J Perceived by Mr Chirnside at that point as potentially retail space.

Whiteside Yes Sir, this is September 2000. But whether retail or storage, these costs would be incurred. In fact the evidence was that if it was going to be used for retail there would be higher costs although a number of the costs ordinarily would be met by the tenant.

Tipping J Is the 454,200 the sum of the 217,200 and 196,000 with ten percent added.

Whiteside Yes Sir.

Tipping J Yes. So the Judge had the figure you're saying.

Whiteside Yes the Judge had the figure. And the issue of the floor area is referred to in the Macpherson valuation. The earlier Macpherson valuation's from Mr Fletcher that my friend talked you through this morning.

Blanchard J So are you saying that after the Judge did the capitalisation he overlooked deducting this figure in working out the profit.

Whiteside Yes Sir.

Blanchard J Now is that agreed between counsel.

Whiteside I understood it's agreed.

Blanchard J That there is that omission.

Whiteside Well my friend this morning has indicated that these costs did have to be incurred. I've read his submissions and understood that he's there conceded that they have to be brought into account but he now says that that's not the position.

Now the other area or the other, just in case any further diagrams are required in addition to the colour material that I've handed up in relation to this floor issue, you can see in volume 9 at page 1033.

Blanchard J Can I have that reference again please.

Whiteside Volume 9 Sir, page 1033. This is the first Macpherson valuation report. You'll see elevations there. And in the Rattray Street elevation the middle diagram, you can see a reference to unit two floor level half way across the diagram. And the adjacent building in front of which there's a car is the tank room which involved, or would have involved the extension of the floor across there. And you'll see it again in the immediately below diagram with a reference again half way across to

new floor built off existing, giving a level floor for unit two right across to the western side of the building.

Now at the very end of my submissions, s.10 I've addressed two outstanding issues which may or may not arise, depending on of course the view this Court reaches. The position of the second appellant Rattray was simply left up in the air in relation to the Court of Appeal's judgment. Because of course they assessed the equitable compensation on a loss of chance basis and on the face of it that compensation would be payable by Mr Chirnside. And I make the submission that if that approach is upheld then no equitable compensation should be awarded against Rattray. And there is also the issue of the caveat and that again of course is subject to the findings that this Court may make.

Blanchard J The issue of what?

Whiteside The caveat.

Blanchard J What caveat.

Whiteside The caveat, para 10.2 of my submissions Sir was registered by Mr Fay after the initial High Court judgment against Rotary's land claiming a constructive trust or resulting trust.

Tipping J What did the trial Judge do about that caveat.

Whiteside He did nothing Sir.

Tipping J Nothing.

Whiteside Because it was registered after the first judgment. After the liability judgment.

Blanchard J Was he asked to do anything.

Whiteside I think probably at the second hearing on relief he wasn't Sir.

Tipping J But the nature of the relief was surely that the caveat should have gone.

Whiteside Yes.

Tipping J You say it's sort of been sitting there ever since.

Whiteside It's been sitting there ever since. I'm sorry, I just not sure Justice Blanchard what the answer to your question is. There were a number of hearings by way of telephone conference with the Judge after the second judgment dealing with issues like the stay, costs and I'm just not clear at the moment without looking through the papers as to whether the issue of the caveat was raised at those hearings. It was certainly raised in the Court of Appeal.

Tipping J Was there a counterclaim for removal of the caveat.

Whiteside No Sir. But of course in the pleadings before trial the caveat wasn't there.

Tipping J Of course.

Whiteside The caveat only went on in early.

Tipping J Yes of course, I'd overlooked that, yes.

Blanchard J Well if the result was an award of a monetary sum and no specific relief in relation to the property, the caveat would simply have to come off. It couldn't be stayed.

Whiteside Yes Sir.

Blanchard J Because presumably it was only there to claim a proprietary interest in the land.

Whiteside Yes Sir.

Blanchard J Well once there's no possibility of a proprietary interest, the caveat must go.

Whiteside Yes Sir. And I seek an order for its removal. And the final matter I want to address is to return to this issue of the sale of the property.

Gault J Just before you do that, can you just clarify something that's giving me a bit of confusion here. I was looking at the figures that you set out as a calculation in 8.7.8. And I noticed you applied a 75% discount and I went back to the Court of Appeal judgment at 121, para 56 where they talked about a 25% discount. Yet they appear to have in the parenthesis applied a 75% discount. Can you just clear my confusion.

Whiteside Well I agree with Your Honour. The figures show it's a 75% discount which was what I've adopted.

Gault J They talked about we adopt a discount of 25% but then they take 25 percent of the figure as being profit. It's not a discount application at all is it. I just don't understand.

Whiteside Well I must say, I've tried to grapple with this too and I've understood they were applying a 75% discount. But they don't.

Keith J When you read the previous paragraph it looks like that doesn't it.

Whiteside Yes.

Keith J There's some chance there wouldn't have been a deal. There's some chance there would have been an under 50% deal. And so you come out with 25% as a figure. So yes, I'd read that as meaning a 75% discount.

Tipping J It's a 75% of the full profit but it's 25% discount from half the profit.

Keith J Well it's actually 50% discount from half.

Whiteside I think Justice Keith's right.

Tipping J Is it.

Whiteside Yes I claim there's a 75% discount.

Keith J Mm, mm.

Tipping J Yes it would have to be wouldn't it.

Whiteside From the whole.

Tipping J From the whole. So that's a half of a half.

Keith J Yeah.

Gault J Yes so it's not a 25% discount at all.

Keith J No.

Whiteside No Sir. Now Sir in terms of final resolution, the appellants are very anxious to have this matter finally resolved. This litigation commenced over 4 years ago and in my submission it is highly desirable that there should be finality and I do submit that justice can be achieved by this Court by reaching a final decision as to the appropriate relief for the respondent.

The issue of sale was of course canvassed by the trial Judge and in my submission his reasons are sound as to why sale was not appropriate. That's at para 13, well really paras 12 and 13 of the relief judgment at page 65. Because in my submission it's also relevant to take into account two factors here as to whether there should be a sale. And they're the same factors that influenced the Judge, that a sale of the development pursuant to a Court order would be unlikely to result in the best possible price.

Blanchard J Sorry, where are you reading from.

Whiteside Page 65, para 13, the last sentence Sir. The fact is the development is still not complete and the other factor that in my submission should weigh with this Court if it is considering whether or not there should be

a sale is the interests of the other investors in Rattray Properties Ltd. And in my submission their interests should be brought into account in assessing what is the appropriate relief.

Elias CJ How. I mean is there material before us on that. Has anyone addressed it.

Whiteside No Ma'am because of course the order for sale hasn't been sought.

Elias CJ Oh and it wasn't sought. Yes I see that.

Whiteside Until now. But it's going to be highly prejudicial to their interests if as soon as the Court releases its judgment, an order for sale is made.

Gault J But it follows from the finding of the trial Judge that relief is available against Rattrays, that that company must be regarded as a knowing participant in the breach of duty.

Whiteside But that's by.

Gault J So that how relevant is the interests of other investors in that.

Whiteside Well that's by virtue of Chirnside's directorship of course. And it may be of course that if an order for sale was made that Chirnside may face a claim from other parties.

Gault J But that would be his problem wouldn't it.

Whiteside Well it would Sir but equity strives to achieve fairness and here in my submission where until now the case has been presented on the basis that an order for sale was not sought, it would be highly prejudicial to the interests of those parties without having the opportunity to present evidence, to have effectively a sale now without the development being completed.

Gault J Well I don't understand that an order which is made by a Court against a company that opportunity is given to the shareholders to make submissions.

Whiteside Well the company was, I represented the company at the hearing in front of the trial Judge and I'm representing the company here now. But it's too late in the day in my submission for in this Court for the first time, an order for sale to be sought. And one of the factors that in my submission must weigh in the balance as to whether this Court should take that step at this late stage, is the interests of the other shareholders.

So my submission is that justice can be achieved by continuing the relief that has been sought until this Court, namely an award of equitable damages.

Tipping J The claim against Rattray, and I'm just looking at the case book at page 23, I'm assuming I'm looking at the most relevant statement of claim, was an order for payment of a money sum. It wasn't an order for execution of any trust by means of an in rum (?) remedy so that rather supports you I think.

Whiteside Yes Sir, and nor an order for sale.

Tipping J And of course if there had been an in rum, then questions might have arisen of having the company separately represented and so forth.

Whiteside Yes.

Tipping J Yes.

Whiteside Right well those are my submissions. I'll now hand over to Mr Ormsby.

Elias CJ Thank you Mr Whiteside . Yes Mr Ormsby.

3.04 pm

Ormsby Your Honours I have the task of dealing with the appropriate, or first of all with whether or not an allowance should be granted and secondly the appropriate quantum of that allowance. My submissions are set out at para 7 of the appellant's written submissions. The appellants submit that the Court of Appeal in its quantum decision should not have interfered with the trial Judge's assessment of an allowance of $300,000 to Mr Chirnside for his disproportionate contributions to the project. I've adopted a principled approach to this by looking at the principles which apply when companies, sorry when fiduciaries breach their duties and their entitlement or disentlement to an allowance. Before I examine those principles I would like to take the Court through some of the relevant evidence and findings of fact so that Your Honours can view those principles in light of the facts.

If I could start at the green volume of the casebook, page 158. This is Mr Fay's brief of evidence. At para 3.5 Mr Fay says, in relation to Chirnside undertaking most of the work of the project, there were also practical benefits. By then I no longer had any staff working for me. Chirnside meanwhile had his own office and part time typist so he had an established administrative base which I thought we could both use if we were in business together. And sorry I correct myself there, that's in relation to them working together generally prior to the CRT project.

I take you then to page 160 at para 3.14. Mr Fay says there, typically while we both had experience in running development projects, Chirnside would want to manage each venture, handle day to day matters, arrange for plans and specifications and obtain the necessary

building permits and consents. I tended to focus on the purchase of properties, finding tenants and entering into leases, advising on total redevelopment, sorry development, redevelopment packages and arranging onsales of viable projects. I'd submit that actually in this particular case Mr Fay did not focus on those aspects which he says he tended to focus on.

But the next sentence is important. Practically this made sense because Chirnside already had an established office. So Mr Fay was certainly quite willing to allow Mr Chirnside to make disproportionate contributions. And as I will develop, you'll see that it's the finding by the Judge that he was also prepared, he would have also been prepared to make an allowance for those disproportionate contributions.

I'll now get the Court to turn to page 177 of his brief of evidence. Same casebook. It's at the top of page 24 point B sub para roman numeral I. Chirnside was always in control of the project. It is true that he took responsibility for the key contracting in relation to the project but then we had originally agreed that he would do so. He had done so before on our behalf. So reference again there to the fact that he accepted Mr Chirnside was making disproportionate contributions or was doing the key work in relation to the project and that he had done so before on their behalf in the CRT project which, as I will develop further, later in my submissions, he was given an allowance for by Mr Fay.

I turn now to the relief judgment dealing with the findings of the Judge first in the liability judgment. This is in the white volume page 57. There has been some hyperbole relating to Mr Fay's abilities to carry out the tasks which were performed by Mr Chirnside. It says there in para 43 sub para 1, this is the finding of the trial Judge, Mr Fay is not a details person whereas Mr Chirnside is. It is not surprising the detailed.

Gault J We have had this para read to us.

Ormsby Yes sorry Your Honours. I'd just emphasise that the Judge there found that he wouldn't, if he was involved with Mr Fay, he would have wanted to have taken care of the details. And then again in para 2 the point about the office.

Your Honours will be familiar also with the finding in that judgment that Mr Fay had an exaggerated view of his own abilities.

Tipping J Are you going to come in due course and submit why the Court of Appeal was in error either in a matter of principle or otherwise in revising the trial Judge's? Because that really is the crunch isn't it. You've got to show that the Court of Appeal acted in a way that they shouldn't have acted in the revision either as a matter of principle or exceptionally perhaps in a matter of detail. But is it possible for you to

foreshadow so that one can listen to this knowing what's coming up what your essential criticism of the Court of Appeal is.

Ormsby Yes Sir. My essential criticism of the Court of Appeal will be that they failed to properly take account of the disproportionate contributions made by Mr Chirnside. Firstly because of the assertion I think by Mr McIntosh in his submissions that only 250 hours should be allowed for. But also because they adopted an approach which looked at an hourly rate.

Tipping J So in effect your argument is that they improperly interfered with a finding of the trial Judge.

Ormsby Yes Sir.

Tipping J Yes.

Ormsby I would also make the point Your Honours that at the final para of the liability judgment, the Judge indicated and indeed this was the result, that he would not be prepared to grant exemplary damages. Your Honours if I could now get you to turn to the findings by the Judge in the relief judgment which is found mainly at page 79 of the white case on appeal. At para 70 the Judge found for present purposes, this is the last sentence, I am prepared to work on the basis that Mr Chirnside had spent around 500 hours on the project up until July 2000. Then half way through para 71, the Judge says about his findings that Mr Chirnside had been less than open with Mr Fay. He says I am not persuaded however that these findings or what is implicit in them are particularly relevant to the allowance which should be made for Mr Chirnside's efforts in relation to what happened prior to July 2000. That is before Mr Chirnside excluded Mr Fay from the joint venture. During this period Mr Chirnside could not fairly be said to have been acting in breach of fiduciary duty despite any private reservations about Mr Fay's continuing participation in the joint venture.

Over the page at para 73, the Judge says about the extra or additional expenditure that Mr Chirnside had incurred, the second sentence, but had the project failed I do not believe that Mr Fay would have been prepared to compensate Mr Chirnside for the time and effort he had deployed. So there is a risk component which must fairly be allowed for. As well there can be no doubt that the efforts which Mr Chirnside put into the project were fundamental to its success, to the creation of the commercial opportunity which has since been exploited. In this context assessing a fair reward for Mr Chirnside requires more of me than simply fixing a modest or even a substantial hourly rate in respect of his time. And Your Honours, that is perhaps one point which I would say the Court of Appeal erred in. Because they did fix what I would submit is a relatively modest hourly rate of $200 per hour.

Keith J Are you saying there should be no hourly rate or it's an inappropriate hourly rate.

Ormsby Yes Your Honour, I am saying that the better approach is the broad brush assessment of the parties' contributions which the trial Judge took, not only considering the hours. He did make a consideration of the hours devoted. But also of the risk that he took and the success that he made out of the project which these findings demonstrate in his honour's view would not have been made without Mr Chirnside's input.

Finally, over the page at para 79, the trial Judge said, Mr Chirnside had a strong moral case for obtaining appropriate recognition of his disproportionate contribution to the project. Mr Fay 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.

So here Your Honours you can see quite clearly that the trial Judge who dealt with all the evidence did not consider that Mr Chirnside had acted capriciously, but furthermore that he indeed had a strong moral case himself for an allowance.

Those are the facts that I wish to highlight to Your Honours. If I now turn back to my submissions at para 7.2. It is Your Honours always in equity a matter of Court discretion as to whether an errant fiduciary should be granted an allowance in respect of work performed by him or her. Discretion is exercised with reference to three principles or rules. I submit these are the no profit rule, the non-encouragement principle and the principle that equity itself should not create injustice. And I will submit that the award of $300,000 should be granted for two key reasons. First that the firstnamed appellant Mr Chirnside would have been given an allowance if the project had proceeded and he had not breached his fiduciary relationship with the respondent. Now I of course here Your Honours proceed on the basis that Mr Chirnside was an errant fiduciary. And (b) the jurisdiction to award equitable damages is compensatory and not penal. To properly ascertain the damages which a fiduciary must pay it is necessary to subtract (a) any expenses incurred, (b) any allowance for the fiduciary and (c) the portion of profit that the fiduciary would have been entitled to had he not breached his or her duty. And that is axiomatic from the principle that the obligation in equity is for a fiduciary to compensate or restore that which was improperly obtained.

Gault J Is there anything in the point that in relation to an allowance rather than taking the full effort of Mr Chirnside one should take only that effort which was disproportionate.

Ormsby Yes Sir I think.

Gault J Or beyond that which would have been appropriate in any event.

Ormsby Yes Sir. You do need to take, you aren't here taking into account the contributions made by the fiduciary but that is at the point beyond what you say their initial agreement was. And here the Judge found that there was an additional 500 hours worked on the project. And that was done at a time when Mr Fay could have contributed to the project but chose not to. And indeed was quite happy as you see from his evidence to allow.

Gault J This wasn't an additional 500 hours. According to the Judge it was around 500 hours on the project up to that date.

Ormsby Yes Sir you're quite right with that point. But I would submit that the allowance here is for all the work performed by the, and indeed the cases will demonstrate this, that it's the work performed by the fiduciary to make the project a success. So yes we do have the figure of 500 hours.

Tipping J There's a link here, my brother Gault's point, with your rejoinder to the respondent's point in your 7.5, that there's an anxiety in my mind too that there's an element of doubling up that's come into this exercise. That he was undoubtedly going to do something in return for his share of the profit. He may have been going to do more by arrangement for which he'd get an allowance before the profit was struck but don't you have to keep those conceptually separate.

Ormsby You certainly do. You have to keep them conceptually separate. But Mr Fay's case is that they both would have contributed finance to the venture. So there you have their equal contribution in the sense of their.

Gault J Well it wasn't just going to automatically happen once finance was provided.

Ormsby That's right Sir. But you have equal, what I'm saying as to that point, you have equal contribution or however the finance would have been arranged because of course our cases is premised on a different basis. And then you have the work performed. And that's quite a separate thing. That's something for which the parties should be remunerated. And indeed that's recognised in the judgments. Commencing, well not initially commencing, but perhaps which has taken precedence since Boardman v Phipps. So there's no element of doubling up because you have their agreement to pursue the venture and to pursue the venture with whatever their input would be financially and then you have the additional work on that performed by either or both of them to make it a success. And in this case performed wholly by Mr Chirnside.

Tipping J Well what makes this case more difficult than some is the fact that in a lot of cases raising this issue the fiduciary is not entitled to any

beneficial interest in the venture. Therefore it's a prima facie whole disgorgement to the beneficiary plus an allowance. So that's relatively clean like it was in Estate Realties. But here we've got this added dimension. You say the Judge was studious to avoid. Can you show where he was studious to avoid any doubling up.

Ormsby Well.

Tipping J Because prima facie he seems to have simply said 500 hours. That's my starting point. Now was that 500 additional hours or was the whole premise that they were each going to get compensated before profit was struck for the hours they spent. It doesn't seem to come through very clearly that proposition from the findings.

Ormsby I think that proposition is dealt with Your Honour, implicitly dealt with I should say, in, and I'll just find the particular para, para 75 of the trial Judge's judgment. Mr McIntosh urged me to allow for what Mr Fay did. It is true that Mr Fay did make some contribution to the project. But this was a very limited moment compared to Mr Chirnside's contribution. It was Mr Chirnside who very substantially carried the principal burdens associated with the joint venture.

I also do want to avoid simply an hourly basis for assessing this. But I take Your Honour's point and it is quite correct that you cannot doubly reward someone. But the best principled approach here is to look at what the parties would have agreed as to the division in terms of their equity in the project and then to deduct the remuneration for the hours worked. And what the Judge has said here is that Mr Fay's contributions were not deserving of an allowance because they were a very limited moment.

Tipping J I just want to be absolutely clear, are you resting this argument on the premise that it was inherent in the joint venture had it succeeded and gone ahead according to plan, that before profit was struck each of them would allow the other a money sum for their time spent and energies and skills and all the rest of it.

Ormsby Ah well slightly different to that Your Honour. I'm premising it on the basis that the Judge has found that Mr Fay would have allowed for Mr Chirnside's 500 hours which he contributed. And that Mr Fay himself through counsel to day has admitted that he would have made allowance for Mr Chirnside's disproportionate contribution. So it's not a matter of both parties having done the work together. In this case we have one party performing all the work.

Keith J Or a disproportionate amount.

Ormsby Well a significantly disproportionate.

Keith J So it's a net figure.

Ormsby That's right Sir.

Keith J We must must assume I suppose.

Tipping J So really you're saying that the Judge's 500 hours was his best estimate of the disproportionate.

Ormsby That's my submission Sir.

Tipping J Yes.

Ormsby And certainly the fact that he was urged to take into account Mr Fay's contributions but refused to do so demonstrates that he was alerted to this aspect from both parties.

Of course Your Honours, and I'm now at para 7.6, this is following from the point which Your Honour picked up at 7.5 where I say that Mr McIntosh's submissions are in error and require a full profit. Indeed in a sense he may well have resiled from that argument .

7.6, the making of an allowance for Mr Chirnside's disproportionate efforts does not offend the principle that equitable damages should restore to the respondent what he would have received had there been no breach of duty. The High Court determined that the respondent would have made allowance for Mr Chirnside's disproportionate contributions and I've been through that passage. The allowance therefore which only represents remuneration for the first named appellant's considerable skill and highly disproportionate efforts does not offend the restitutionary or compensatory jurisdiction of the Court.

My friend has also perhaps in wolves' clothing attempted to run an argument that is effectively an argument which seeks to impose a penalty on Mr Chirnside by disentitling himself to the allowance. Now of course the courts have for a long time resisted the proposition that courts of equity are courts of a penal jurisdiction. My submission is that an allowance deprives the result of any sanction, sorry the respondent's submission that an allowance deprives the result of any sanction is an attempt to punish Mr Chirnside.

I'd just like to read a para from Estate Realties and Wignall, which is at tab 2 of the bundle on quantum at page 629 at line 50 where the Court there says, damages, it's in the small, it's a very small bundle, tab 2 and it's at page 21 of the bundle or 629 of the report.

Damages, whether at common law or in equity are compensatory other than in cases where punitive or exemplary damages in the strict sense are claimed and appropriate. An account of profits is not penal but

restitutionary. To introduce a penal or punitive element is in my respectful view unsound in principle and not supported by authority.

Now at para 7.11 of my submissions. It's submitted Your Honours that the principle of determining proper equitable damages should not be conflated with the purpose of punishing a fiduciary. An allowance should not be disallowed for the purpose of punishing or sanctioning a fiduciary. Indeed that is the purpose of exemplary damages which were denied by the trial Judge. And indeed the tenor of his judgment makes it clear that there was no contumelious conduct here or flagrant disregard for Mr Fay's rights.

But this is a case dealing with the imposition of fiduciary obligations by a Court. And even in constructive trust cases where the trustee has been guilty of dishonest conduct, the courts have granted the dishonest trustee an allowance for services performed by the trustees. And the case that I cite there is O'Sullivan v Management Agency. It's not a case that is in the casebook. But it is a case dealing with the dishonest trustee and it's a case dealing with undue influence.

In my submission the trial Judge recognised Mr Chirnside's hugely disproportionate contribution. Now in this case the fiduciary here or alleged fiduciary is much more worthy of an allowance than in many of the case in which an allowance has been granted. The making of an allowance in what I have called in my submissions an atypical fiduciary relationship, but what I really mean is a fiduciary relationship recognised by the Court for remedial purposes as opposed to a strict express trust where you have a trustee breaching express terms, will not encourage fiduciaries to breach their duties to beneficiaries because firstly Mr Chirnside would only be receiving remuneration for significant work performed on the project to make it a success and secondly, he is not receiving, sorry the respondent is not receiving any less than what he would have received in absence of a breach of duty.

I therefore submit that allowance should be granted by equity because it has imposed equitable obligations on Mr Chirnside to restore Mr Fay to the position he would have enjoyed had no breach occurred and equity should likewise be done to Mr Chirnside.

Most importantly, Your Honours, I submit at para 7.16 that equity itself will not create injustice. An allowance should be granted to a fiduciary that has turned a sows ear into a silk purse. And in Estate Realties v Wignall an allowance was made after applying the maxim that equity should do equity to the fiduciary. Without Mr Chirnside's disproportionate contributions there would have been no success of the project.

I set out Your Honours at para 7.18 Mr Chirnside's disproportionate contributions to this venture. I don't propose unless Your Honours require me to or wish me to assist you, to take you through all the

pages of evidence setting out those details. But Mr Chirnside approached Lion Nathan. Negotiated the purchase of the site. He undertook the due diligence exercise. He negotiated and secured the anchor tenant, Harvey Norman, he personally met all associated expenses in the sum of in excess of $71,000.

Blanchard J Has he been reimbursed for those.

Ormsby He has subsequently Your Honour by Rattray Properties Ltd. He personally guaranteed 100 percent of the bank borrowings to enable the Harvey Norman project to proceed. He operated an office throughout the relevant period incurring overhead expenses. He secured the adjacent Taunton Mews site. And he has devoted at least an additional 500 hours to the project. Mr Chirnside's evidence is that it's 924 and that's found at page 1,008 of the blue volume.

Mr Fay's submission that there should be no allowance ignores Mr Chirnside's extra contribution to the venture and would deny Mr Chirnside any recompense for the significant time, energy and risk that he undertook at a time when he was not in breach of his duties towards Mr Fay. And that's another key point. He was not during this particular period in breach of his duties to Mr Fay.

Elias CJ Really, if he's received recompense for this, surely there's no question of his being penalised. It's just a question of working out what is the profit to be disgorged isn't it.

Ormsby He hasn't, I'm not sure that I follow Your Honour.

Elias CJ Well this is all proceeding on the basis that it would be very unfair to your client not to permit him to receive some recompense but he's received recompense.

Ormsby No he hasn't received any recompense Your Honour. He has been reimbursed only for the expenses. An allowance in equity is granted to a fiduciary in my submission for their additional time, their skill and their contributions to making the project a success.

Elias CJ And did he note receive that from Rattray.

Ormsby He has not received any, no, remuneration for that.

Keith J Well the 71,000 is part of that though isn't it.

Ormsby Well the 71,000 is simply a reimbursement of expenses that he paid out personally.

Keith J Okay, right.

Ormsby And that might be a bit distracting. That's simply.

Keith J Yes, okay.

Ormsby I'm sorry if I've led Your Honours astray, that's simply a reimbursement of expenses, out of pocket expenses that he met.

Keith J Right, right.

Ormsby But he hasn't received any allowance for his contributions to making the project a success and his time and his skill.

Elias CJ Well why wouldn't he if it's fair for his former joint venturer to permit him that allowance, I'm sorry, I might be getting a bit weary on it, and so not be thinking very straight on this. But what's the reason why he wasn't entitled to look to the new joint venture partners for payment of this.

Ormsby I think the point is Your Honour that he hasn't liked to the new joint venture party.

Elias CJ Well then that sounds like a windfall he's seeking from this party.

Ormsby Would you just mind if I confer with my friend. My learned friend's just asked me to point out that it was all done before the joint venture started so this is all work that was performed prior to the project taking off. There has been no remuneration. And what we're dealing with here is a situation where.

Gault J But he took it into whatever joint venture he eventually engaged in.

Keith J Mm.

Gault J And presumably used it as a negotiating factor in the deal that he ended up with.

Ormsby The trial Judge deals with that question Your Honour. He said that he did negotiate a manager's fee with the joint venturer.

Gault J Yes but it's not just whether this was itemised as a reimbursement figure. It was part of the package he was able to take to these new partners surely. I've done all this work, I've got this to this point where it is a viable operation subject to your financial investment, and let's talk about shares and participation rights and everything else. He was getting that as part of the package he took to them.

Ormsby Well no I don't accept that Your Honour.

Gault J Well why not.

Ormsby Because in fact what the remedy of this Court, or which the respondent has asserted is an account of profits. Now an account of profits will be equal to the value after the completion of this whole project. So that is all wiped away by the remedy imposed by the Court. And then an allowance must be granted from the person who obtains the benefit of the profit.

So Mr Fay will obtain the benefit of the profit here. Or the benefit of the value of the project as it was at the completed at the time of the trial, or the stage it was at at that time. And therefore it's upon Mr Fay to reimburse Mr Chirnside and make allowance for him.

I turn now really to the quantum of the award, having dealt with the appropriateness of the aware. Have I answered all of Your Honours' questions on why the appellants submit that an allowance is appropriate.

Dealing from para 7.21 I submit that the $300,000 allowance is appropriate for his contributions. The risks of failure were borne entirely by Mr Chirnside and likewise the success was due to his disproportionate contribution. The fixing of remuneration such as that done by the Court of Appeal by reference to an hourly rate of remuneration for Mr Chirnside does not adequately compensate him for the risks taken or the performance achieved. Performance based remuneration is in my submission not unusual. And indeed had been used in the CRT project for the firstnamed appellant's disproportionate efforts. In my submission Mr Fay is in error in submitting that Mr Chirnside should not be remunerated for 500 hours' work but only for 250 because he would have had to have done 250 hours work in any event. And that's for the reasons that it stated earlier. In fact Mr Chirnside did perform an additional 500 hours' work. The assessment by the Judge was based on an assessment of 500 hours.

In fact the trial Judge was wrong not to remunerate for all additional hours worked on the project which led to its success. But my submission today is to restore his award.

At para 7.28, it is submitted that the Court of Appeal award of $200 per hour was miserly compared with the risks taken by the firstnamed appellant.

Tipping J I think with respect you'd be more in tune with what I would be sympathetic to and perhaps you feel a little too discrete to say it, but the reasoning of the Court of Appeal as to why they were differing from the trial Judge on this is exiguous to say the least. That really is your best point isn't it, that they really don't give any reasoning other than to say that they accepted Mr McIntosh's argument that if you allowed 300 you'd actually be compensating him for what Mr Chirnside did in order to breach the duty and this quibble about the hourly rate.

Ormsby Yes Sir.

Tipping J It's 44 and 45 isn't it of the Court of Appeal's judgment that you really say is just not persuasive.

Ormsby I do Sir.

Tipping J As a matter of both principle and fact when you're talking about reversing a Judge who's sat there for days listening to it all.

Ormsby Yes Sir.

Tipping J That's really your argument . I'm sorry to sound a bit peremptory Mr Orsmby but isn't that essentially your argument.

Ormsby Your Honour has hit exactly on my point. There is no reasoning in the Court of Appeal decision other than the points which Your Honour raised.

Tipping J It's just bang, we agree with these points and we're fixing a sum which equally comes from nowhere.

Ormsby And they simply deduct 200,000 off the figure. With no reasons as to why it should be.

Tipping J They don't say what elements of it the Judge had wrongly allowed for in that Mr Chirnside shouldn't get compensation because he was about breaching his fiduciary duties in those respects. It's just to my mind with great respect completely impossible to see exactly what they were relying on in that respect.

Ormsby Yes Sir and in my submission.

Tipping J Those were the two things that weighed, in part he was getting compensation for breaching the duty or doing work necessary to breach the duty. And in the second part it was that they felt that the hours was wrong. That the hours and the value per hour was wrong. Well that seems to me with respect to be your best point, those two together. That there just wasn't a sufficient foundation for appellate intervention.

Ormsby Yes Sir and I would wholly adopt that.

Tipping J I'm not saying I agree with you, I'm just trying to articulate it in a way that cuts through all the sort of preliminaries.

Ormsby Yes Sir, no that's quite right. And we had a trial Judge who had listened to all of the evidence, was able to make an assessment of the characters of these people and of what Mr Fay would have done to give a fair and reasonable allowance to Mr Chirnside. And indeed the Court

of Appeal's probably in error anyway because this work, the allowance was only granted for the work performed prior to breach.

Tipping J And also they seemed to have been of the view, and I have to confess I'm not clear on this, this point of he would have had to have done half of it anyway.

Ormsby Yes Sir.

Tipping J Which is of course quite inimical to what you say was the approach of the trial Judge.

Ormsby That's right Sir.

Tipping J Well I'm not sure about that. But if that is so it's a fundamental error on their part.

Ormsby I of course as Your Honour knows, submit that that is wrong, yes. And they also ignore the submission, and they do this although they note it in para 43, they give no reasoning or indeed account as to whether they have taken weight of the fact that Mr Chirnside personally guaranteed 100 percent of the bank borrowings to enable the project to proceed.

Tipping J But this risk taking, an entrepreneurial skill, has in my respectful view seldom been crudely assessed on an hourly basis struck by a rate per hour. It's a very arguably crude measure.

Ormsby Yes Sir and indeed in my submissions I go on to highlight the fact that you simply couldn't go out and hire a developer with the skills necessary to do this on an hourly rate basis.

Tipping J Well there's a passage about that in estate realties. You cant just do it on a crude arithmetical basis. Now that may be wrong. But these are your points.

Ormsby That's right Sir and the trial Judge in his judgment said that he was doing, you couldn't do it on an hourly rate basis.

Tipping J Well the trial Judge was counsel in estate realties as a matter of interest. So he probably had some fairly detailed and lively recall of the argument and the judgment.

Ormsby That may well be so Your Honour.

Tipping J Well I'm sure it's so.

Ormsby And picking up Your Honour's point at para 65 on page 78 of the white case which is the relief judgment.

Tipping J Well you needn't go through it, unless you feel it's particularly important.

Ormsby No, he simply says there that there is necessarily a broad brush quality to the assessments which he must make. I've highlighted that 2.616 percent was what was allowed in the CRT project. I have the references there. It was for both management.

Tipping J Well if you're going to get down to that sort of precision you're shooting yourself in the foot.

Ormsby So I don't want to rely on that Your Honour. I'm simply using that as an example because if you took that here, it would work out to roughly what the Judge allowed on a broad brush assessment.

And I don't think I can really add any more than that. Your Honour has quite articulately summarised my argument .

Tipping J Well I didn't want to steal your thunder but I was mindful of the fact that time was marching on and it seemed it might be helpful just to sharpen up the focus on what can reasonably be argued to be the problem with the Court of Appeal's approach.

Ormsby Yes, yes Your Honour and you have articulated my argument as I have submitted in my written submissions. So those are my submissions Your Honours.

Elias CJ Thank you very much Mr Ormsby. Now Mr McIntosh do you want to be heard in reply.

McIntosh Ma'am thank you yes I do but only briefly. Your Honours my friend Mr Whiteside in his support of the Court of Appeal's loss of a chance approach made a couple of comments which I thought it's appropriate, or certainly fair to Mr Fay that I make some attempt to reply to. He placed some reliance, as he's done in the Court of Appeal and here on Mr Fay's evidence and he's put some of it in his submissions that Mr Fay repeatedly said that he agreed that there was no joint venture until they had a viable project. Now this point was raised with the Court of Appeal in comprehensive submissions and they accepted in their judgment that all he was saying was, you don't sit down and document your final joint venture agreement until you've become viable. There was absolutely nothing in this point.

Blanchard J Wasn't this a point that was made yesterday.

McIntosh Not by me Your Honour. But Sir to the extent that he made that point today in support of loss of a chance, that was certainly not accepted. And the evidence shows in my submission that he didn't lose a chance. In his view he didn't, in his mind his actions and this was essentially

found by the trial Judge, Mr Fay didn't think that he was losing a chance to negotiate. He thought he was very much in the venture.

The second point Your Honours is the breach of the obligation of loyalty. And there was some discussion about that. In my submission there is a key part of it. It's not just to negotiate in good faith. It's also not to hijack the venture, or the incipient venture as the Court of Appeal said. And Your Honours had some discussion with my friend about the negotiation that might take place. If I can just take that one step further. What the argument means is that if you just have an equitable obligation to negotiate in good faith you can discharge that by saying, would you like to talk to me about coming into my joint venture. And Mr Fay says, yes I'd like to be in on these terms. And the appellant, the first appellant is then able to say, well thank you, I've considered that in good faith. But I've determined that I don't want you. Nothing against you personally but I don't want you and I may or may not give you reasons. And as a result of that, the obligation to negotiate in good faith has been discharged and there's no liability.

And that Your Honours is the net result of saying that all their duty was is duty to negotiate. It simply doesn't work.

Tipping J It's not a sufficient protection to the beneficiary in other words.

McIntosh Well it's more fundamental than that Sir.

Tipping J I'm not wanting to spark you off if I haven't got it right. No, no. Sorry.

McIntosh Well Sir, my point was just in one sentence, it mischaracterises the nature of the relationship. You're either in a joint venture with joint ownership or your not.

Tipping J Yep.

McIntosh The next point Your Honour was that my friend says, well this has to be particular to this case because it's only an evolving joint venture. But the point was Your Honours, the evidence showed that they were working together for a year at least before Mr Chirnside then without telling Mr Fay took the active steps for his exclusion and then excluded him. And in those dealings Mr Chirnside himself gave evidence in his evidence in chief. And some of this is in the trial Judge's judgment. But Mr Chirnside was concerned that if he told Mr Fay that he wouldn't be a participant, Mr Fay might sabotage the project. Now in my submission that was because he knew that Mr Fay thought he was a full joint venture. And in those circumstances if he does not disclose to him along the way that is not his view he is caught by the nature of the relationship which he has allowed to arise.

In particular in relation to this point there was discussion about whether in fact Mr Chirnside held the option to purchase the Speights site in his own name. And my friend said that there was no pleading that it was held jointly.

If I could just turn Your Honours to page 18 of the white case. At the foot of the page, para 9, there's the clear pleading that the relationship pursued the project as a business in common with a view to profit from early '99 'til the end of August 2000 including entering into the additional agreement for sale and purchase of the site. And then over the page there are particulars. And particular number 4 in about September 99 on behalf of the relationship Chirnside signed a conditional agreement. Now it was most clearly pleaded and we have to I think fairly take it that the trial Judge concluded that this was part of the joint venture relationship and there was no question that Mr Chirnside held that property on any other basis.

And just in relation to that Your Honours, because it has come up a couple of times over the last two days, what is clear is that as from March 1999 the parties went off in different directions to a common end. Mr Fay went off looking out for Harvey Norman to try and get their interest. And his evidence in chief was the various attempts he made to find other tenants as well. And Mr Chirnside went off in his direction to negotiate the option over the site. And then both men reported back to each other as to how they got on. In those circumstances there's no question that there is a venture, that it's joint and they're acting or at least Mr Fay believes they are acting jointly.

Now just some very brief comments. And I'm not sure whether they are actually material to the court's thinking in any event. But my friends made submissions about finding of, about untruths that were told to the bank by Mr Fay. Now as a general observation Your Honours, this shows one of the main concerns about applying a loss of a chance remedy here. It enables you post facto to start to raise arguments about why the chance wouldn't have happened.

Elias CJ Mr McIntosh I don't think you need, unless there's something you particularly want to say, address that because I didn't understand how it went to any point that we have to decide.

McIntosh I'm grateful for that Your Honour. It's just that some of them were of particular concern. I don't think they go anywhere because they are post facto reasoning. But if Your Honours were at all concerned about those particular submissions.

Tipping J Anything that suggests loss of confidence after the relationship had already broken down seems to me to be wholly irrelevant.

Blanchard J Mm.

McIntosh Alright, well can I leave those points then Your Honours and I appreciate that. But can I just say in particular the offer that was made at the end of the relief hearing which my friends made some moment of. I must stress and I have got a memo of counsel which I filed with the trial Judge afterwards, it was as counsel's submission, it was counsel's fault, it was counsel's idea, it was not Mr Fay in any respect.

Elias CJ Hold on a moment. This doesn't arise in reply. You're addressing us in reply on your cross-appeal. I didn't understand that that point had arisen in relation to your appeal.

McIntosh I'm replying on the cross-appeal Ma'am on relief. I'm only replying on that.

Elias CJ Yes, yes, I'm sorry I hadn't appreciated that we were back into the question of the offer that was made.

McIntosh This was one of the examples, Justice Tipping.

Elias CJ I see, sorry, yes, yes.

McIntosh Of the things after the event going to confidence.

Tipping J Yes. Well it's not uncommon that people who've fallen out lose confidence in each other.

McIntosh Indeed and I think I can leave that point then Sir by saying that the trial Judge found that these misgivings were not ever passed onto Mr Fay at the time.

Just dealing quickly then with the vacant space. Really there's two points I wish to make. My friend made the submission that how could there really have been a mistake about the space that was being valued by Mr Sellers because they had a report in reply, a stmt of evidence in reply from Mr Mcknight who pointed out what his problems were. Your Honours the relief hearing took place on the 7th and 8th of July in 2003. They were Monday, Tuesday. Mr McKnight's report was received on the Friday night, the 4th of July, i.e. just before the weekend when counsel was travelling between Wellington and Christchurch for that hearing. So it was not a situation where there was time for contemplation and realising exactly what had happened with that. And in fact it's quite clear that the issue became observations during the cross-examined of Mr Sellers.

The second point I'd like to make Your Honours, and this is a point that I have made in my submissions, Mr Whiteside took the Court through para 40 of the trial Judge's relief judgment where he raised his concerns about the problems with the off the cuff valuation, Mr Sellers giving his figures by way of re-examination. Your Honours I don't know whether you've yet had opportunity to read my submissions, but

I was aware of the need to be able to address all of those problems squarely to be able to raise the issue which I did this morning and I've set that out. But if I can ask Your Honours to please take those arguments into account in dealing with the Judge's problems because it is an important issue that he had problems with it.

Just to give one example and one example will suffice. At page 52 of my written submissions on relief, at the top of that page I've set out the Judge's sub para 3 from his para 40 and I've called it problem 3. Associated with the actual marketability of the proposed new retailing space is the question of what vacancy allowance should be made. This involves a question of valuation judgment. I do not believe I should be expected to reach a conclusion on this point without specific valuation evidence addressed to it. And on the face of it Your Honours that's a perfectly valid concern to have. However, in this case, he had before him a vacancy allowance from Mr Sellers for the March proposal, 18 months. Now a vacancy allowance Your Honours is what you do when you have, and I'll be brief, just in case you're familiar with the point, but where you have unlet space, you value it as if there's a tenant there but you adopt a vacancy allowance to take into account that it may take you a while to get a tenant. Mr Sellers had put 18 months and that reflected his concern about marketability of space. And Mr Dick for the other side had put 16 months. So it's my submission Your Honours, there was exactly the answer that the trial Judge needed if he wished to complete the exercise that he was asked.

And lastly on the vacant space Your Honours it is significant that no evidence was given at any point, whether at the trial on liability, the trial on relief, in response to the new evidence, in any forum have the appellants given any evidence or discovery about their efforts to try to lease the space, the vacant space.

As to the costs of the floor, their need to build in the new floor, yes I can I confirm that the figure agreed between the parties for building the floor was 452 or thereabouts. And just to clarify the question or our answer to the question put by Justice Blanchard earlier, there is agreement between the parties as to the cost. And there was also agreement between the parties that the cost has to be incurred whether you use that floor for storage or for retail. I didn't mean to mislead in that respect at all and my friend is right, where I don't agree is that I don't think the Judge made a simple arithmetical error in not factoring it at the end because in his judgment he said, no I'm not going to take account of that because I don't believe that would in the evidence before me.

Blanchard J He said what.

McIntosh He said, because the appellants raised this point following the relief judgment or following the relief hearing and before the relief judgment. And the Judge in fact deals with it in his relief judgment.

Elias CJ Yes that's as I'd understood it.

McIntosh Yes.

Elias CJ That you were in agreement on that figure and you were in agreement that the floor had to be built to tenant the space at all.

McIntosh At all.

Elias CJ Yes.

McIntosh For a storage unit. But the Judge said, I'm not going to do that, it hasn't been raised with me in there. So it was a conscious error if you like Ma'am rather than a simple arithmetical one that he made.

Blanchard J Can you refer us to that. I don't quite understand.

McIntosh Well.

Gault J Took into account income that could not be earned without the expenditure.

Blanchard J Mm.

McIntosh Well Your Honour this goes to what I said this morning that there are complaints on either side about the valuation exercise in respect of this vacant space. There is the area and there is the cost that has to be factored in on my friend's side and on my Fay's side there is the capitalisation rate and the rental.

Blanchard J Where does the Judge deal with it.

McIntosh At para 35 Sir, it's page 71. Now what he is saying is, when I put the $25 per square metre I did not understand Mr Dick to be saying he needed a new floor for that.

Tipping J All the Judge should have done was just deduct $452.00 from what ever figure otherwise emerged. Because it was going to be necessary to.

McIntosh Yes Sir except that this actually presupposes that had that been the case then he might have increased the 25.

Tipping J Oh yes. Yes, yes, yes.

McIntosh But otherwise, yes it would have to go in. The last, there's two last points Your Honours which have arisen. And that is the caveat point.

Blanchard J Where's the linkage between this and the $25 per square metre.

McIntosh Well Mr Dick Your Honours put forward the idea of storage and he said he attributed $25 and then over the page, at para 43, over two pages, the Judge said, against that back, para 43, page 73, against that background I propose to adopt the approach of Mr Dick.

Tipping J I mean it stands to reason if you're going to spend 452,000 you're going to hope to get a higher rental than you would have got without spending it.

McIntosh Well that's the point Your Honours. But also as my friend.

Tipping J Otherwise you're crazy.

McIntosh As my friend said today, it's the same cost whether it's storage or retail.

Tipping J Yes.

McIntosh So obviously you'd try to do retail if you possibly could.

Gault J Well he took into account income of $25 which could not have been earned but for the expenditure as I understand it.

McIntosh Well no Sir, he understood Mr Dick to be saying that that's all I attributed it to. Because Mr Dick did not speak of a new floor.

Elias CJ But that's a misunderstanding of the position.

Blanchard J What was Mr Dick saying. I'm just not understanding what you're saying.

McIntosh Mr Dick said simply here is a space which hasn't been let, I'm going to attribute a notional low cost rental, i.e. for storage.

Blanchard J But it couldn't be used for that without a floor.

McIntosh Well no, well it could Your Honour but probably inadequately. You certainly couldn't use it for its full potential at all. But what Mr Dick was saying, it's a black hole at the moment, I'm going to attribute a nominal $25.

Blanchard J On the basis that nothing needs to be done to it.

McIntosh Well his report didn't say you need to build a new floor for this. And that's what the trial Judge is saying. Well he never told me I needed a new floor. So I'm not going to factor one in.

Tipping J But if the rent for a black hole is $25, the rent for a black hole with a nice new floor is presumably something more than 25, is that, that's really the nub of the point isn't it.

McIntosh Yes Your Honour. I'm just, yes I didn't mean to be obtuse about it.

Tipping J No.

McIntosh It is implicit in any valuation of any moment that you have to spend that money.

Tipping J It would be unfair to deduct 452,000 without putting some sort of compensating uplift on the rent.

McIntosh Or at the very least taking it back to the trial Judge, yes.

Blanchard J I still don't really follow this. It seems to be a total mess.

Elias CJ Well if.

Blanchard J Mr Dick seems to have been valuing something on a basis which was unworkable.

Keith J Mm.

McIntosh Well you see Sir, he just said there is a space and without going anything into it, I'm going to attribute a value to it. Because I can't say it's worth zero. But I'm not going to investigate it because it hasn't been let. And it's about $25. And under cross-examined he admitted that storage could be higher depending. He'd taken his from wool storage elsewhere in South Dunedin. Mr Sellers said that storage would be 40 to 60. Although Mr Sellers would have built a new floor in for that. So there's an example I think of Justice Tipping's point that if you're going to use this space properly, you're going to have to build a floor.

Blanchard J Could it have been used for anything at all without the floor.

McIntosh Well to a limited extent I imagine Sir. But you certainly couldn't use it's full capacity because it's split levelled.

Tipping J He discounted the what would otherwise have been the value with the floor. He didn't reason this way but he discounted it on account of the absence of the floor and the inconvenience and awkwardness and all the rest of it. But I have to say that I think I've got your point. Where it fits in ultimately is another matter. But I understand the point.

Blanchard J So if we use the figure of $25 per square metre, we don't make any deduction for the cost of the floor. If we make a deduction for the cost

of the floor, we've got to up the $25 per square metre but we don't quite know to what figure.

McIntosh Correct Sir although we do know that you spend that money by upping it, you've got something which looks very much like a retail space.

Blanchard J So we ought to go for $100 per square metre.

McIntosh If Your Honours were minded to go through that exercise, this is the point that was made in the Court of Appeal and here, all the tools, all the constituents are there, they've just got to be put together. Every single, there's no uncertainty about anything Your Honour in my submission.

Tipping J You might discount the 100 for the chance that you wont be able to retail it, let it for retail purposes.

McIntosh No.

Tipping J I mean it's not an exact science. What you're saying is that it hasn't been valued for its highest and best use, at least potently.

McIntosh Yes, no but Mr Sellers did. Because at his 100 Your Honours, because we're really seeing there's differential figures above that.

Blanchard J Mm.

McIntosh 100 allows for the fact that it's secondary space. It's not your premium.

Tipping J Yes.

McIntosh And then the other part of the equation is you add in the vacancy allowance.

Tipping J Yes.

McIntosh Of 16 to 18 months to then achieve that.

Tipping J Yes.

McIntosh But nothing is going to be as exact as the market actually on that point.

Blanchard J Thank you.

Elias CJ Now you wanted to refer to the caveat for your second to last and last points. Was that right.

McIntosh Yes ma'am because the caveat is relevant. The reason that the constructive trust was sought as against and pleaded for as against

Rattray Properties was to avoid the situation that Mr Chirnside turned out to have in fact no money because everything was held in trusts so that any award for equitable damages against him was empirical. And so I perceive that the trial Judge recognised this and said yes, well I'm going to give you relief against both parties here because that's going to be an important part of it. So that in the event that the caveat is released and the building is sold and an award is made only as against Mr Chirnside, then Mr Fay would suffer that real risk of insolvency on the part of.

Blanchard J But how can you sustain the caveat unless there's a constructive trust.

McIntosh Well.

Blanchard J If you've got essentially a damages award.

McIntosh Yes, no Your Honour. I totally accept.

Blanchard J The caveat's got to come off.

McIntosh Yes I accept that point. In the event that Your Honours determine a damages award, then the corollary of that would also be releasing the caveat. But I'm just trying to explain how it came into place.

Elias CJ So you're not seeking a constructive trust pending payment.

McIntosh Well.

Elias CJ Because you're seeking equitable compensation, a monetary amount in lieu of the proprietary interest, is that right.

McIntosh Yes ma'am, if the award of equitable debt or damages was made payable against both appellants then I think that concern would go because there would be ways, through insolvency law, if there were to be any issue. But if there was an order only as against the first appellant, then that would be problematic.

Elias CJ Yes and your last point.

McIntosh And that was in relation to the sale ma'am that was proposed and my friend had two arguments against the sale. One that it was too late. In my submission in principle that is not a sustainable argument if the Court is looking as we now are at what the appropriate remedy is. Because with a sale and an interim accounting as has happened in several of those cases which we looked at from Australia, everyone is kept whole. There is no issue in terms of timing.

Tipping J Have you actually ever sought formally in the pleadings a sale.

McIntosh Not in the pleadings Sir. But the point was raised there with the Court of Appeal in relation to relief.

As to the second argument that there would be prejudice or we'd need to take into account the position of the syndicates who hold the 25%, in my submission that is also not relevant. Because they are also entirely kept whole by a sale of the building. They have no title to the building. They simply have shares in its holding co.

Tipping J Well if the building was sold peremptorily it's well known of course that it wont necessarily achieve its best price. I think that's the concern. And that their interests might there be damaged indirectly by their shareholding in the company that holds the, but I'm not at all convinced that we're going to go down the sale route anyway. I mean you're asking us to consider it of course. But it just seems to me that justice can be done other ways.

McIntosh Yes well if you take the view, I forget which if Your Honours made the point, but if you take the view that the company itself was a knowing recipient, then it is in principle not appropriate to take into account the indirect impact on the syndicate shareholders. Those were my submissions in reply Your Honours.

Whiteside Can I ask leave just to raise one issue.

Elias CJ Yes.

Whiteside It's the point that Justice Blanchard's been concerned about, this vacant space and the issue about whether or not this floor is required for storage and or retail. There is one passage which is critical in Mr Dick's report which deals with this issue which clears the point up. And given the misunderstandings that have occurred in the courts below.

Elias CJ Give us the reference Mr Whiteside .

Whiteside It's volume 5, page 634.

Elias CJ What colour is 5.

Whiteside 5 is yellow ma'am.

Keith J Yellow.

Whiteside Page 634, the last para. The basis of Mr Dick's assessment for the vacant level 5 area was an area of approx. 279 square metres and that calculation was taken through into Justice Young's judgment. Now the 279 sq. metres is the entire level 5 area including both the ABC area and the tank room or cool room. So it wasn't just a black hold that he was assessing for storage. It's the entire level 5 area and you see that

area. That area of 279 square metres is frequently referred to in all these valuation reports. It's for instance in Mr Sellers' valuation at page 573 where he actually, well he's referring to Mr Fletcher's … assessment of the vacant retail, 2/3 of the way down the page, 2790 square metres. So that is the entire area, both tank room and the adjacent ABC bottling hall area.

Elias CJ Yes thank you.

Blanchard J Well what's the significance of that point.

Whiteside Well the point is that for this storage assessment that Mr Dick made, carried through by the Judge, to have a total area of 2,790 square metres you had to have a floor in the tank room.

Gault J So that you end up with two levels in the tank room, is that what you're talking about or it's just usable once you've put a floor in it.

Whiteside It's just usable once you've put a floor in it.

Gault J Mm. You've got two areas and they're at different levels and they add up to 2790 and the question is whether they could all be made to the same level by the installation of a suspended floor and.

Whiteside No the total area in the, there were two existing levels in the tank room. This is where it becomes complicated, but shown in the diagrams which total about 1600 square metres, two lots of 800 square metres.

Gault J Yes.

Whiteside But the 2790 comprised the top level of the tank room because the bottom level had the Harvey Norman … the AC plant on it, the 2790 comprised the top level of the tank room plus the vacant ABC bottling area.

Gault J And the top level of the tank room can only be useful with the floor, is that right.

Elias CJ Mm.

Gault J Thank you.

Elias CJ If we need some assistance on that matter we may put out a memo seeking further clarification.

Whiteside As Your Honour pleases.

Elias CJ Alright well thank you counsel for your assistance. We'll take time to consider our decision.

Whiteside As Your Honours please.

McIntosh As Your Honours please.

Court adjourns 4.23 pm