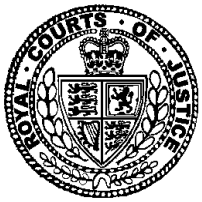

Neutral Citation Number: [2023] EWHC 1279 (Ch)

Case No: CH-2022-000105

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 26/05/2023

Before :

SIR ANTHONY MANN

- -

Between :

Christopher Charles Fisher	**Defendant/ Appellant**
- and -	
Colin Laverock Dinwoodie	**Claimant/ Respondent**

- -
- -

Andrew Butler KC and **Richard Alford** (instructed by **Fieldfisher LLP**) for the **Defendant/Appellant**
Shane Sibbel (instructed via **Direct Access**) for the **Claimant/Respondent**

Hearing dates: 22nd & 23rd March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 26th May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

SIR ANTHONY MANN

Sir Anthony Mann :

Introduction

1. This is an appeal which raises the question of whether a fiduciary relationship arose as between the appellant (Mr Fisher) and the respondent (Mr Dinwoodie) because Mr Dinwoodie, who says that such a relationship existed, uses that as the first basis on which he claims an interest in the shares of various companies in circumstances in which legal title to those shares was and is held by Mr Fisher. It also raises the question of whether a claim can be made to an interest in some of those shares via an express trust or a constructive trust on what are described as *Pallant v Morgan* principles ([1953] Ch 43) or other constructive trust principles. The judge below (HHJ Monty KC) held in Mr Dinwoodie's favour on both of those counts. In his order he granted an injunction against Mr Fisher as well, which restrains him from competing with various of the companies concerned. That remedy is challenged in this appeal by Mr Fisher, as are the findings of fiduciary duty and trust which underpin the claims to the shares.

2. Mr Andrew Butler KC led for Mr Fisher in this appeal; Mr Shane Sibbel appeared for Mr Fisher. Both counsel appeared at the trial below, which doubtless partly explains their impressive mastery of the detail of the documents in this case.

3. A further outline of the facts of this case will assist further navigation round the issues, and I provide it here. The more detailed facts are set out in a separate section.

4. Mr Fisher and Mr Dinwoodie had a friendship going back many years before they started a business relationship. Several years before 2009 they started some sort of business with a number of projects. Among those projects was the provision, or intended provision, of consultancy services to third parties. There is a dispute in this case as to whether that amounted to a partnership - the judge below held that it did. In 2009 they agreed that the services would be provided by two companies, namely Business E&M Ltd ("BEM") and Business M&E Ltd ("BME"). One was registered for VAT and the other was not. The idea apparently was that the former would deal with VAT registered clients, and the latter with clients not registered for VAT. Where it is not necessary to distinguish between these companies I shall call them the BEM companies. The first main dispute in this case is as to whether, in the circumstances, Mr Dinwoodie has acquired a beneficial interest in those shares by virtue of a fiduciary relationship between him and Mr Fisher. The judge below held that he did.

5. It seems a certain amount of activity took place within those companies. In 2012 Mr Fisher acquired a sole legal shareholding in various other companies originally controlled by Ms Julia Dee. In the compromise of litigation in a Tomlin order it was acknowledged that, as between Mr Fisher and Ms Dee's interests, Mr Fisher acquired sole rights to the shares in two of those companies, namely Alterations Matter Ltd ("AML") and Queenstown Ventures Ltd ("QVT") - collectively "the DA companies". The second main dispute in the case was as to whether Mr Dinwoodie acquired an interest in those shares via a constructive trust and the alleged fiduciary relationship, and/or an express declaration of trust and/or the alleged *Pallant v Morgan* constructive trust. The judge below held that he did under all heads

6. The third element of the appeal in this case is the terms of the injunction to which I have referred. In this appeal it is said that that injunction is far too wide.

The basis of the appeal

7. The complaints made in this appeal, and which I have to consider, are as follows:

(i) The finding of partnership (which was used as a building block, though not an essential one, for the construction of the fiduciary duty case) was not justified on the evidence.

(ii) The finding of fiduciary duty was not justified on the basis of the approach by the judge and on the basis of the evidence. The judge did not adopt the right legal approach to finding fiduciary duties, did not identify sufficient facts to justify a relevant duty, did not articulate it sufficiently clearly and failed to take into account the corporate structure in finding that there was a duty.

(iii) The judge erred in finding on the evidence that there was an express trust of the DA companies shares.

(iv) The judge erred in finding, on the evidence, that the DA company shares were affected by a constructive trust.

(v) The injunction granted was too wide in principle.

The correct approach to the matters in this appeal

8. Mr Butler said that there was no challenge to any of the findings of primary fact made by the judge. From time to time Mr Sibbel complained that the matters raised on this appeal were matters which went to what were essentially evaluative judgments made by the judge, with consequential limits on the extent to which an appellate court can interfere with those findings. I shall consider those points when I consider the detail of this appeal. It was common ground that so far as there are evaluative decisions (which is itself in dispute) the relevant authorities lay down the following principles, which appear conveniently in *Re Sprintroom Ltd* [2019] EWCA Civ 932:

> "76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".
>
> 77. All this said, when assessing an evaluative decision of the facts found by a trial judge, there can be no doubt that one must also bear in mind the well-known passage in the speech of Lord Hoffmann in *Biogen Inc. v Medeva plc* [1997] RPC 1, 45 where he said:
>
> "…The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

78. Again, the position is so well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd. & anor. v Chobani UK Ltd. & anor.* [2014] EWCA Civ 5, at paragraph 114, as follows:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

Where relevant I shall apply those principles.

The judge's findings

9. The judge made most of his findings of primary fact in a section of his judgment devoted to that issue, but he added in a few more when he was considering the issues that he had to decide. What follows is an account of those facts. In some instances I can summarise, but in others I have to give some detail because Mr Butler's appeal depends, in part, on the detail not being sufficient to justify the legal conclusions which the judge based on them.

10. The two men met in 1981 and became "good friends" before starting becoming involved in a number of business ventures from 2006 and a "consultancy business" in 2008 (paragraph 1). They included their first project, Technofree, which is said by Mr Fisher to have been a "not for profit" venture to facilitate internet access for the elderly; there was a proposal to acquire equity in a landscaping business called Vernalis (which apparently did not come to fruition); and there was Mr Fisher's purchase of an Italian delicatessen business called Olive, for which Mr Dinwoodie had some involvement in the negotiations. The judge records:

> "36. Mr Dinwoodie regarded Mr Fisher as his business partner. In my judgment, Mr Fisher did likewise."

The positioning of this paragraph in the judgment indicates that this was a finding in relation to this period of their relationship.

11. In late 2008 and early 2009 the parties discussed how they could formalise their relationship so as to provide consultancy services to small businesses. Mr Fisher proposed BEM (then under another name) as a corporate vehicle; he was its sole shareholder, but acknowledged that there were probably brief discussions about issuing a share to Mr Dinwoodie in that company and BME. A Skype message interchange of 28th May 2009 seems to contain an acknowledgment by Mr Fisher that Mr Dinwoodie should have a share, and the judge considered that Mr Fisher was not being truthful in the witness box when he said he had no intention either way.

12. In paragraph 41 the judge found that Mr Dinwoodie entrusted Mr Fisher with the paperwork required for organising the corporate affairs of the company, and that that is what happened over the years. He added:

> "42. I also accept that Mr Dinwoodie believed he was a 50% shareholder in BEM and BME and that this was also Mr Fisher's understanding, belief and intention."

13. The annual returns of the companies reflected Mr Dinwoodie as being one of the two shareholders in both of the companies from January 2010 (BME) and November 2011 (BEM), and in November 2016 a confirmation statement for BME recorded both Mr Dinwoodie and Mr Fisher as persons with 25-50% significant control. Mr Dinwoodie assumed Mr Fisher had made the relevant transfers and relied on him to have done so, and to have filed correct documents at Companies House (paragraphs 8 and 41). Mr Fisher sought to distance himself from the returns, but the judge did not accept his protestations of non-involvement. He had discussed Mr Dinwoodie's shareholding with a third party (Ms Martin, the companies' book-keeper).

14. In paragraph 49 the judge made findings that the pre-corporate business continued through the medium of the BEM companies:

> "49. It is clear, in my judgment, that the pre-corporate business then continued through the medium of the consultancy companies. The significant background to this was that it is plain, in my judgment, that Mr Fisher and Mr Dinwoodie were in business together (a business which they referred to either as Project X or as The Business) from before the use of BEM (they offered and provided business consultancy services to a Mr Mason in 2008, they made the offer in respect of the equity in Vernalis, and were also involved in other projects such as Olive), and Mr Fisher's repeated denial that they were rang hollow."

And in paragraph 50 he found that Mr Dinwoodie and Mr Fisher regarded themselves as owners of the consultancy companies, that they were in business together and were sharing the corporate ownership. He backed this up by reference to admissions by Mr Fisher in other proceedings. Then he turned to the DA companies, and said:

> "53. As to the original DA companies, it seems to me that the position is equally clear and to similar effect."

15. His findings then deal with this. He had already found (paragaph 11) that when BME started to provide consultancy services to the DA group Mr Fisher acquired a single

share in each of four of the companies in the group, including the two DA companies which feature in this claim (AML and QTV). Litigation took place between Ms Dee and Mr Fisher, which was compromised in a Tomlin order (undated in my papers but which appears to have been in about October 2013) under which it was agreed that Mr Fisher would retain (inter alia) the shares in the DA companies and two other identified individuals would relinquish all interest in those shares. Mr Dinwoodie was not a party to the litigation or to the compromise, though he did sign the Tomlin order on behalf of BME. Judge Monty firmly rejected the proposition (advanced by Mr Fisher) that Mr Fisher was intended to be the sole beneficial owner of those shares and he found (without much reasoning) that:

> "55… after the Tomlin Order the position was that BME had 100% beneficial ownership of the [DA companies], and Mr Fisher and Mr Dinwoodie owned half each in turn."

16. He also found that in connection with those companies Mr Fisher was given to describing Mr Dinwoodie as his "business partner" to third parties, and added:

> "In my judgment, Mr Fisher meant what he said when referring to Mr Dinwoodie as his partner - he meant more than "business partner" and knew that it carried legal connotations, and he meant it to do so when he used the word." (paragraph 54).

17. The judge found that the position in relation to the beneficial ownership of the shares in the DA companies was confirmed in a Skype Message from Mr Fisher to Mr Dinwoodie on 13th December 2013. The terms of that message, so far as relevant, were as follows:

> "I think we agreed the following yesterday:
>
> [Various matters concerning the business of the DA companies and funding]
>
> I am still holding the sole share in [AML and QTV] but we are still agreed that we share equally in DA equity/shareholding until we discuss and agree otherwise.
>
> Have I got this right?"

To which Mr Dinwoodie replied:

> "Broadly agreed (we have subsequently discussed on afternoon of 13/12). Let me know if you are available this afternoon for a chat."

18. The judge found as a fact that there was actual agreement on the beneficial holdings in the DA companies. What remained to be agreed were the other matters referred to in the message.

19. Thereafter (as the judge found - paragraph 55) Mr Fisher described Mr Dinwoodie from time to time as "co-owner" to third parties (outsiders and new recruits), and Mr Fisher procured that Mr Dinwoodie and himself be registered as persons with significant control over DA companies. The judge rejected Mr Fisher's attempts to explain those matters away. He found that Mr Dinwoodie was involved in the conduct of the business of all the companies, rejecting Mr Fisher's evidence he was a non-executive director.

20. In 2017 the two men fell out. The judge charted some of the course of this falling out, and much of the detail does not matter. What is of potential significance is his reference to an email in which Mr Fisher seemed to acknowledge he had only a 50% share in the value of an unidentified company (probably one of the DA companies) and the fact that he did not correct an assertion by Mr Dinwoodie that he had a 50% share. On 31st October 2017 Mr Fisher send an email in which he talked about ending the "partnership" (a word he put in inverted commas) and adding after the word:

> "… that was perhaps never a true one in the first place. Partnership is a very loaded word, just like 'investment' and 'equity'. Multiple meanings and subtleties. Massive scope for misunderstanding."

21. Thereafter, and once he had realised the true state of the shareholding in November 2017, Mr Fisher embarked on a course of action designed to exclude Mr Dinwoodie from the business. He had references to him removed from Companies House, removed him as director from AML and the BEM companies and diluted the original shareholdings in those companies by the allotment of further shares in those companies. There was a further round of restructuring (unspecified) in 2020 and Mr Fisher has refused to account to Mr Dinwoodie for moneys paid out of the companies for Mr Fisher's benefit since 2017. The judge found (and Mr Fisher did not seem to deny) that Mr Fisher had moved income and assets out of the DA companies into two of his own

companies and registered the trading names of the DA companies ("Design and Alter" and "Bride and Alter") as trade marks in his own name.

22. With the benefit of those facts the judge embarked on a determination of the issues arising. He considered authorities relating to the existence of fiduciary duties or a fiduciary relationship and determined that while it is unusual for fiduciary duties to exist in a commercial context, they might do (paragraph 78) and that considering whether or not they exist in any given case is a fact-sensitive exercise. He accepted the submission that such duties arose in this case out of the following factors:

(a) Prior to the involvement of the BEM companies, there was a partnership between Mr Dinwoodie and Mr Fisher.

(b) Once the corporate structure was introduced the parties, and in particular Mr Fisher, continued to use the words "partner" and "partnership" and to their interests being 50/50.

(c) Mr Fisher had said in his witness statement that the two of them had always acted in good faith and in their mutual interests and agreed completely on a common purpose. That encapsulated a situation in which there was a legitimate expectation on both sides that one would not use his position in such a way as would be adverse to the other.

(d) The close personal relationship meant that it was not primarily a commercial venture and that they did not record their agreement in a personal document.

(e) Mr Dinwoodie relied on and was vulnerable to Mr Fisher. The vulnerability was best illustrated by the events of 2017 when Mr Fisher excluded Mr Dinwoodie from the business and restructured the shareholdings. Mr Dinwoodie also trusted Mr Fisher to deal with any necessary formalities regarding shareholdings and trusted him to hold the DA companies shares on trust for BEM. Mr Fisher knew that that was Mr Dinwoodie's position.

(f) It did not gainsay that conclusion that Mr Dinwoodie might have had a remedy of rectification under section 125 of the Companies Act 2006.

23. Having thus concluded, Judge Monty found that Mr Fisher's retention of title to the shares in the BEM companies and the DA companies was contrary to their agreement and a breach of fiduciary duty

> "not to act otherwise than in good faith and with loyalty in relation to the shareholding of the company." (paragraph 101).

24. Then the judge held there was an express trust in relation to the shares in the DA companies based on the agreement about those shares which he had already found (paragraph 103).

25. In addition, Judge Monty found that a constructive trust had arisen based on *Pallant v Morgan* [1953] Ch 43, rejecting the argument that such a trust could not arises where the property was already owned by one party at the time the trust was said to arise.

26. Accordingly, the judge held that Mr Dinwoodie's claim in relation to his beneficial interest in the shares in the BEM companies and the DA companies succeeded. The new shares which Mr Fisher had issued to himself in those companies and any profits were to be held on trust for the two men equally.

27. So far as the injunction restraining Mr Fisher from competing with the business of the companies is concerned, this was dealt with in a judgment given on the occasion of the consequentials hearing. The judge's main points were:

> (a) The injunction was not a restraint of trade because Mr Fisher was not a former employee or former director, but was a member of a joint venture who still owed fiduciary duties to Mr Dinwoodie.

> (b) The fidiciary duties still existed - this would seem to be at the heart of the reasoning on the injunction point.

(c) He rejected the suggestion that the word "compete" was too vague, pointing out that the word was used in section 30 of the Partnership Act 1890 which provided for a partner to account for his/her profits if he/she "competes" with the business of the partnership.

The partnership finding

28. I have set out above the various bases on which Mr Butler seeks to mount his appeal. His first is an attack on the finding of a partnership before the BEM companies were brought into play. This finding is not determinative of the fiduciary duty point, and even if it is wrong it does not mean there was no fiduciary relationship, but it is the judge's first building block and falls for consideration in that context. If there was a form of partnership then that is a significant part of the background for the relationship which followed because a partnership is one of the relationships which of itself attracts fiduciary duties.

29. Mr Butler sought to criticise the finding by pointing to some very limited evidence given about this in Mr Dinwoodie's witness statement and submitting that the ingredients of a partnership under the Partnership Act 1890 were not there - there was no business carried out on common (with a view to profit), and manifestations of a partnership such as a partnership bank account were not present. He complained that the judge below did not address the elements of a partnership properly.

30. I do not consider that Mr Butler gets home on this point. The judge quoted section 1 of the Act in paragraph 87 of his judgment and must be taken to have had the relevant ingredients in mind. While he did not set out much of the evidence in the part of his judgment where he made his finding, and had not referred to much more in his earlier factual narrative (paragraph 35), Mr Butler fairly accepted that he had received more evidence than he recited, and Mr Sibbel took me to it (or some of it). I do not propose to recite it either. The dispute was really whether the evidence went so far as to establish that the parties had been doing sufficient to amount to the carrying on of a business in common bearing in mind the activities of which the judge received evidence. This is an evaluative question (see *Ilott v Williams* [2013] EWCA Civ 645 at para 18) and can only be upset if the decision was plainly wrong - see above. In my view it was not. This basis of the appeal therefore fails.

Fiduciary relationships and duties - the underlying law

31. This issue is at the heart of the appeal. Mr Dinwoodie's case is based on an averment of, and reliance on, what he said was the fiduciary relationship between him and Mr Fisher. It is said that Mr Fisher was under fiduciary duties in relation to the BEM companies' and DA companies' shares such that his denial of Mr Dinwoodie's entitlement, and his subsequent steps to frustrate it, are a breach of those duties. The existence of this key relationship is denied by Mr Fisher.

32. The main principles underlying the existence of a fiduciary relationship were not much disputed on this appeal, though the emphasis to be given to some of them was. The relevant principles can be derived from the following cases.

33. The leading authority in this area is the much quoted analysis of Millett LJ in *Bristol v West Building Society v Mothew* [1998] Ch 1. In his oft-cited paragraph at p18 he said:

> "This leaves those duties 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. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

34. In identifying whether a relationship is a fiduciary one or not, there are two further concepts which may be of assistance. They are the concept of reasonable expectations and an imbalance of power and vulnerability, but as Birss LJ pointed out in *Tulip*

Trading Ltd v Bitcoin Association for BSV [2023] 4 WLR 16 paras 46 and 47, those are not touchstones, they are merely helpful explanatory concepts.

35. At the heart of Mr Butler's submissions on this point was one to the effect that the judge fell into the trap of saying that since Mr Fisher was a fiduciary, he therefore owed all conceivable types of fiduciary duty without considering what those duties were. I will consider separately how the judge below dealt with these points, and for the moment will deal with other points relied on by Mr Butler which he said arose from the authorities.

36. First, Mr Butler submitted that what existed in the present matter was a joint venture, and authority indicated that fiduciary duties (or relationships) rarely arise in such a context. He pointed to *Al Nehayan v Kent* [2018] EWHC 333 (Comm) in this respect. That was a case described by the the Court of Appeal judge (Leggatt LJ) as one which has elements of the present case:

> "1. The story is all too familiar. Two friends go into business together. The business founders, their friendship falls apart and they end up in a dispute on opposite sides of a courtroom."

It was a joint venture sort of case, and the submission was made that on the facts each party owed fiduciary duties to the other. Having considered two cases in which there was said to be a fiduciary relationship in a joint venture context, Leggatt LJ said;

> "157. In considering this submission, I bear in mind that it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship. The paradigm case of a fiduciary relationship is of course that between a trustee and the beneficiary of a trust. Other settled categories of fiduciary include partners, company directors, solicitors and agents. Those categories do not include shareholders, either in relation to the company in which they own shares or to each other. While it is clear that fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward, as there is no generally accepted definition of a fiduciary.

37. Mr Butler relied on this as some sort of starting point for him. While the cautionary words are appropriate, they do not really take this case very far. As Leggatt LJ pointed out in his judgment, a close personal relationship is not enough (paragraph 163), and all factors have to be considered. That is obviously right, and it applies to all allegations where such a relationship is alleged. Anyone outside the normal established categories is going to have to work harder to establish that the necessary relationship exists. The question in any given case is whether that relationship is established. It is noteworthy that while Leggatt LJ held that his defendant did not owe fiduciary duties to his claimant, he seems to have been prepared to consider that it was much more arguable that duties existed the other way - see paragraph 162 - so it seems there was at least the potential for fiduciary duties even in that "commercial" environment.

38. The position was helpfully summarised by Nugee J in *Glenn v Watson* [2018] EWHC 2016, from which Judge Monty himself quoted. Nugee J carried out an extensive review of the authorities and delivered a summary from which the following relevant principles and guidance can be extracted:

> "131. … (1) There are a number of settled categories of fiduciary relationship. The paradigm example is that of trustee and beneficiary; other well-settled examples are solicitor and client, agent and principal, director and company (subject to the impact of the Companies Act 2006), and the relationship between partners: *Snell's Equity* (33rd edn, 2015) at §7-004.
>
> (2) Outside these settled categories, fiduciary duties may be held to arise if the particular facts warrant it. Identifying the circumstances that justify the imposition of fiduciary duties has been said to be difficult because the courts have consistently declined to provide a definition, or even a uniform description, of a fiduciary relationship: *ibid* at §7-005.
>
> (3) Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings – indeed they very frequently do, as the example of agency illustrates – but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party: *ibid*.
>
> (4) A joint venture is not one of the settled categories of relationship giving rise to fiduciary duties between the joint venturers. Although at first sight the analogy with a partnership might suggest that it would be, it is clearly established that the phrase *"joint venture"* is not a term of art either in a business or in a legal context, and each relationship which is described as a joint venture has to be examined on its own facts and terms to

> see whether it does carry any obligations of a fiduciary nature: *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 (***"Ross River"***) at [34] per Lloyd LJ.
>
> (5) The default position is that no such fiduciary duties arise. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers …"
>
> ….
>
> (7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side. That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to *"the single-minded loyalty of his fiduciary"* (*Mothew* at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent.
>
> (8) This analysis also explains why fiduciary duties will not readily be found in commercial settings. In commercial dealings the relationships are (usually) primarily contractual; and it is of the essence of commercial contracts that each party is (usually) entitled, subject to the express and implied constraints of the contract, to seek to prefer his own interests, and is not obliged to put the interests of the other party first. "

39. Mr Butler particularly relied in the present case on the transition from a prior relationship to a corporate relationship. He submitted that that new relationship was the one that governed the relationship between the parties. There was no room for fiduciary relationships between venturers in such a situation because it was the relationships arising out of company law which thereafter governed their dealings. He cited *Shalson v Russo* [2005] Ch 281:

> "131. [Fiduciary duties] is the third alternative way in which Mr Mimran seeks to establish that he had a proprietary interest in the money he advanced to Westland [the joint venture company]. The proposition is that Mr Russo had undertaken to act in Mr Mimran's interests with regard to the application of the money advanced; that Mr Russo was in a position to deal with the money in a way which could or would affect Mr Mimran's interests; that Mr Mimran was vulnerable to an abuse by Mr Russo of the position he occupied with regard to dealing with the money so advanced; and that Mr Mimran had not agreed to Mr Russo applying the money merely in his own interests. It is said that these ingredients combined to result in Mr Russo becoming a fiduciary for Mr Mimran with regard to the money the latter advanced to Westland, so giving Mr Mimran a right to trace the money when it was misapplied by Mr Russo in breach of his fiduciary obligations."

> 132 I do not accept that Mr Russo became such a fiduciary. The argument ignores that the Russo/Mimran venture was one they agreed was to be conducted through Westland. When Mr Mimran made his loans, the money so advanced became (as he intended) Westland's money: it ceased to be his own money. Mr Russo was not a director of Westland, but I find that he gave the instructions as to the dealings with Westland's money, and I accept that he owed fiduciary duties with regard to such dealings. But any such duties would have been owed only to Westland, not to Mr Mimran, since the dealings related to Westland's money, not to Mr Mimran's. It may be that the Westland venture can be characterised as a joint venture between Mr Russo and Mr Mimran personally. But I do not consider that this entitles Mr Mimran to say that, with regard to the Westland money, Mr Russo owed separate fiduciary duties to him as well. They chose to conduct their venture through a company, and it is simply to the company that each would have owed fiduciary duties. Nor can I see any reason why the duties should need to be regarded as being owed more widely than that. If Mr Russo breached his duties to Westland and misapplied its money, it would be open to Mr Mimran – if necessary, by a derivative action - to bring proceedings for Westland's benefit against Mr Russo I do not, therefore, accept this third alternative way of putting Mr Mimran's case."

40. Mr Butler also relied on what Neuberger LJ said in *Chahal v Mahal* [2005] BCC 655. That was a case where a partnership was succeeded by a company as the business

vehicle, and a question arose as to the extent of the continuation of the partnership. In that context Neuberger LJ said::

> "25 … In other words, I would accept Mr. Pymont's general point that the law, like business common sense, would presume, in the absence of any reason to the contrary, that the transfer of all the business and assets of a partnership to a limited company, in which all the partners are given shares pro rata to their interests in the partnership, raises the presumption that the partnership is thereby determined. Of course, that does not mean that there will be no continuing liabilities, which will be governed by the partnership relationship, such as liability for any tax or other debts of the partnership which may arise, but, as Mr. Pymont says, that is part of the post-dissolution winding up. The point is that the fact that there has been dissolution does not mean that the relationship between the former partners is no longer governed by the terms of the dissolved partnership agreement. "

41. While these cases demonstrate a general or prima facie position, they do not give effect to some sort of general rule which would mean that Mr Dinwoodie cannot assert a fiduciary relationship in the present case. They demonstrate that a joint venture, or a participation in a company, does not, without more, give rise to fiduciary relationships (save for the established one owed by a director to the company), and if such a duty is to be asserted then facts must be established which justify that.

42. There is one particular aspect of company law which Mr Butler relied on which should be got out of the way at this stage. He submitted that within the corporate context section 125 of the Companies Act ruled out the existence of any fiduciary relationship because it gave Mr Dinwoodie a remedy and that was the only remedy he was entitled to. I consider this point to be misconceived.

43. Section 125 provides for the rectification of the share register and says:

> "125. Power of court to rectify register
>
> (1) If—

> (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
>
> (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,
>
> the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.
>
> (2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.
>
> (3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register."

44. The judge rejected this submission, and in my view rightly so. There are various reasons why it is wrong. First, it is a remedy, not a source of rights which would somehow displace rights which might otherwise arise out of dealings between the parties. That is best demonstrated in this case by considering what would happen if Mr Dinwoodie tried to make a claim to his shares in the BEM companies through this route. He could not claim simply by asking the company to rectify the register. He would have to give a reason. He would have to propound his claims arising out of the alleged fiduciary duty. So he would have to establish the duty (and breach) in the course of, or before, applying for rectification under section 125. The section would implement, rather than replace, the fiduciary duty claim. Second, the remedy is a summary one which is not appropriate for substantial disputes on the merits - see the discussion in *Gore Browne on Company Law* at para 10A[14]. Third, it is open to question as to whether it can be invoked when the true dispute is between two shareholders, or one shareholder and a would-be shareholder as to the latter's entitlements - [ibid]. The judge below dismissed this part of the claim for different reasons, but he was right to do so for the reasons I have just given.

45. Mr Butler drew my attention to *Sharp v Blank* [2017] BCC 187 in which Nugee explained why it was that generally speaking (though not as a universal rule) directors of a company do not owe fiduciary duties to the shareholders (as opposed to the company) - see paragraph 9(3) - and submitted that the same factors demonstrated why it was that Mr Fisher did not owe Mr Dinwoodie any such duties. I am afraid I do not understand the parallel that Mr Butler sought to draw in this respect. What is of some relevance is what Nugee J said once he had considered the limited number of instances where, on special facts, such a duty was held to exist. He said:

> "13. …If he is to be held to owe fiduciary duties to the individual shareholders, there must be something unusual in the nature of the relationship which gives rise to it. That no doubt explains why the cases where such a duty has been held to exist mostly concern companies which are small and closely held, where there is often a family or other personal relationship between the parties, and where, in almost all cases, there is a particular transaction involved in which directors are dealing with the shareholders, from which the directors often stand to benefit personally. The imposition of a fiduciary duty in such circumstances reflects the fact that directors who have a close family or other personal relationship with shareholders, and are entering into transactions with them, may be tempted to exploit that relationship to take unfair advantage of the shareholders for their own benefit." (my emphasis)

The emphasised words refer to factors which are said to exist in this case.

46. While all the cases emphasise that the existence or otherwise of fiduciary duties is a highly fact-specific question, and provide what might be thought of as a starting point for instances outside the traditional relationships, the possibility of their being such duties owed between joint venturers is expressly left open in some authority. Of particular interest in this respect is *Farrar v Miller* [2018] EWHC Civ 172, because it demonstrates that the duties might be confined to a particular aspect of the relationship. It concerned a property known as Long Stratton whose development and sale was to be the subject of a joint venture. Following the ownership of the property through various companies is a little complicated, but it is sufficient for present purposes that the property had started out in a jointly owned company and ended up in a company in which one of the joint venturers (Mr Farrar) had no interest. He claimed, inter alia, that that was a result of a breach of duty on the part of his other principal joint venturer, Mr Miller. At first instance he was refused permission to amend to make such a claim and appealed to the Court of Appeal. That court reversed that decision. The case demonstrates that a fiduciary relationship can arise out of a joint venture (which, to be fair to him, Mr Butler never disputed) and that is made clearest by the judgment of Kitchin LJ:

> "75. I recognise that joint venturers may or may not have a relationship in which one of them owes fiduciary duties to the other. The question, to my mind, is whether the circumstances of their relationship justify the imposition of such duties, and in answering that question it is often helpful to consider whether, to adopt the words of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18, one joint venturer has undertaken to act for or on behalf of the other in a particular matter or circumstances which have given rise to a relationship of trust and confidence. It may also be helpful to ask whether one joint venturer is in a relationship with the other which has given rise to a legitimate expectation, which equity will recognise, that he will not use his position in such a way which is adverse to the interests of the other: see, for example, *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 598. Whether a joint venture relationship carries obligations of a fiduciary nature is therefore highly fact-sensitive: see, for example, *Ross River Ltd and anor. v Waverley Commercial Ltd and ors.* [2013] EWCA Civ 910 at [30] to [64]."

47. Kitchin LJ considered it was arguable that the fiduciary duties might be focused on a particular aspect of the relationship:

> "77. The basis of this aspect of the claim is not simply the fact that Mr Miller and Mr Farrar were shareholders in Saxon or Artillery; nor simply the fact that Mr Miller was a director of Artillery. It is that the parties had been in business together as property developers for very many years and it was in that context that Mr Miller was entrusted with the corporate aspects of the parties' joint ventures and was specifically given or assumed the responsibility of transferring Long Stratton from Saxon to Artillery and then from Artillery to the Joint Venture entity. It was only as a result of that relationship of trust that Mr Miller was able to transfer Long Stratton out of Artillery to Edged Red, the means by which he thereafter denied Mr Farrar any interest in Long Stratton or its traceable proceeds. I appreciate that these allegations are heavily contested by Mr Miller but Mr Sibbel submits and I agree that, if made good at trial, it is arguable that they did indeed give rise to the fiduciary relationship for which Mr Farrar contends."

The significance of this will appear below.

48. Other authorities were cited to me, but the above authorities are sufficient to demonstrate the principles which need to be applied.

The appeal in relation to fiduciary duties

49. Mr Butler criticised the judge's findings under three heads - treating fiduciary duties as some sort of homogenous mass without considering the actual duties involved (if any); there was an inadequate factual basis for finding a duty at all; and the duty he relied on was insufficiently articulated.

50. Mr Butler is right to say that fudiciary duties are not some sort of universally applicable homogenous mass, and to say that it is inappropriate to describe them globally as if a relevant one is part of some overall package. The authorities demonstrate that it is necessary to see what the relevant relationship is in any given case and to ascertain whether any particular fiduciary duties rise out of the relationship. Some of them (articulated by Millett LJ) will arise in every case, though they can be modified. However, it is plain that Judge Monty recognised this and applied the law correctly. He cited Snell's Equity as encapsulating the relevant principles and cited *Farrar v Miller* at paragraph 75 and various paragraphs from *Glenn v Watson*. The judge then recorded himself as deriving two basic principles from the authorities:

> "78. First, while it is unusual for there to be fiduciary duties in a commercial context, such duties can sometimes arise on the facts.
>
> 79. Secondly, the court must undertake a fact-sensitive enquiry in order to ascertain whether, objectively, fiduciary duties arose in the particular context."

51. Mr Butler criticised paragraph 78 as turning on a wrong emphasis. He submitted that "sometimes" should have been "exceptionally". This seems, with respect, to be a rather nit-picking criticism. There is really nothing wrong with the formulation of the judge so far as it goes. Whether one chooses to use the one word or the other depends on the emphasis wishes to place on the point. What emerges from the authorities is that in a "commercial relationship" parties are expected to define their respective relationships as a matter of agreement. Where that has happened there is rather less room for the implication of a fiduciary relationship because the parties have pinned down their respective responsibilities. However, that is not true of all commercial relationships, whatever that expression may mean, and the warnings appearing in the authorities (such

as *Glenn v Watson* above) really do no more than reflect what are the likely commercial realities. It is also worth pointing out that a partnership would seem to be a "commercial" relationship; no one seems to have had any difficulties in spelling fiduciary duties out of that relationship.

52. Having arrived at those two basic points, the judge went on to consider various cases where fiduciary duties were owed in a commercial context and elaborated the test in his paragraph 83.

> "I accept that ultimately at the heart of the enquiry is the test set out by Leggatt LJ in *Al Nehayan,* and is summarised by Falk J at [76]: (a) the existence of trust and confidence is not enough; (b) the test is not whether one party subjectively placed trust in another; (c) the test is objective: is the nature of the relationship such that one party was entitled to repose trust and confidence in the other, where one had to put aside his own interests and act solely in the interests of the principal?

53. At paragraph 84 he said:

> "84. In my judgement, the existence of fiduciary duties is made out on the evidence, and I accept Mr Sibbel's submissions, which I summarise below."

54. What then followed was a form of analysis of the relationship between the two gentlemen, starting with the existence of the partnership. After considering the evidence the judge concluded that:

> "91. In my judgment, this encapsulates a situation where there was a legitimate expectation, on both sides, that one would not use his position in such a way which was adverse to the other.
>
> 92. It is because of the close personal relationship between them (which in my view Mr Fisher wrongly attempted to play down in his evidence) that first this should not, as Mr Sibbel submits, be regarded as primarily a commercial venture, and secondly, that the parties did not record their agreements in any formal document. It was clear on the evidence that each trusted the other."

55. He then further analysed the relationship, dismissed any effect that the Companies Act 2006 section 125 might have had, and concluded:

> "100. I therefore conclude that Mr Dinwoodie has established the existence of fiduciary duties.
>
> 101. Having made that finding, I have no hesitation in also concluding that Mr Fisher's retention of legal title to the shares in the consultancy companies and the original DA companies was contrary to the parties' agreement and a breach of the fiduciary duty owed by him to Mr Dinwoodie not to act otherwise than in good faith and with loyalty in relation to the shareholding of the company."

56. None of this demonstrates some sort of inappropriate homogenous approach to the existence of duties or a failure to "unpack". It considers the circumstances in which duties are said to have arisen, and reaches a conclusion as to one of the relevant duties in paragraph 101. The judge was not required to articulate other duties which might exist but which were not relevant (which Mr Butler accepted). This particular criticism of the judgment therefore fails.

57. The second criticism turns out to be a criticism of the judge's evaluation of the facts. The judge considered the facts under two categories, "mutual" and "reliance", as proposed to him by Mr Sibbel. Under "mutual" the judge started with the existence of the partnership. While he did not articulate it, the judge obviously thought that the fiduciary relationship which arose from that was a starting point for what followed. Then he considered the move to the "corporate structure" and Mr Fisher's historic statements that they were 50/50 owners and his frequent references to the use of the word "partner" and "partnership" to describe their relationship. Labels by themselves do not matter of course, but it is a reasonable inference that the judge considered the relationship between the two men, which started off as a partnership and fiduciary one, continued in the same way into the corporate structure. He referred to a paragraph in Mr Fisher's witness statement as to the two men always acting in good faith (which, taken by itself, is not particularly probative of a fiduciary relationship but in context has a greater significance) and concluded in paragraph 92 that the closeness of the relationship demonstrated not primarily a commercial relationship and that each trusted the other.

58. Then he turned to "reliance" and found that Mr Dinwoodie was reliant on and vulnerable to Mr Fisher. As an example of his vulnerability, he referred to the steps Mr

Fisher took in 2017, which he was able to take because he had retained legal ownership of the shares in all companies, and he found that Mr Dinwoodie trusted Mr Fisher to deal with all formalities in relation to share transfers and registrations (paragraph 93).

59. On the basis of that material the judge concluded that Mr Dinwoodie had established the existence of fiduciary duties.

60. That is the material which is said to be inadequate to establish the existence of fiduciary duties. I think that one might say that that material, as expounded by the judge, might be at the lower limits of what is required, but the judge's findings were in the context of a trial in which he will have heard a lot more about the relationship, and it cannot be said that the finding was one which he was not entitled to reach. The finding of the prior partnership was particularly significant, in my view. That relationship is one of the established relationships which give rise to fiduciary duties. While in many cases a formalised corporate structure which succedes an informal arrangement may leave less scope for a fiduciary relationship, that is not an inevitable consequence. In a case like the present, where a highly informal partnership was translated into a corporate relationship on the basis of Mr Dinwoodie acquiring an equal shareholding, and where there was a reliance, as found, on Mr Fisher to deal with such matters, a finding of a fiduciary duty of the kind found by the judge was one which the judge was entitled to reach. Mr Fisher was impliedly given the responsibility to make sure Mr Dinwoodie got his shares. The BEM shares were owned by, or under the control of, Mr Fisher, so he had to start the ball rolling by a transfer or issue of shares, and it was clearly established that thereafter he made various company filings which were consistent with the obligation that he needed to undertake (and its fulfilment). In paragraph 93 Judge Monty found that Mr Dinwoodie trusted Mr Fisher to deal with shareholding matters and that Mr Fisher knew that that was Mr Dinwoodie's position. While there was no evidence of an express undertaking by Mr Fisher to that effect, the two men operated under the same unstated assumption, and that is sufficient. It gave rise to a fiduciary duty in that respect just as it was arguable in *Farrar v Miller* that Mr Miller's assuming responsibility for a transfer of the property meant he was (at least arguably) under a fiduciary duty in that respect - see paragraph 77 cited above.

61. The judge's finding was as justifiable in relation to the DA companies shares as in relation to the BEM companies' shares. In relation to both sets of shares Mr Fisher was in breach of duty in failing to give Mr Dinwoodie his entitlement.

62. In his oral submissions Mr Butler submitted that a breach had to be deliberate, and that a careless breach did not found a claim for breach of fiduciary duty. He relied on certain passages in *Mothew* which he submitted was to that effect and he submitted that the judge below made no finding of any deliberate breach until, possibly, 2017.

63. This point was not specifically raised in the Grounds of Appeal, and it is not dealt with by the judge. It is not apparent to me that it was raised at all below. If it was not then it is not appropriate to raise it now, because if it had been raised below then the judge would doubtless have made some findings about it. However, in any event it is not a good point in law. In *Mothew* at page 15H Milllett LJ (the first passage relied on by Mr Butler) Millett J is dealing with breach of trust, not breach of fiduciary duty; at 19F he is dealing with a particular breach of duty which is not the same as that alleged in the present case; and at 19F he is dealing with another kind of alleged breach of duty (an unconscious omission which happens to benefit one principal at the expense of another). The duty in the present case is straightforward and absolute in the sense that it does not import a "best endeavours" requirement, or anything like that. It was a duty to act in good faith and loyally (as the judge put it) in relation to the shareholding of the company. Translated into practical terms, it was to make sure that Mr Dinwoodie got his shares. It would be remarkable if Mr Fisher were liable if he thought about it and decided deliberately not to comply, but not liable if he meant to and simply forgot. He was under a duty which involved his having to provide shares, and a failure to do so is a breach of duty. Accordingly, if Mr Butler is allowed to raise this point it does not succeed.

64. Mr Butler raised an additional point in his reply which concerned the date when the breach of fiduciary occurred and the absence of clarity in the pleadings about this point. There is no reference to this point in the Grounds of Appeal, or in Mr Butler's supporting skeleton argument. It is not a point dealt with in the judgment; I do not know if it was raised below. I am far from convinced that there is anything in it, save for an observation that the breach needs to have occurred before 2013 in relation to the BEM companies in order for a trust relationship to follow through to the DA companies. The judge's finding would seem to involve a determination that there was a breach from the outset in 2009, and perhaps a continuing breach thereafter (though that is less clear). I do not propose to allow something which amounts to a further challenge to the judgment in this area.

65. I add one point of my own. It seemed to me that Mr Sibbel might well have had a case based on conventional estoppel and constructive trust grounds, which would be less elaborate than his fiduciary duty and *Pallant v Morgan* claims. However he did not seem to have run them and more or less disclaimed them before me.

Grounds 3 and 4 - generally

66. As appears above, the judge went on to consider alternative ways in which a claim could be made to the DA shares and found an express and a constructive trust. The fiduciary duty point, on which Mr Dinwoodie now succeeds, gives Mr Dinwoodie what

he seeks in this action, so strictly speaking it is unnecessary to consider these two alternatives. However, they were fully argued and out of respect to those arguments and the judgment below I will consider them.

Ground 3 - the finding of express trust in relation to the DA companies shares

67. A consideration of this ground requires a more detailed study of the findings of the judge in this area. His actual determinative finding is expressed very shortly:

> "103 I also accept Mr Sibbel's submission that there was an express trust in relation to the shares in the original DA companies, which arose because of the agreement between Mr Fisher and Mr Dinwoodie: see paragraph 55 above."

68. Paragraph 55 follows on from paragraphs which deal with the circumstances of the Tomlin Order pursuant to which Mr Fisher's title to the DA companies was confirmed. Paragraph 55 then reads:

> "55. It follows, in my judgment, that after the Tomlin Order the position was that BME had 100% beneficial ownership of the original DA companies, and Mr Fisher and Mr Dinwoodie owned half each in turn. This was accepted by Mr Fisher in a Skype message of 13 December 2013, in which he said, "I am still holding the sole shares in [the DA companies] , but we are still agreed that we share equally in DA equity/shareholding until we discuss and agree otherwise." I accept that this message starts with, "I think we agreed the following yesterday", but it is plain in my view on any reading of this message that this point was one of the matters which was actually agreed, and I so find as a fact that it had been. What remained to be decided was the future respective cash contributions, and that continued to be a topic of discussion and debate, but the 50:50 ownership did not (by way of further example, the Skype messages from July and August 2014 show that there was a concluded 50:50 ownership agreement, and that when Mr Dinwoodie proposed a change in the equity, Mr Fisher was adamant that he wanted to stick with 50:50). In a similar vein other numerous references by Mr Fisher to Mr Dinwoodie as "co-owner" (again, expressed to third parties and internally to new recruits ...) and the various Companies House filings to which I have already referred. In relation to the latter, I found Mr Fisher's evidence in cross-examination that

> when he was told about the filings and that he and Mr Dinwoodie had been listed as PSC he did not know what PSC meant ("I am not very good on abbreviations… I did not know what those letters stood for") was quite frankly risible in the light of his having responded to emails about what should be in the filings, and what should be said about persons with significant control, just a day before …"

69. Mr Butler's first criticism of the finding in paragraph 103 is that it is actually inconsistent with the first sentence of paragraph 55, to which it cross-refers. Paragraph 103 finds an express trust in favour of the two individuals in equal shares - the final order in the case grants a matching declaration, and that does seem to have been Mr Dinwoodie's case at the trial, judging by the written final submissions (paras 22ff).

70. This is certainly a valid criticism so far as it goes. Paragraph 55 finds that the DA companies shares were held within the BME companies, giving Mr Dinwoodie an indirect interest via his 50/50 interest in the latter companies, whereas paragraph 103 makes a finding of a direct shareholding. Mr Sibbel acknowledged as much in his oral submissions. He suggested that the judge cannot have meant what he said in paragraph 55, and was perhaps using "BME" as a sort of collective noun.

71. I do not think that that is a particularly convincing explanation, but at the end of the day I do not think that this area of dispute matters very much unless it goes to the question of certainty in relation to the creation of trusts. If the judge intended a finding that the DA companies shares were legally owned by BME, giving Mr Dinwoodie and Mr Fisher indirect 50% interests via that route, then the Skype message, and the preceding agreement which the judge found to have been reached, is material supporting that conclusion at the very least. If there was no prior trust (constructive or otherwise) affecting those shares then the judge's findings would be capable of giving rise to the direct interest trust which he seems to have found in paragraph 103. So either way Mr Dinwoodie has an interest which Mr Fisher denied, and it may not matter much at the end of the day which route is taken. Mr Butler's submissions were designed to demonstrate that there was no interest at all. If his submissions failed at that level, I did not detect that Mr Fisher was arguing for or against one or other of the alternatives for the end result.

72. I therefore turn to those submissions. Mr Butler's arguments, intended to succeed against a background against which Mr Dinwoodie had not already acquired an interest, were evidential and legal, the latter being based on the absence of certainty.

73. So far as his evidential attack was concerned, he pointed to the fact that the judge found an express trust based not on the Skype message itself, but on what it records as a meeting the previous day. That, he said, was a departure from the pleaded case, but he did not press that strongly. In fact, although the pleading is a bit equivocal, such an express trust would be consistent with it. His main point was that there was no written or oral evidence about the meeting the previous day; Mr Dinwoodie's pre-action letter had not referred to such an express agreement; and indeed Mr Butler said it was contrary to a particular part of Mr Dinwoodie's case that there was an express agreement in late 2012.

74. It seems to be true that there was no positive evidence from Mr Dinwoodie that that meeting actually happened or as to its contents, but it is not accurate to say there was no evidence of it. The message itself is evidence of it. The judge so relied on it, and he was entitled to do so. In fact, in cross-examination Mr Dinwoodie was prepared to accept the letter as an accurate reconstruction, but he did not profess to any actual recollection of the meeting, though he did say in general terms that the message sets out what was agreed. There may have been matters which can be said to be contra-indications, but the judge made a finding of fact about this (which is not a surprising fact) and it is a finding which cannot realistically be challenged on appeal.

75. Mr Butler's certainty point was that it was not possible to ascertain at what point of time the three certainties necessary for a trust (words, subject matter and objects) were satisfied. Having considered his submissions on the point it seems to me that it is really more of an evidential one. There is no difficulty about the certainty of objects or subject matter under debate. The objects were Mr Dinwoodie and Mr Fisher, or BME depending on the view one takes of the evidence. The certainty of words point is not a problem if one treats the Skype message as being evidence of the words used, or even as the declaration itself (which the judge did not find). Mr Butler's point involved an analysis of the preceding events and some of the wording of the Skype message which preceded those relied on by the judge (which I will not quote because it contains some obscure references to how the business was to be conducted and seems to me to be irrelevant to this point) and what were said to be inconsistencies in Mr Dinwoodie's evidence as to when he thought he had an interest in the shares (he said he considered that he always considered he had a 50/50 interest in the DA companies shares). That is a question of evidence, and not really an uncertainty about one of the certainties. He also said that there was no evidence of an intention on the part of Mr Fisher to create a trust. On the judge's findings there was plenty of evidence of that.

76. In short, there is nothing in Mr Butler's uncertainty point in the light of the findings of the judge, and this ground of appeal falls to be dismissed.

Ground 4 - the Pallant v Morgan trust affecting the DA companies shares.

77. This point is capable of leading one into an area of some complexity, but I propose to deal with it relatively briefly because it does not matter in the light of the other determinations in Mr Dinwoodie's favour.

78. At paragraph 104 the judge records that he was persuaded by Mr Sibbel that:

> "there is a constructive trust here, an argument which based on *Pallant v Morgan* [1953] Ch 43".

Although he does not expressly say so, his "here" is in relation to the DA companies shares. That is the asset by reference to which Mr Sibbel advanced the case and that is what was understood by both parties in this appeal.

79. The judge summarised the law at paragraph 105:

> "105. As is pointed out in Snell's Equity at 24-039, a *Pallant v Morgan* equity typically relates to specific property that is not at first owned by either of the parties, A and B, but where A and B form a common intention that A will take steps to acquire the property, and does so, then B will obtain some interest in it."

80. He went on to refer to Chadwick LJ in *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372 (without quoting from it) and set out a passage from *Farrar v Miller* [2018] EWCA Civ 172 (at para 42) where Kitchin LJ was said by the judge to have acknowledged that a "*Pallant v Morgan"* equity could arise even where the property in question was already owned by the constructive trustee:

> "As Millett LJ explained in *Paragon Finance*, a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of a property to assert his own beneficial interest in the property and deny the beneficial interest of another. Where a party, though not expressly appointed as a trustee, has lawfully assumed the duties

> of a trustee and in that capacity has received trust property but later appropriates that property to his own use then he will be acting in breach of trust. *Pallant v Morgan* may be understood as an example of such a constructive trust. In this and in other such cases the claimant does not impugn the transaction by which the defendant obtained control of the property; he contends that the circumstances in which the defendant obtained that control make it unconscionable for him to treat the property as his own."

81. Then he referred shortly to a point taken by Mr Butler to the effect that the equity could not arise where one party owns the asset (relying on *Cobbe v Yeoman's Row Management Ltd* [2018] 1 WLR 1752), saying that that point was rejected in *Farrar.* Then he reached his conclusion, expressed briefly in three paragraphs:

> "108. It seems to me, with respect, that this misses the very clear point expressed in *Farrar* that there is nothing in *Cobbe* which lays down a different rule (that the *Pallant v Morgan* equity can only arise where there is a prospective purchase)."

> 109. Whilst it is right that on the facts of *Farrar* Kitchin LJ went on to hold that a *Pallant v Morgan* equity arose on the more conventional basis that the joint venture agreement preceded the relevant acquisition of the property by the joint venture entity, it seems to me that where appropriate, in particular where it would be unconscionable for the owner to assert his own beneficial interest and deny that of the non-owner, and where the owner has assumed the duties of a trustee, equity should impose a trust.

> 110. So it is, in my judgment, here, because of the fiduciary duties owed (see also *Farrar* at [32], when considering the decision in *Crossco No 4 Unlimited v Jolan Ltd* [2012] All ER 754: "many of the cases giving rise to a *Pallant v Morgan* style equity will have at their heart a fiduciary relationship"), and because of the parties' mutual understanding that the shares would be owned equally."

82. It is not easy to deal with this aspect of the case because it is not clear on what findings of fact the judge based his conclusion. His reference to *Pallant v Morgan* suggests that he had in mind a situation (as in that case) in which an asset (the shares in the DA

companies) was acquired by one of the two "partners" on the understanding that the other would have an interest. However, his reference to post-acquisition agreements suggests that he had another point in mind at which the constructive trust arose, but he does not make clear what that point of time was or what the circumstances were. It is on this latter point (a post-acquisition arrangement) that most of the debate before me turned.

83. Turning to his findings of fact which might be thought to be relevant, at paragraph 11 he recites the original acquisition of shares in the DA companies (with two other companies) by Mr Fisher as part of the terms on which he and Mr Dinwoodie provided consultancy services and at paragraph 13 he recites Mr Dinwoodie's case that Mr Fisher held those share on the basis that the two of them would take 50% each of whatever resulted from an agreement with Ms Dee as to the division of all the companies. He does not make a positive finding at this stage that that was the arrangement, but his later findings indicated that he accepted it. However, he makes no positive finding of reliance on this (as Mr Sibbel accepted before me), which one would normally expect in a successful constructive trust case.

84. Then there is the Tomlin Order under which the litigation about the DA companies was settled, and which secured legal title in the shares in the DA companies shares for Mr Fisher. It is not clear how this "acquisition" can be fitted into a typical *Pallant v Morgan* type trust because there is no finding of an arrangement between the two men about that transaction which would lead one into *Pallant v Morgan* territory, other than what is recorded in paragraph 110.

85. I do not consider that a *Pallant v Morgan*-type constructive trust has been made out on the findings of the judge. There are insufficient findings about a positive arrangement between the two men at the time of the acquisition of the shares in the DA group (whichever date one takes, but especially the later date), and no findings of reliance. Mr Sibbel took me to some evidence in Mr Dinwoodie's witness statement from which it was said that I can infer reliance, but that is not a satisfactory way of dealing with the matter. He accepted that there was no positive element of reliance (though such a piece of evidence would probably have been plausible in the circumstances had it been given). While this might have been capable of being presented and determined as a *Pallant v Morgan* type case, I do not consider that it has actually been so presented.

86. I strongly suspect that the debate as to whether one can have a *Pallant v Morgan* type trust where the arrangement post-dates the acquisition is sterile, because the debate should be not about timing, but about whether the circumstances are such as to give rise to a constructive trust based on the general principles referred to by Kitchin LJ in *Farrar*. It must be remembered that *Pallant v Morgan* is a sub-species of the species

constructive trust. It is not necessary to look for a sub-sub species or mutation of *Pallant v Morgan* in order to succeed where an arrangement post-dates acquisition of the property. It may be possible to succeed in establishing a constructive trust in such a case, but if that happens it would probably be not because it is a minor mutation of *Pallant v Morgan* but because the circumstances justify the remedy on other constructive princples.

87. I add one further point, returning to paragraph 110 of the judgment. In that paragraph the judge referred to *Crossco No 4* and a sentence in *Farrar* about many *Pallant v Morgan* cases having a fiduciary relationship at their heart. In *Crossco No 4* Etherton LJ analysed the authorities and held that *Pallant v Morgan* cases can and should be explained by the existence and breach of fiduciary duty (see paragraph 88). The other two Lords Justices did not agree with that, and the Court in *Farrar* did not consider it necessary to consider the point (see paragraph 32). I do not have to consider it either, but it is of interest to note that Judge Monty considered that fiduciary duties and the parties' mutual understandings gave rise to a *Pallant v Morgan* equity. I do not think that is the correct analysis in the light of the Court of Appeal authorities, but Mr Dinwoodie has already got home by reason of the fiduciary duties imposed on Mr Fisher.

88. It follows that this basis of appeal against the judgment would succeed, but that is irrelevant in the light of the other failed grounds.

Ground 5 - the injunction

89. Thus far the appeal falls to be dismissed on liability. However, there remains the question of one aspect of the remedy. After receiving argument on the point the judge made the following order about Mr Fisher's future conduct:

> "8. The Defendant is prohibited, until further order of the Court, from taking the following steps without the consent of the Claimant:
>
> …
>
> (2) competing with the business of AML, QTV, BME or BEM.
>
> whether such steps are taken by the Defendant directly or indirectly, by himself or through his agents, trustees, employees or nominees, or otherwise."

90. The reasons for this severe order, which is prima facie wider than anything that would normally be ordered in an employee or director/company situation (in terms of its open

ended and wide nature coupled with its duration) were set out in a separate judgment delivered on or after the handing down of the main judgment. The reasons were given in answer to points made by Mr Butler and his junior, so it is necessary to set those out too:

> "12. Mr Butler and Mr Alford submit:"
>
> (1) I made no finding in my judgment about competing – I said nothing about whether there was a fiduciary duty not to compete, nor that Mr Fisher has competed.
>
> (2) The proposed order is a clear restraint of trade, and such a wide restriction – had it been the subject of agreement – would have been unenforceable.
>
> (3) The extent of Mr Fisher's duties in this regard are no more than those set out in section 170(2) of the Companies Act 2006, which provides that a person ceasing to be a director continues to be subject to the statutory duties to avoid conflicts of interest and not to accept benefits from third parties. Since the proposed order goes beyond what the companies themselves would be entitled to, it would be anomalous to grant an injunction in favour of Mr Dinwoodie as sought.
>
> (4) In any event, Mr Dinwoodie has no legitimate interest to protect, and he should not be able to prevent Mr Fisher from undertaking such commercial activities as he wishes.
>
> (5) The proposed order is without limit in terms of time or geographical area – it is too wide.
>
> (6) The proposed order is grossly unfair – why should Mr Fisher be so restrained when Mr Dinwoodie is free to do as he chooses – and wrong in principle. There should be no restraint on Mr Fisher for an uncertain period.
>
> (7) The word "compete" is too vague.

> "14. Dealing with the points made by Mr Butler and Mr Alford in turn:
>
> (1) I agree with Mr Sibbel that events post-November 2017 – see paragraph 69 of my judgment – show that Mr Fisher has carried on a business through corporate vehicles under his control which has appropriated the assets, goodwill, trademarks and clients of AML and QTV. That is plainly competition with the joint venture.

(2) Mr Fisher is not an ex-employee or former director but a current member of a joint venture who continues to owe fiduciary duties to Mr Dinwoodie. I agree with Mr Sibbel on this point. This is not a restraint of trade.

(3) Again, in my view Mr Sibbel is right. The question of the relief the companies might obtain is not relevant.

(4) Mr Dinwoodie's interest is as a person to whom Mr Fisher owes fiduciary duties.

(5) Mr Butler and Mr Alford refer to an offer made by Mr Dinwoodie on September 2020 which would have left the parties as 50/50 owners of the joint venture. That offer included an undertaking to be given in the same terms as those in paragraph 8(2) of the draft order. There was also, in the same letter, an offer of global settlement under which Mr Dinwoodie would purchase all of Mr Fisher's interest in the DA companies, on condition that Mr Fisher agreed to non-solicitation, non-competition and non-dealing covenants.

Mr Butler and Mr Alford say, about this offer, that when Mr Fisher raised the difficulty of the non-competition provisions, Mr Dinwoodie produced "a lengthy list of more specific anti-competition undertakings running to over a page and – notably – limited to a particular geographical area (the UK) and a 12-month period."

In fact, when one looks at the exchange of correspondence surrounding these offers, it is clear that Mr Fisher was only dealing in his response with the global offer, and he asked for clarification of the post-sale undertakings sought, which led to Mr Dinwoodie's "more specific anti-competition undertakings". Mr Fisher refused.

I agree with Mr Sibbel, that the comparison which is sought to be drawn – and the suggestion that this was a "tacit acknowledgment of the shortcomings of an injunction simply preventing D from 'competing'" – is a false one, because the list of undertakings was in relation to post-venture.

(6) The answer to this point is, as Mr Sibbel says, beyond the scope of this case and there is no suggestion that Mr Dinwoodie would act inconsistently with any duties owed by him.

(7) The word "compete" is used in section 30 of the Partnership Act 1890 ("Duty of partner not to compete with firm"). That section provides:

> "If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business."

I reject the suggestion that the use of "compete" is unclear or unworkable."

91. Not all of those points are now in issue. Mr Butler's case on this appeal is directed mainly to the nature, extent and duration of the fiduciary duties which are said to be the foundation of this injunctive relief. His submissions can be summarised as follows:

(a) Being a member of a joint venture, which was important to the judge's reasoning (see his second reason) is not a recognised status in law, let alone a reason for granting this sort of injunction.

(b) What was required, if fiduciary duties were to be the basis of this injunction, is an analysis of what those duties were, and none appears in the consequentials judgment or the main judgment.

(c) In any event, it was unreal to talk of the joint venture as still being in existence after the events of 2017.

(d) The judge failed to unpack such fiduciary duties as might be owed. There was no evidence of a discussion about non-competition.

(e) The relief granted is far wider than would have been granted against a departing director, and amounts to a perpetual ban on Mr Fisher ever working in the sector in which he has hitherto worked.

(f) He repeated his submissions to the effect that the corporate relationship had superceded any fiduciary relationship and duties that might have existed.

92. For his part Mr Sibbel sought to justify the injunction in part by reference to the conduct of Mr Fisher. He pointed to Mr Dinwoodie's exclusion from the company and what were said to be Mr Fisher's continuing attempts to cover up what he had been doing and an attempt to wind up the old entities using voluntary striking off (which actions were suspended when Mr Dinwoodie discovered them). His skeleton argument said this:

> "The fundamental purpose of the injunctive relief [is] to prevent [Mr Fisher] from engaging in further breaches of this nature. The effect of such relief may be to compel [Mr Fisher], if he wishes to continue to be involved in the joint venture businesses,

> to take whatever steps are within his power to restore those businesses (including their assets, customer relationships, trade marks and income streams) to the original companies."

93. He submitted that the terms of the injunction went no wider than Mr Fisher's fiduciary duties as pleaded (which included a duty not to compete) and narrower relief ran the risk of circumvention. So far as duration is concerned, the injunction could be brought to an end by the consent of Mr Dinwoodie, or an order of the court, so it was not perpetual. The relationship between the parties which gave rise to fiduciary duties was not lawfully determined in 2017; Mr Fisher merely engaged in a series of unlawful activities and Mr Fisher should not be allowed unilaterally to refuse to adhere to those duties. There is no anomaly based on a comparison with a director/company situation; the fiduciary relationship in this case is different.

94. Part of Mr Butler's objections are based on his case as to the absence of an appropriate finding of fiduciary duties in this case. Since I have found that the decision of the judge as to the existence of fiduciary duties should stand, that part of Mr Butler's objections falls accordingly.

95. However, I do consider that Mr Butler has a valid criticism of the reasoning which led to the grant of this drastic injunction. It is questionable whether or not the joint venture existed in any meaningful manner at the time of the trial, but that is not quite the point. The real question is whether there are any continuing underlying duties which justify the injunction. It is not necessarily enough to say that the joint venture exists; the question is whether there was, in the circumstances, any relevant duty flowing from the relationship, whether it still existed or not.

96. The first point is therefore to consider whether there is any aspect of the fiduciary duties owed by Mr Fisher to Mr Dinwoodie that would prevent his plying his competing trade at all, and if so what the scope of that aspect is. As I have pointed out, the judge made a finding of good faith and loyalty in relation to the shareholding of the companies. It follows that he found that the relationship was one which imported the all-important aspects of good faith and loyalty, and in my view it plainly follows from that that the duty prevented competition with the venture at least while the venture was continuing. True it is that the judge did not spell that out in his consequentials judgment, but in my view it is obvious from his other findings and it must be what he had in mind in giving his reasons for the grant of the injunction.

97. The next question that necessarily arises is the question of the duration of that particular aspect of the fiduciary relationship. As I have just said, it must be obvious that in this case the bar on competing lasts during the continuation of the venture. However, in my view, absent special circumstances, this particular aspect will fall away when the relationship giving rise to it comes to an end. In *A-G v Blake* [1998] Ch 439 Lord Woolf MR held:

> "There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The relationship between employer and employee is of this character. The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer."

> But these duties last only as long as the relationship which gives rise to them lasts. A former employee owes no duty of loyalty to his former employer. It is trite law that an employer who wishes to prevent his employee from damaging his legitimate commercial interests after he has left his employment must obtain contractual undertakings from his employee to this effect. He cannot achieve his object by invoking the fiduciary relationship which formerly subsisted between them. Absent a valid and enforceable contractual restraint, a former employee is free to set up in a competing business in close proximity to his former employer and deal with his former clients. Such conduct involves no breach of fiduciary duty. (p454).

98. The court recognised that other duties might have a different duration, but that is what it said in relation to the employer/employee relationship. It seems to me that the same applies in relation to a joint venture relationship such as that between Mr Dinwoodie and Mr Fisher. So far as competition is concerned, there is no obvious reason why there should be a restraint on competition per se after the venture/relationship has come to an end, though there may well be restraints on using joint venture assets (to use a loose term) for a time. The non-competition aspect should come to end when the relationship comes to an end, because there will often be no reason why it should continue after that time. If the relationship has come to an end then there is no reason for the full panoply of loyalty obligations to continue even if some aspects do. Apart from anything else, if the joint venture has come to an end there is nothing left to compete with.

99. There is, however, a difficulty in translating the employment situation into the present situation completely, and that is that the relationship between Mr Dinwoodie and Mr Fisher, as individuals, was not a legally prescribed relationship like a contract of employment. The relationship arose out of their personal dealings with each other on

a non-contractual basis, or at least no contract is pleaded. It found its practical embodiment in companies, but that corporate structure is not the relationship which gave rise to the fiduciary duties. One knows whether an employment contract has come to an end because the law prescribes that. There is not the same prescription for "joint ventures".

100. I consider the correct approach in this case is to ask the question: Has the relationship between the two men changed such the duty of loyalty no longer prevents competition, or does it still exist? What has happened in the present case is that Mr Fisher has sought to withdraw from it unilaterally. That is apparent from his conduct, and it is also apparent from an email that Mr Fisher sent to Mr Dinwoodie on 8th November 2017 (referred to by the judge in paragraph 65 of his main judgment) in which he said:

> "You have today, for me, ruled out any possibility of our working together in 2018, so I am also curtailing all extant arrangements between us with immediate effect. I see no benefit of purpose in waiting until 31/12/17."

101. It is pertinent to consider whether Mr Fisher was entitled to withdraw in this fashion (or at all). That is a different question from whether the steps he took in relation to excluding Mr Dinwoodie from the business and in adjusting the shareholdings in the companies were proper. Even if he was fully entitled to withdraw, he was not entitled to take those steps.

102. Although I have not had full argument on the point, I consider that Mr Fisher, like Mr Dinwoodie, was entitled to withdraw unilaterally from the venture, and thus to affect some of the fiduciary duties existing between them. No terms were agreed between them as to the duration of the relationship, so it could only exist at will or perhaps on giving reasonable notice. That being the case, the next question is how any withdrawal was to be done. It seems to me plain that any proper indication of an intention to withdraw would suffice. The relationship between the two men existed only for so long as they jointly wished it to, and an indication of withdrawing would suffice to bring it to an end.

103. It follows that Mr Fisher was entitled to withdraw, as he plainly sought to do in November 2017. From then on, or from the expiry of reasonable notice (which would have expired long before the injunction was granted) there was no real "joint venture" (if that is a significant question) and Mr Fisher was indicating that from that time the fiduciary relationship was at an end. He was entitled to do that for the future, but subject to some duties remaining such as non-personal exploitation of joint venture assets.

104. So one needs to consider whether the duty of loyalty was immediately qualified so as to allow competition thereafter. There may be a case for saying that if the good faith and loyal winding up of the affairs of the venture still required non-competition for the time being, then the duty of loyalty would still require non-competition for a time. But that time would be limited, if it existed at all, and it would have that limited purpose. If there is a further purpose which requires it, that is not apparent to me in the present case.

105. The judge was considering the point at a trial some 4 years or more after the relationship had plainly broken down. It is hard to see in what sense the joint venture was continuing even though the affairs of some of the companies had not been wound up, though as I

have indicated the continuation or otherwise of the joint venture is not really the right question. The question is whether the lingering duty of loyalty still required, in 2021, that there still be no competition, and that an open-ended injunction should be granted restraining it.

106. I do not consider that the injunction should have been granted, at least not without some qualification as to time or purpose (a consideration of which might well have demonstrated that it was completely inappropriate). In the light of Mr Fisher's conduct, it could not seriously be suggested that he and Mr Dinwoodie could continue to work together in 2021, and that had been the case for years. The joint venture, in the sense of a mutually co-operative activity, had come to an end in a real de facto sense. Mr Fisher had demonstrated that he was not going to assume any responsibilities of loyalty for the future, and he was entitled to do that, albeit without divesting himself of the consequences of his prior assumption. I cannot see a proper basis on which he could be personally restrained from competing any longer other than on the limited basis which I have just suggested.

107. Mr Sibbel's attempt to justify the injunction as a mechanism for preventing further abuses of Mr Fisher's legal shareholdings is not a good reason for preventing competition. The purpose of an injunction such as this is usually to prevent breach of rights which are the counterpart of the injunction, or to prevent breaches which cannot be prevented in another way (for example, if non-competition is the only way of protecting other rights for a time). The injunction is not an in terrorem measure to police or restrain other activities. Nor is it to be used as an in terrorem measure to procure the restoration of benefits.

108. At the heart of Mr Sibbel's attempts to maintain the injunction was the proposition that the relationship between Mr Fisher and Mr Dinwoodie was not lawfully determined in 2017. That proposition is not correct. As I have pointed out, this was not a relationship such as employer/employee or company/director which was known to law and which had terms governing its subsistence. There was an informal but trusting relationship which gave rise to fiduciary duties. There was no sort of term governing its duration. It existed at will, essentially. Its termination by Mr Fisher was not unlawful; it is his subsequent conduct that was unlawful. Mr Dinwoodie sought to say that the injunction was not perpetual because it could be brought to an end by Mr Dinwoodie's consent, or by the court. The trouble with that is that the criteria which would govern the latter are not apparent from the terms of the injunction. If there were matters which should bring the injunction to an end they ought to be set out in the injunction so that Mr Fisher (and the court) could know what the limits were.

109. It follows that I find the grant of the apparently perpetual injunction was incorrect and it ought to be set aside. However, I add one significant qualification. As I have pointed out, a full legal analysis of the interaction between the assumption of fiduciary duties and their termination in this area was not the subject of full argument before me. It may just be that some specific case can be made out for maintaining the non-competition injunction on the basis that, for example, it remains necessary in order to complete an orderly winding down (or winding up) of the affairs of the companies, though to be frank I very much doubt it. If Mr Sibbel wishes to make such a case I might be willing to determine it at a further hearing after this judgment, though it is more likely it would have to be the subject of remission to the county court. I will hear further argument on that if necessary on or after the occasion of the hand-down of this judgment.

110. I also add, if it needs adding, that if Mr Fisher is wrongfully exploiting assets originating during the fiduciary relationship, they it would seem that he could be restrained from that activity. That would not prevent competition per se, and an injunction ought to be properly framed to cover that particular point.

Conclusion

111. I therefore dismiss the appeal in relation to all matters save for the injunction restraining competition. In relation to the latter I shall allow the appeal, but subject to the possibility of further argument on the point here or below.